



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 299 OF 2012

IN THE MATTER OF THE ESTATE OF ANNA SYEKONYO NTHENGE (DECEASED)

ROSE MUKULA CHAMA

ROSE NTHENYA NZUKI

BRAMWEL MWANGANGI NTHENGE

ANNA MUSYAWA MWAI

MUNYIVA MUSILI.....BENEFICIARIES/APPLICANTS

VERSUS

REGINA MUTINDI MUINDE.....ADMINISTRATOR/RESPONDENT

RULING

1. This ruling relates to three applications that shall be addressed chronologically.

a). Application for confirmation of grant.

2. By an amended summons for confirmation of grant dated **28.6.2018** the administrator/respondent sought confirmation of grant made on **24/3/2015** in respect of the deceased's estate in the instant matter. The said administrator also sought for the removal of Thomas Kyalo as Administrator and replacement with Bramuel Mwangangi Nthenge as the said Thomas Kyalo is since deceased. The administrator further sought that the property Kangundo/Isinga/1106 be added to the estate of the deceased as the same had been omitted. The administrator sought that the grant be confirmed as per the schedule of distribution.

3. It is supported by an affidavit deponed by Regina Mutindi Muinde where she attached a copy of the search in respect of Kangundo/Isinga/1106 that indicated the same is registered in the names of the deceased. She gave the list of the properties of the deceased and proposed the distribution and sought that the grant be confirmed in the terms proposed.

4. There is a reply to the said application vide affidavit deponed on 2nd October, 2018 by Rose Mukulu Chama who averred that the beneficiaries oppose her being administrator as she is not fit to be one and further that she is not trustworthy and there is no cordial relationship between her and the beneficiaries.

b). Application for injunction and removal of administrator.

5. The Beneficiaries/ Applicants filed an application under Section 45, 47, 66 and 70 of the Law of Succession Act and Rule 26 of the Probate and Administration Rules that sought that the administrator/respondent be restrained from interfering with the deceased's plot 16 Situate at Matetani Shopping Centre and that she be removed as administrator and replaced with Rose Mukulu Chama, Mary Mumbua Mbiti and Bramwel Mwangangi Nthenge.

6. The application was grounded on the following facts as per the application and supported by affidavit of Rose Mukulu Chama ; That the petitioner is a daughter in law to the deceased and the suit property is a property of the deceased and that the petitioner was invited for a family meeting in respect of the estate of the deceased and she had refused to attend and it is unknown how she became administrator of the estate of the deceased because she is a problematic person and she cannot be trusted with the administration of the estate of the deceased. The deponent averred that she evicted all the tenants from the suit plot and commenced development in the same hence the beneficiaries do not want her as an administrator.

7. In reply to the application, the petitioner opposed the application. She deponed that the suit property does not belong to the deceased as per a letter from the Kangundo sub-county administrator attached to the affidavit. She lamented that her signature in respect of the instant cause were obtained through forgeries and attached a letter requesting for investigation of the same. She also lamented that the applicants and the 1st administrator have joined hands to disinherit her and attached copies of searches registered in the names of Nthenge Makau. Rose Mukulu Chama filed a supplementary affidavit on 18th October, 2018 and averred that the suit property belonged to her late father and the petitioner herein is an intermeddler in respect of the same. She denied being responsible for subdivision of the properties in exhibit RM4 of the petitioner's replying affidavit and emphasized that none of the beneficiaries want the petitioner as administrator and thus she should be removed.

c). Application for injunction and conservatory orders in respect of he deceased's estate.

8. The 1st administrator filed summons dated 6.11.2018 under Section 4 and 47 of the Succession Act and Rule 49 and 73 of the Probate and Administration Rules seeking injunctive orders against the 2nd Petitioner (Mumbua Mbiti) and the beneficiaries from dealing in the listed properties of the deceased as well as an order for account of rent received in respect of the said properties from 2011 as well as deposit and payment of the same into court until the cause is heard and determined. The application is supported by the affidavit of Regina Mutindi Muinde who gave a list of the properties of the deceased as registered in her names and enumerated what she considered as acts of waste by the respondents in the application therein. She lamented that the respondents had been collecting rent from the said properties and she has not received a cent and no account of the same had been rendered and further the estate of the deceased is yet to be distributed. She attached copies of searches in respect of the said properties and also attached a sale agreement between Kevin Okebaso Omao and Mumbua Mbiti in respect of an unknown plot of land.

9. In reply to the application, Rose Mukulu Chama opposed the same and averred that the deceased subdivided her land, Donyo Sabuk/Komarock Block 1/18628 into 80 plots before her death and distributed the same as per the list annexed to the affidavit together with the consent to the same and mutation form. She averred that the beneficiaries of the estate continue to utilize their plots and collect rent and hence there is no instance of intermeddling. She attached a copy of the minutes in respect of the distribution of the estate of the deceased.

10. In further support of the application, Reginah Mutindi Muinde vide affidavit filed on 4th March, 2019 emphasizing that the injunction be granted against the 2nd petitioner to stop any transaction on the deceased's properties until the determination of the instant cause.

11. When the matter came up for hearing the court directed the parties to file and exchange submissions.

12. Counsel for the beneficiaries submitted in respect of the application dated 28.6.2018 that they have no objection to Bramwel Mwangangi Nthenge being substituted, however they are opposed to Regina Mutindi Muinde remaining as an administrator. In respect of the applications dated 20.9.2018 and 6.11.2018 counsel submitted that the beneficiaries of the estate of the deceased do not trust Regina and in terms of Section 26 of the Probate and Administration Rules the surviving children of the deceased are higher in rank and priority over her. Counsel submitted that the beneficiaries have demonstrated that the deceased subdivided her plot Donyo Sabuk/Komarock Block 1/18628 into 80 plots before her death and that at the confirmation stage, facts shall come out that some of the plots were purchased from the deceased before her death. Counsel further submitted that Regina had not demonstrated that there is income coming out of the estate of the deceased in terms of Section 55(2) of the distribution before confirmation of the grant is permitted. Counsel submitted that she has no issue with the orders for preservation of the estate of the deceased or interference with the same however prayed that the status quo be maintained. Counsel had no issue with the inclusion of omitted assets of the deceased and reiterated that Regina be removed and replaced with Rose Mukulu Chama, Mary Mumbua Mbiti and Bramwel Mwangangi Nthenge.

13. Learned Counsel for the 1st petitioner vide written submissions filed on 25.4.2019 framed three issues for determination. On the issue of whether the 1st administrator is capacitated under the law to be the administrator of the estate of the deceased, counsel submitted that she is well capacitated and relied on the order of the court issued on 24.3.2015 and the provisions of **Section 66 and 39 of the Law of Succession Act**. On the issue of whether actions by the 2nd petitioner and the beneficiaries amount to intermeddling, counsel submitted that in selling part of Donyo Sabuk/Komarock Block 1/18628 the same amounts to intermeddling. Counsel submitted that Plot 16 is not part of the estate of the deceased and urged court that an injunction be granted to prevent transaction in the properties of the deceased. On the issue of whether there is full disclosure to the inventories of the assets of the deceased and whether they are fully accounted for, Counsel cited the provisions of Section 83(c) of the Law of Succession Act and submitted that the 2nd administrator has transacted in the properties of the deceased pending the conclusion of this cause and cited the finding in case of **Paul Rono Pymto & Another v Giles Trapin Lyonnet (2014) eKLR** that stated that the administrators exceeded their statutory mandate and intermeddled with the estate of the deceased and ought to have come to court to seek authority to do so. Counsel concluded by submitting that conservatory orders be granted in respect of the estate of the deceased and that applications dated 26.8.2018 and 6.11.2018 be allowed.

14. In this cause, it is undisputed that the deceased died on 18th December, 2011 and it appears that the contest is whether or not Reginah Mutindi Muinde should be an administrator of the estate of the deceased and what exactly is the estate of the deceased so that the orders sought may be granted and whether the parties have demonstrated whether or not the orders should be allowed or declined. After going through the evidence on record, I find the following issues necessary for determination:

- i. *Who is entitled to be appointed administrator*
- ii. *Whether there has been intermeddling in the estate of the deceased*
- iii. *Whether the court may grant the orders sought and*
- iv. *What orders may the court grant?*

15. The petition herein was filed on 5th April, 2012 by Jacob Kisozi Nzuki and Mumbua Mbiti, the grandson and daughter of the deceased and according to the record, the deceased was a wife of Nthenge Makau and she died on 18.12.2011 and was survived by Mumbua Mbiti her daughter, Mwai Nthenge, her son, Kyalo Nthenge, her son and Mwangangi Nthenge, her son and the grant was issued to the initial petitioners which was later revoked and issued to Regina Mutindi Muinde, Mumbua Mbiti and Thomas Kyalo. The grant had not been confirmed and this led to the instant applications. The various respondents are accused of intermeddling. However the record indicated that the deceased effected the distribution of Donyo Sabuk/Komarock Block 1/18628 before her death. Regina Mutindi Muinde who avers being the daughter to the deceased and a beneficiary therein seeks the preservation of the estate of the deceased and issue of injunction and conservatory orders too.

16. In the first application, Regina seeks that the grant be confirmed. However there is a dispute as to her capacity to be administrator. The operative section in this regard would be Section 66, 38, 41 and 42 that provide as follows

“66. Preference to be given to certain persons to administer where deceased died intestate

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

- (a) Surviving spouse or spouses, with or without association of other beneficiaries;
- (b) Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- (c) The Public Trustee; and
- (d) Creditors:

38. Where intestate has left a surviving child or children but no spouse

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

41. Property devolving upon child to be held in trust

Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.

42. Previous benefits to be brought into account

Where—

- (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
- (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

17. From the evidence on record, the surviving children of the deceased are Mumbua Mbiti her daughter and Mwangangi Nthenge her son. In accordance with Section 38 and 66 of the Law of Succession Act, they are the persons entitled to be administrators of her estate. It follows that the grant cannot be confirmed as prayed by Reginald Mutindi Muinde and the application dated 20.9.2018 partially succeeds in that regard.

18. Section **45 of the Law of Succession** is to the effect that no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person. The issue to be determined is what then is the free property of the deceased? This would be a question to be determined during the confirmation of the grant. However at a peripheral angle, the deceased appears to have subdivided her land, Donyo Sabuk/Komarock Block 1/18628 into 80 plots before her death and distributed the same as per the list annexed to the affidavit together with the consent to the same and mutation form.

19. The court therefore takes the view that the actions relating to the dealing with the property resultant from the subdivision of the said Donyo Sabuk/Komarock Block 1/18628 into 80 plots do not amount to intermeddling. However the actions before any grant was issued in respect of any other property would amount to intermeddling. Nevertheless there is nothing tabled before the court to show any dealings with the deceased property and therefore any finding in respect of the intermeddling would have to await the relevant evidence.

20. Reginald Mutindi Muinde sought for an injunction or similar reliefs. The celebrated case of **Giella v Cassman Brown & Co. Ltd (1973) E.A 358** sets out the grounds for granting an injunction. On the first principle as set out in the case, I am not satisfied that the said Reginald

Mutindi Muinde has established a prima facie case as described in **Mrao v First American Bank & 2 others [2003] KLR, 125**. It was evident from the facts tendered in court and my analysis above that the deceased effected a conveyance of her property before her death and therefore there is nothing to injunct in that regard.

21. I am not satisfied that if the order so sought by Reginah Mutindi Muinde is not granted, there will be no irreparable loss to her that cannot be compensated by damages as she would need to wait for her allocation from the estate of the deceased. In **Ann Wairimu Wachira v Jerioth Wangui Maina and 2 others (2016) eKLR**, court observed that the applicant must demonstrate that the loss alleged cannot be compensated by damages. On the same limb I am not satisfied that with respect to plot 16 Situate at Matetani Shopping Centre there has been demonstration of a prima facie case, a right to the said plot as well as irreparable loss that will be occasioned to the respondents if the order of injunction sought by them is not granted. The upshot is that I am not satisfied that the principles for granting injunctions have been fulfilled in both applications as per the requirements set out in the celebrated case of **Giella v Cassman Brown & Co. Ltd 1973 EA 358**.

22. With regard to the application dated 6.11.2018, the other issue to be determined is whether or not the applicant has raised sufficient grounds to an order for account of rent received in respect of the said properties from 2011. In light of my analysis above and order for account would serve no purpose.

23. Having outlined the details of the arguments of the parties so as to address the issues framed at the onset of my analysis the facts before the court do not disclose sufficient reason to confirm the grant. There is no reason to order for injunction and conservatory orders as well as an order for account and I hold the view that any other grievances with respect of the suit property can be channeled to the ELC Court more particularly the properties that had been given out by the deceased herself prior to her death.

24. Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules enjoin the court to exercise inherent jurisdiction to make orders as are necessary to meet the ends of justice. In addition Section 76 of the Law of Succession Act provides that **Revocation or annulment of a grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion(emphasis added)**—

a.;

b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

25. Regina Mutindi Muinde has in her affidavit deponed that she is a daughter to the deceased. However this is not the case as she has described herself as a daughter in law of the deceased while there are surviving children of the deceased. Indeed the beneficiaries have resoundingly rejected her as an administrator and want her out and be replaced by new administrators. The role of an administrator is fiduciary in nature and that an administrator must always handle the role with care. If the beneficiaries resolve that they no longer trust the administrator then the administrator has to leave once the trust is lost. In the premises this court is of the view that the grant issued in her names be revoked.

26. In the result I proceed to make the following orders:

i. The applications dated 28.6.2018 and 6.11.2018 are dismissed.

ii. The grant issued on 24/3/2015 in the names of Regina Mutindi Muinde be and is hereby revoked and a fresh grant be issued in the names of Mumbua Mbiti and Mwangangi Nthenge

iii. Mumbua Mbiti and Mwangangi Nthenge do file a fresh application for confirmation of the grant and indicate all the properties of the deceased.

iv. Each party shall bear their own costs.

It is so ordered

Dated and delivered at **Machakos** this 31st day of **July, 2019**.

D.K.KEMEI

JUDGE