



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO 18 OF 2017

IN THE MATTER OF THE ESTATE OF FANICE MARY KHANALI AURA (DECEASED)

RULING

1. The deceased herein died on 23rd September 2017.

2. Representation to her estate was sought vide a petition lodged herein on 1st December 2017 by Agnes Nyangasi Kwanzu for grant of probate of the will of the deceased allegedly made on 23rd September 2017, which had named her as executrix, and I shall hereafter refer to her as such. The petition was lodged simultaneously with an interlocutory application dated 30th November 2017, by the executrix, seeking withdrawal of a certain amount of money from one of the accounts held by the deceased at Barclays Bank Kakamega branch to meet the medical and educational needs of the widower and the children of the deceased, respectively.

3. The interlocutory application of 30th November 2017 was placed before the Judge on 4th December 2017, who certified it urgent for a formal hearing on 8th December 2017. On the appointed date, after hearing the parties, the court ordered that a sum of Kshs. 250, 000.00 be released from the deceased's bank in accord with the terms of the will, for the upkeep of her husband and the educational needs of the children.

4. Notwithstanding the fact that the matter was yet to be gazetted, Morris Washington Mulima, hereinafter referred to as the objector, lodged herein on 7th May 2018 an objection to the making of the grant dated 5th February 2018. In the objection he raises several issues, which I hereby summarize as follows: -

- (a) That the will the subject of the cause had been made fraudulently as it was not executed in accordance with the relevant law, and was designed only to access the property of the widower in the guise of taking care of him;
- (b) That the will disposed of property that did not belong to the deceased, but to the widower, especially the land and the money in bank account number 0098700536;
- (c) That the widower had close blood relatives who can take better care of him compared with the executrix;
- (d) That the deceased had stepchildren in Norway who ought to be the beneficiaries of her net estate and who have not been disclosed in the petition;
- (e) That the executrix could not be trusted to administer the estate alone as she had made a move to cash large sums of money from the deceased's account without proper accounting for how she used the money; and
- (f) That the objector ranked higher in entitlement to administration of the estate of the deceased compared to the executrix.

5. In addition, the objector filed an answer to petition dated 5th May 2018, stating that the petition ought to be dismissed or amended to be made jointly. The reasons advanced for the dismissal or the making of a joint grant are the same as those listed in the objection dated 5th February 2018, although he has added that the petition was made secretly without his knowledge, and that there was concealment of matter from the court and therefore the executrix cannot be trusted to manage the estate fairly. He also lodged a petition by way of cross-application for grant. He describes himself as a brother of the widower and a brother-in-law of the deceased, and that he had presented the cross-application in that capacity. The rest of the grounds mirror those in the objection and the answer to petition.

6. In the objection proceedings, Morris Washington Mulima names the widower as the objector, yet the proceedings are brought by Morris Washington Mulima himself in his purported capacity as the attorney of the widower. He agitates the case for the widower as his attorney and therefore it is in fact Morris Washington Mulima who is the objector on behalf of the widower and shall be referred as such in the remainder of the ruling.

7. The executrix filed another interlocutory application on 6th April 2018, under certificate of urgency, dated 4th April 2018. She seeks an order to withdraw a sum of money from the deceased's bank account to pay off debts, and for an order to make monthly withdrawals of a sum of money for the upkeep of the deceased's widower. She also accuses the objector of intermeddling and sought to have him barred from so doing. She explains that the widower had been incapacitated in an accident and she needed money for his upkeep and medication. She also states that the workers taking care of him needed to be paid, hence her prayer to have a standing order to allow withdrawal of moneys from the account monthly. She avers that the intended objector had sold a cow belonging to the estate and embezzled the funds, but that she had intervened and the cow was not removed from the homestead. She further avers that he was entrusted with a sum of Kshs. 50, 000, 000.00 by the employer of the widower, which money he disappeared with to Tanzania where he invested it. She asserts that the widower had no capacity to give a power of attorney to the intended objector, and further that the said intended objector was not a beneficiary of the estate of the deceased.

8. The application is opposed by the objector through an affidavit sworn on 5th May 2018. He avers to have had been appointed by the widower to act as his attorney as he; the widow was terminally ill following an accident. He accuses the executrix of withdrawing large sums of money from an account jointly operated by the deceased and the widower in the guise of using the same on the widower while in fact she was spending it to meet her own needs. He accuses the executrix of not taking care of the widower as alleged. He states that if any of the assets, including the alleged cow, belonging to the deceased and the widower, were sold they must have been so sold to raise money to defray funeral expenses. He asserts that the widower had only two workers and their remuneration was nowhere near the amount of money that the executrix was seeking to withdraw monthly from the deceased's bank account. He states that the executrix ought not be allowed more money before she accounts for the amount withdrawn through the order made on 8th December 2017, he denies receiving a sum of Kshs. 50, 000, 000.00 on account of the widower, who is also his brother. He asserts that the money sought to be withdrawn by the executrix did not belong to the estate, but was money paid as compensation to the widower following an industrial accident while on duty in Norway. He said that he was only interested in having the estate properly managed for the benefit of the family. He says that the deceased did not have children with the widower, and the will on record omitted the biological children of the widower from benefit. He would like to be appointed administrator of the estate to the exclusion of the executrix.

9. He has attached to his affidavit several documents. There is copy of a letter dated 25th October 2017 from the Assistant Chief of Eshibeye Sub-Location, which identifies him as a brother of the widower, adds that the widower and the deceased did not have a child together, and recommends that the intended objector be appointed administrator of the estate of the deceased. There is copy of a medico-legal report by Dr Alushula dated 21st October 2017, describing that the widower had had an accident in Norway in 1989 which left with loss of memory, salivation, loss of power in the left upper limb and loss of 'memory' of the left lower limb. His speech is described as slurred and power in the left side of his body is said to be lost. The prognosis is that he cannot manage himself and needed someone to take care of him. There is a power of attorney dated 19th April 2018 allegedly executed by the widower appointing the intended objector as such with respect to Butsotso/Shibeye/409. There are also documents showing that moneys were paid on divers dates to Barclays Bank Kakamega to the account of the widower. There are copies of bank statements showing that the widower is the holder of account number 0098700536.

10. In response, the executrix swore a supplementary affidavit on 7th May 2018. She states that the documents put in evidence by the objector to support his case actually supported her case, that the widower was incapacitated and was not in a position to give a power of attorney. She refers in particular to the letter from the Assistant Chief and the medical report by Dr Alusula. She states that she has no interest in the estate save for her appointment as executrix of the will of the deceased. She says that she had lived with the couple as a child and was trusted enough to know their bank account details, and after the deceased passed on she was the one who was left taking care of the widower. She asserts that the objector sold the cows after the burial, of the accused and the money raised could not have been intended to defray burial expenses. She states that there were five workers in the homestead and not the two alleged by the objector. She asserts that the objector has not demonstrated that he took care of the widower since the demise of the deceased. She says that she would be able to account for the use of the money whose withdrawal was the subject of the order of 8th December 2017. She states that the claim that the deceased had stepdaughters was a mere allegation given that the said stepdaughters had not yet come to Kenya to see their father, the widower herein. She claims that although the widower had listed the objector as next of kin in his papers, he subsequently changed his mind after the objector was paid gratuity on his behalf but failed to account for it. She describes the objector as a resident of Tanzania who is hardly ever within Kenya. On the power of attorney, she says the same is limited to affairs touching on Butsotso/Shibeye/409.

11. To her further affidavit, the executrix has attached some documents of account. There is an income and expenditure account for the estate and the widower as at 30th March 2018. It reflects that she spent Kshs. 419, 570.00 on salaries, medical drugs for the widower, drugs and treatment of livestock, animal feeds, farming, planting, foods and lawyer's fees. She had received an advance from the bank of Kshs. 250, 000.00, which meant that she had expended her own funds of Kshs. 169, 570.00 over and above what she had received from the bank. The other document details the figures in the account running from September 2017 to March 2018.

12. The further affidavit prompted the filing of a further replying affidavit by the objector, sworn on 29th May 2018. He denies that the widower was totally incapacitated, saying that the doctor had only said that he was mentally ill. He also denies that the executrix had been the one solely taking care of the widower. He asserts that the widower was his blood brother while the executrix was the widower's sister in law by virtue of his marriage to her sister, the deceased herein, and therefore between the two of them he was the most qualified to take care of him. He avers that she is a married woman, and in his view, it would be award for her to be charged with taking care of another man. He argues that the widower does not need the many workers that the executrix was referring to, and suggests that the said workers being imposed by the executrix were in fact her own employees. He asserts that the property sought to be administered by the executrix in fact belonged to the widower, and he refers to an official search certificate over Butsotso/Shibeye/409. He asserts that he has a clean criminal record, and has attached a certificate of good conduct from the police to support his assertion. The certificate of good conduct dated 7th November 2017 indicates that the objector has no previous criminal record. The certificate of official search, dated 6th February 2005, on the other hand, indicates that Butsotso/Shibeye/409 is registered in the name an Elijah Julius Mulima since 20th January 1969.

13. The cause is yet to be gazetted, and I have noted from the record that the Deputy Registrar has processed the relevant documentation in that behalf dated 1st October 2018.

14. Directions were given on 21st May 2018 for filing of written submissions on the application, to be highlighted. There has only been partial compliance. The objector has filed incomplete written submissions in terms of them missing the final pages that should bear the signature of the person who drew them; while the executrix has not filed any. The executrix had asked for more time when the matter came up on 12th July 2018, but when the matter came up next on 24th October 2018 the court was asked to give a date for ruling on the understanding that the executrix would file her submissions in the intervening period. She never got to file her written submissions.

15. Representation to the estate of the deceased is yet to be granted in this case. The cause was initiated by a person who claims to be an executrix named in the will of the deceased in respect of which she seeks probate. Her petition is opposed by someone who alleges that the will is not valid. The question as to the validity of the will is moot. According to section 79 of the Law of Succession Act, Cap 160, Laws of Kenya, a grant of representation vests all the property of the deceased in the executrix or the administrator appointed in intestacy. That would suggest that the property in this case is yet to vest in the executrix. However, section 79 should be read together with section 80(1) of the Act, which establishes that a will takes effect upon the death of its maker, and that the grant of probate merely authenticates it and gives validity to any acts of the executrix carried out between date of death and the date of the making of the grant. That would mean that the property of a testatrix really vests in the executrix from the date of death, and that such acts are not unlawful so long as they are concomitant with the duties of an executor.

16. In this matter the validity of the will is challenged. Much as the executrix is entitled to exercise the powers and discharge the duties of an executor, even before grant of probate is made, where the validity of the will, which allegedly appoints her, is under challenge it would mean that the foundation of her authority to act as such would be shaky, and it would be prudent not to assert the right to act as such prior to determination of the question. Where the question arises after a grant has been made, the executor or grant-holder would be entitled to continue acting as such until the court rules on the validity of the will. Where the issue arises prior to the making of the grant then the proper thing to do would be to proceed under paragraph 10 the Fifth Schedule to the Law of Succession Act, which states as follows -

‘Pending any suit touching on the validity of the will of a deceased person, or for obtaining or revoking any probate or any grant of letters of administration, the court may appoint an administrator of the estate of the deceased person, who shall have all the powers of a general administrator, other than the right of distributing the estate, and the administrator shall be subject to the immediate control of the court and shall act under its direction.’

17. In this case, the validity of the will the subject of these proceedings has been challenged. The objection raised by the objector together with the answer to petition and the cross-petition amount to the suit envisaged in paragraph 10 of the Fifth Schedule to the Law of Succession Act. It would be appropriate to appoint an administrator or administrators to take care of the estate as the battle over the validity of the will rages.

18. Eventhough the executor assumes office immediately upon death, and does not have to await a grant of probate, it is still necessary to obtain probate. The said grant is the testimony of his appointment and of the validity of the will. Any person dealing with the estate need not require to see the will itself but a copy of the probate of the will. The grant of probate is the evidence that any person dealing with the estate needs to see to be satisfied or persuaded that the estate of the deceased vests in the executor, and therefore the said executor would have authority to act on behalf of the estate. Indeed, eventhough the executor may act without the grant, it is prudent for one to be obtained. Where a full grant cannot be obtained, the law, through the Fifth Schedule to the Law of Succession Act, provides a variety of limited grants that the court can grant under section 54 of the Act to address various situations. Ideally, estate assets ought not be accessed by anyone under whatever circumstances prior to a grant being made, whether full or limited. That would mean that the executrix ought to have obtained a limited grant before obtaining the orders of 8th December 2017. I would be reluctant to grant the orders sought in the instant application without a limited grant being in place. It would be prudent to do so given that a grant holder is subject to accounting requirements, which are easier to enforce where the administrator is court-appointed. The orders being sought in the application should only be available after a grant has been made limited in such manner as the court shall find appropriate.

19. One of the issues that arise in the application turn around the question of the guardianship of the widower of the deceased. The executrix argues that she was appointed to that office by the deceased in her will, and it is on that basis that she would like to access estate assets to raise funds to take care of the widower. The objector feels that he is in a better position to take care of the widower in his capacity as his brother. A testator is entitled to appoint by will guardians for persons who are under disability and in respect of whom they have responsibility. That is the case here. There is no doubt that the widower suffers disability and requires tender care, hence the alleged exercise by the deceased of her power to appoint by will a guardian to take care of him.

20. However, I should point out that there is no property in a human being, or his body, for disposal by will. The primary function of will-making is disposal of property; appointment of guardians or directions on the disposal of the remains of the testator, among other things, are incidental or secondary functions of a will. These incidental functions are not binding. Appointments of guardians for persons who are not able to take care of themselves due to mental disability are not governed by the Law of Succession Act, but rather by the Mental Health Act, Cap 48, Laws of Kenya. If disputes arise as to who ought to act as guardian of such a person as between an executor and close relatives of such a person, who are closer to him than the executrix, then such disputes are not for determination by a probate court. The appropriate thing to do should be to move the court under the Mental Health Act in accordance with the provisions of that law. The issues that the objector raises as to who between him and the executrix would be the best person suited to act as the widower’s guardian would be a matter that is not within my jurisdiction, sitting, as I am now, as a probate court, to determine.

21. The objection herein has been filed prematurely, for sections 68 and 69 of the Law of Succession Act and Rule 17 of the Probate and Administration Rules, envisage that the objection comes after the cause has been gazetted. Gazettement herein is yet to happen. Gazettement is designed to bring to the notice of any interested person, whether a beneficiary of the estate or a creditor, that the process of appointing administrators of the estate has started in the earnest so that if they have any claims they can come forward and raise them. In that case therefore the Deputy Registrar should still go ahead and have the matter gazetted for the benefit of any persons who have not yet come forward. Premature as the instant objection is, I believe there is a cure for it in Article 159 of the Constitution, as well of Rule 73 of the Probate and Administration Rules. Directions ought to be given for the disposal of the objection proceedings.

22. The other issue raised that I should address relates to the accounts by the executrix with regard to the money that the court directed be released to her. As executrix she has handled property that does not belong to her and she is bound in law to account for it. I note that she has tabled an account, which I find to be superficially plausible, but I should leave it to the objector to raise any issues with regard to it as he shall find appropriate. I shall therefore make no orders with regard to it.

23. I trust that I have said enough. The orders that I shall make in the circumstances, to dispose of the application dated 4th April 2018, are as follows –

(a) that I hereby appoint Agnes Nyangasi Kwanzu and Morris Washington Mulima administrators of the estate of the deceased pending hearing and determination of the objection proceedings filed by the objector;

(b) that a grant of letters of administration *pendente lite* shall issue to them, limited in the manner prescribed in paragraph 10 of the Fifth Schedule to the Law of Succession Act;

(c) that the administrators shall access the funds and assets of the estate only with leave of court, to be utilized in such manner as the court shall direct;

(d) that upon the grant referred to in (b) above, limited as aforesaid, being issued, the administrators, or any one of them, shall be at liberty to move the court appropriately for any orders relating to the management of the estate of the deceased;

(e) that issues relating to the management and guardianship of the widower shall be subject to separate proceedings appropriately brought under the provisions of the Mental Health Act;

(f) that the Deputy Registrar shall cause the cause herein to be gazetted forthwith;

(g) that the objection proceedings herein shall be heard at Kakamega for three (3) days before a single Judge, to be disposed of on the basis of affidavit and oral evidence, on dates to be given at the disposal of this ruling, and the parties shall file statements of the witnesses that they propose to call at the trial (who have not sworn any affidavits) and bundles of the documents they propose to rely on at the trial;

(h) that each party shall bear their own costs; and

(i) that any party aggrieved by the orders that I have made herein shall be at liberty to move the Court of Appeal appropriately within twenty-eight (28) days of the date hereof.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 10th DAY OF April, 2019

W. MUSYOKA

JUDGE