



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 576 OF 2005**

**IN THE MATTER OF THE ESTATE OF CECIL PETER OKUMU (DECEASED)**

**RULING**

1. According to a letter dated 7<sup>th</sup> November 2005, from the Chief of Shieywe Location, the deceased died on 2<sup>nd</sup> October 2002. He had bided possessed of a property known as Butsotso/Shikoti/2632. The Chief indicated that the family had agreed that Roeeen predeceased by his wife, and he was survived by eight children, being Roselyne Atieno Oracha, Nancy Okumu, Mark Omondi, Chrispinus Okumu, Victor Oracha, Millicent Oracha, Eric Oracha and Lilian Oracha. The deceased was said to have dselyne Oracha seeks representation to the estate.
2. Roselyne Oracha sought representation to the estate of the deceased through a petition lodged in this cause on 1<sup>st</sup> November 2005. She listed the eight individuals listed in the Chief's letter referred to paragraph 1 here above as survivors of the deceased. She indicated that the estate comprised of Butsotso/Shikoti/2632 and death gratuity. Letters of administration intestate were made to Roselyne Oracha on 28<sup>th</sup> February 2006 and a grant was issued to here out of this registry on 2<sup>nd</sup> May 2006. I shall henceforth refer to Roselyne Oracha as the administratrix.
3. On 27<sup>th</sup> May 2016, the administratrix moved the court by a summons dated 27<sup>th</sup> May 2016 seeking confirmation of her grant, release of funds held by the Barclays Bank Kakamega branch to be utilized to pay school fees and for medication, and for leave of court to collect rent from Butsotso/Shikoti/2632 for sharing out equally between the survivors. In her affidavit sworn in support of the application she proposed that the gratuity be released to her to be spent on school fees and medication for named survivors, Butsotso/Shikoti/2632 be shared out equally amongst the survivors and the four plots at Kisumu be shared out in manner that would have the daughters share one plot while the sons took the remaining three. The consent on distribution appears to share rent on the landed assets instead of sharing out the land itself.
4. The application was placed before the Judge under certificate of urgency on 15<sup>th</sup> June 2016. An order was made for release of the money held at Barclays Bank, being Kshs. 374, 000.00, to be utilized to pay school fees and later for medication. The court directed that the other prayers, including that for confirmation, be disposed of later.
5. The administratrix lodged another application at the registry on 24<sup>th</sup> June 2016, in which she sought orders to restrain Eric Oracha and Victor Oracha with respect to collecting rents from Butsotso/Shikoti/2632, deposit of the rents so far collected into a specified account for distribution amongst the survivors and for release of documents relating to the Kisumu plots. In her affidavit in support of the application, she complained that the respondents had been collecting all the rent from the property Butsotso/Shikoti/2632 without accounting for it to the estate. They are also accused of running the said assets down and of withholding documents relating to the Kisumu assets.
6. Victor Odongo Oracha and Eric Ochieng Oracha swore separate affidavits in reply to the application but both word for word in terms of their averments. They complained that they had been left out of the process of administration of the estate. They said the whole process was initiated without consultation with all the survivors of the deceased. They denied that they had been collecting rent and misusing it. They accused the administratrix of receiving gratuity and squandering it.
7. The administratrix responded to the replies by filing a supplementary affidavit. She said that she had distributed the estate equally to all, including the respondents. She asserted that she had involved all her siblings in the application for representation. She pointed to the infighting over the estate, and reiterated that the respondents had been collecting rent from the estate without rendering accounts.
8. The application dated 23<sup>rd</sup> June 2016 was argued on 21<sup>st</sup> September 2016. In the end the court delivered a ruling the same day, in which it noted that the parties were accusing each other of collecting moneys from the estate in terms of gratuity and rents without accounting for the same. The court then directed them to file accounts in respect of the monies that they had collected from the estate and utilized. In compliance the administratrix filed a supplementary affidavit through which she rendered an account of the moneys that she had received and giving a breakdown of how she spent it, supported by documentation. I have not seen any documents that the respondents might have filed in compliance with those directions.

9. On 28<sup>th</sup> September 2016 further directions were given by the court, to the effect that that out of the amount of Kshs. 37, 000. 00 collected as rent, Kshs. 20, 000.00 be retained by the respondents and the balance of Kshs. 17, 000.00 be paid over to the administratrix to utilize on school fees and medical care for some of the survivors of the deceased.

10. The administratrix filed another application on 3<sup>rd</sup> October 2016 for orders to be made pending confirmation of grant, to allow her to withdraw money from the Barclays Bank account to spent on school fees and cater for medical expenses, and also for orders to compel the respondents to deposit a certain amount of money into a Cooperative Bank account as ordered by the court.

11. On 29<sup>th</sup> March 2017, the administratrix filed yet another application, seeking that the proceeds of rent from Butso/Oracha/2632 be deposited in a joint account in the names of the administratrix and Erick Ochieng Oracha, the citation of the two sons for disobeying court order made on 28<sup>th</sup> September 2016. Her case was that the two had been collecting rent from the premises on the subject property that they were not accounting for. She also argued that the court had ordered that the money be shared out equally amongst the children, but the respondents had ignored the same.

12. The reply to the application was through an affidavit that Eric Ochieng Oracha swore on 19<sup>th</sup> May 2017. He continued to decry the fact that the succession case was initiated without bringing all the children of the deceased on board, and, therefore, in a manner that was fraudulent. He averred that the cause had some four pending applications in respect of which they were not properly represented. He accused the administratrix of initiating two succession causes, one at Kisumu High Court for a grant *ad litem* and the other at Kakamega High Court for full grant. He further accused her of using the grants to collect the deceased's benefits and utilizing them for her own ends. He referred to certain instances and attached copies of documents to support his case. He complained that the court had not given them adequate time to call her to account. He stated that the only time she ever gave an account the same was false. He took the position that the little rent collected ought not be shared equally because the administratrix had not shared what she collected from the estate.

13. That application was argued on 22<sup>nd</sup> May 2017. A ruling was delivered on 5<sup>th</sup> June 2017, in which the court found the respondents in contempt of court in failing to comply with the orders made 28<sup>th</sup> September 2016. They were fined Kshs. 5, 000.00 each.

14. The administratrix filed yet another application on 14<sup>th</sup> January 2019, curiously dated 15<sup>th</sup> January 2019, seeking similar orders to the previous applications, that the two sons be ordered to deposit a certain amount of money in court as rent collected from estate property, especially Butso/Oracha/2632. She also sought to be authorized to take over collection of rent from the said property. She referred to orders that were made on 26<sup>th</sup> September 2016 which spelt out how the rent was to be shared out as between the sons and daughters of the deceased. She stated that the sons had refused to comply with the said orders. She further stated that the court found them guilty of contempt of court on 5<sup>th</sup> June 2017 and sanctioned them by imposing fine on them.

15. The application was placed before me on 12<sup>th</sup> March 2019. It had been served but no reply had been filed as at the date fixed for hearing. I granted the application in terms of prayers (b) and (c), being that the accumulated sum of moneys payable to the administratrix and her sisters be deposited in court. Regarding the prayer on contempt of court, I directed that the respondents appear personally before me on 3<sup>rd</sup> April 2019.

16. On 3<sup>rd</sup> April 2019 only one the respondents was in court, Victor Odongo Oracha. Counsel for both sides addressed me. Mr. Ondieki, for the administratrix, informed the court about the order for deposit of money in court of the rent collected, which he submitted had not been complied with. He further submitted that the respondents had been previously convicted of contempt of court and fined, but they had continued with the contempt. He urged that the respondents be jailed without the option of a fine for they had continued to disobey a court order. Mr. Imbenzi, for the respondents, submitted that the administratrix was under an obligation to account to the court and the survivors of the deceased yet she had not yet so far done so. He stated that the order in question required tenants to deposit rent into a certain account, yet the said tenants were not parties to the cause, meaning that it was the obligation of the administratrix to notify them of the requirement to deposit rent in the said account. Regarding the orders made on 12<sup>th</sup> March 2019, he submitted that the same was served on him on 8<sup>th</sup> April 2019 rather than personally on the respondents as was required in law. He submitted that the respondents never collected the money that they were being required to deposit in court.

17. After hearing both sides I directed that I needed to peruse the record to acquaint myself with what had been transpiring before I could give more comprehensive directions. I have perused the entire record, and I have noted what has been going on, which I have recited in the foregoing paragraphs.

18. The deceased person, the subject of these proceedings, died in 2002. Representation to his estate was granted on 2<sup>nd</sup> May 2006. The scheme of things under the Law of Succession Act, Cap 160, Laws of Kenya, is that once representation is obtained, the personal representative ought to collect and gather the estate upon identification of the assets and liabilities, and ascertainment of the survivors and beneficiaries, and thereafter move the court, within six months, for distribution of the estate through a confirmation application. Six months after confirmation, the personal representative should complete distribution and report to court. The exercise of administration ought to be completed within one calendar year. The primary mandate of a personal representative is distribution of the estate. All the other functions are incidental to that core mandate. Administration is not designed to last forever.

19. Just so that all the parties are clear on the relevant law, I will here below set out the provisions which state this position.

20. Section 71 of the Law of Succession provides for confirmation of grants of representation, which process encompasses the distribution of the estate. The provision states:

“71. *Confirmation of grants*

(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—

(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or

(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or

(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or

(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.

(2A) Where a continuing trust arises and there is only one surviving administrator, if the court confirms the grant, it shall, subject to section 66, appoint as administrators jointly with the surviving administrator not less than one or more than three persons as proposed by the surviving administrator which failing as chosen by the court of its own motion.

(3) The court may, on the application of the holder of a grant of representation, direct that such grant be confirmed before the expiration of six months from the date of the grant if it is satisfied—

(a) that there is no dependant, as defined by section 29, of the deceased or that the only dependants are of full age and consent to the application;

(b) that it would be expedient in all circumstances of the case so to direct.

(4) Notwithstanding the provisions of this section and sections 72 and 73, where an applicant files, at the same time as the petition, summons for the immediate issue of a confirmed grant of representation the court may, if it is satisfied that—

(a) there is no dependant, as defined by section 29, of the deceased other than the petitioner;

(b) no estate duty is payable in respect of the estate; and

(c) it is just and equitable in all circumstances of the case, immediately issue a confirmed grant of representation.”

21. Section 83 of the Law of Succession Act sets out the duties of an administrator, which include that to render accounts at confirmation of grant and to wind up administration six months thereafter. The provision says:

“83. Duties of personal representatives

Personal representatives shall have the following duties—

(a) to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;

(b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;

(c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);

(d) to ascertain and pay, out of the estate of the deceased, all his debts; (e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;

*(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;*

*(h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;*

*(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.”*

22. As stated above, the principal purpose of succession proceedings is to have the estate of the deceased shared out amongst those entitled to the assets, be they survivors, heirs, beneficiaries or creditors. The principal duty of the personal representative in that process is to collect, gather and get in the assets, identify the persons entitled to a share in the assets and eventually distribution of the estate. The primary mandate of the probate court seized of a succession cause is to facilitate distribution of the estate. An administrator who fails in his or primary duty of administration, and especially of failing to keep the timelines set out in the Law of Succession Act, exposes himself to having their grant revoked. Section 76(d) of the Law of Succession Act is specific on instances where a grant may be revoked: it includes failure to apply for confirmation of grant within one year from the date the same was issued, lack of diligence in the process of administration and failure to account. For avoidance of doubt the provision states:

*“76. Revocation or annulment of grant*

*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—*

*(a) ...*

*(b) ...*

*(c) ...*

*(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—*

*(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or*

*(ii) to proceed diligently with the administration of the estate; or*

*(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular;*

*(e) ...”*

23. As stated above, the deceased died in 2002. It is disappointing that his estate has not been distributed to date. Representation to his estate was obtained in 2006. Again, disappointingly, the grant is yet to be confirmed. In the first place the application for confirmation of the said grant was not sought until ten years later, instead of the six months envisaged in section 71 of the Law of Succession Act, for the application for confirmation of grant was not filed until 27<sup>th</sup> May 2016. As stated elsewhere, the application for confirmation of grant is the most important process in succession proceedings for it enables the administrator and the court to discharge their primary function, which is the distribution of the estate. Rather than concentrating on having her application for confirmation of grant disposed of, to pave way for distribution of the estate, the administratrix busied herself with pursuing peripheral matters, such as getting authority to access estate property to obtain funds for school fees and medical care. She filed a record five applications around this single issue.

24. The disposal of the application for confirmation of grant would have addressed all these issues. In the first place, it paves way for distribution of the estate, so that whoever requires school fees or money for medical care can access the same from the assets allocated to them. Secondly, regarding persons who are said to be intermeddling with the estate, by doing things that they have no power or authority to do, such as collecting rents when they do not hold grants of representation, the hearing at confirmation would enable the administratrix to call such persons to account, instead of filing separate applications for that purpose. It will also give the administratrix herself opportunity to account of her administration from the date she was appointed up to the date of the account.

25. The administratrix has expended a lot of her energy and wasted precious judicial time pursuing matters that are really not necessary. She should have sought to have her confirmation application heard and determined, during which process the court would have had a chance to address all the issues that she has raised in her numerous applications. It is to abuse the court process to keep filing one application after another around the same single issue. The fact that the administratrix did not get to have control of some of the assets and does not even seem to be clear of where some of the assets could be, is clear indictment of her and evidence failure of administration on her part.

26. I will now advert to the question of the respondents collecting rents and not sharing them with the other beneficiaries. In the first place

the respondents are not the administrators of the estate of the deceased. The property of the deceased does not, therefore, vest in them in terms of section 79 of the Law of Succession Act, which provides as follows:

*“79. Property of deceased to vest in personal representative*

*The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”*

27. The vesting that is provided for in section 79 of the Law of Succession Act enables the personal representative of the deceased to enjoy the powers that are vested in them by section 82 of the Act, and to discharge the duties imposed upon them by section 83 of the Act. The personal representative exercises the powers of the owner of the property and can sue and be sued with respect to the property, and can sell or dispose of the property. I have set out the provisions of section 83 of the Act above, so, at this stage, I shall set out the provisions of section 82 of the Act, for avoidance of any doubt, It says:

*“82. Powers of personal representatives*

*Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—*

*(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;*

*(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:*

*Provided that—*

*(i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and*

*(ii) no immovable property shall be sold before confirmation of the grant;*

*(c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;*

*(d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation:*

*Provided that except so far as otherwise expressly provided by any will—*

*(i) no appropriation shall be made so as to affect adversely any specific legacy;*

*(ii) (ii) no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required.”*

28. My understanding of these provisions, therefore, is that the assets of estate of the deceased herein were vested in the administratrix upon her appointment as such. She is the one who enjoys the powers set out in section 82 and is under the duties imposed by section 83. Conversely, the respondents were not appointed administrators. The assets, therefore, were not vested in them. They cannot exercise the powers of owner that section 82 creates. An administrator is a trustee according to the Trustee Act Cap 167 Laws of Kenya. As such the administrator also enjoys the powers conferred upon trustees by that Act and by the common law.

29. A person who is not an administrator, and to whom, therefore, the property of the estate does not vest has no power to handle it. When such a person deals with such property they are said to intermeddle with it for they would lack the authority to deal with it. Section 45 of the Law of Succession Act outlaws such conduct and criminalizes it. Section 45 says:

*“45. No intermeddling with property of deceased person*

*(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose,*

*take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.*

(2) *Any person who contravenes the provisions of this section shall—*

*(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and*

*(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”*

30. It is clear from the record that the respondents were found by the court to be collecting rent when they should not been so doing. That of itself meant that they were intermeddling with estate property. It was on that basis that orders were made by the court on what was to be done with regard to the property that they were unlawfully holding onto. Clearly their conduct was contra the law, and action ought to and was properly be taken against them. However, they have raised valid questions. After the order was made by Kariuki J it was to be served on the tenants to ensure compliance by having them deposit the moneys into the account. Is there any evidence that the respondents have been collecting the money in question? These are questions that can only be addressed at the oral hearing of the confirmation application.

31. I feel that both parties are blameworthy for the delay in the finalization of this cause. Both are equally to blame for the impasse that they find themselves in. That impose or dead lock can only be unlocked by the matter being heard orally so that all the outstanding issues are addressed.

32. I note that the respondents have repeatedly argued in their affidavits that the grant was obtained in a process that did not involve them. In otherwards, the process was not open, transparent and democratic. That could explain the difficulties that they have been causing to the process. Section 71 allows the court to look into such issues and determine whether the process of appointment of the administrator was proper, in addition to evaluating whether the administrator had done a good job at administration. That is what confirming administrators is about. The relevant provision states:

*“71. Confirmation of grants*

*(1) ...*

*(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—*

*(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or*

*(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or*

*(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or*

*(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case ...”*

33. After taking into account all the factors that I have addressed above, I shall give the following directions –

**(a) That I shall refrain from making any orders of a punitive nature against the respondents at this stage;**

**(b) That instead I shall direct that the pending confirmation application dated 27<sup>th</sup> May 2016 be disposed of first, by way of *viva voce* evidence, where all the pending issues shall be addressed;**

**(c) That I direct the respondents to file their affidavits of protest to the said application in the next fourteen (14) days, with corresponding leave to the administratrix to file further affidavit, if need be, to address such new issues as may be raised by the respondents in their protest;**

**(d) That the parties shall have twenty-one (21) days to file and serve lists of documents and witness statements of any individual that they propose to call as witnesses who will have not filed any affidavits;**

**(e) That both sides shall in the next fourteen days file detailed accounts, the administratrix of her administration of the estate from the date of her appointment to date and the respondents of any rental income that they might have collected from any of the assets of the estate; and**

**(f) That the matter shall be mentioned for compliance and for allocation of hearing dates; and that the mention date shall be given in open court at the delivery of this ruling.**

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26<sup>th</sup> DAY OF July, 2019**

**W. MUSYOKA**

**JUDGE**