



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

SUCCESSION CAUSE NO.20 OF 2017

IN THE MATTER OF THE ESTATE OF:

PATROBA NDURI MBAI.....DECEASED

VERSUS

HENRY HUMPHREY NDURI.....OBJECTOR/APPLICANT

VERSUS

MARY ADHIAMBO AGUTU.....1ST PETITIONER/RESPONDENT

MARTIN OKOTH NDURI.....2ND PETITIONER/RESPONDENT

KENNETH KENNEDY NDURI.....3RD PETITIONER/RESPONDENT

SAMUEL OKECH OMER.....4TH RESPONDENT

RULING

[1] Over one year ago on the 25th October 2018, this court observed in a ruling on a previous application presented herein that the conclusion of this matter in a just, equitable and expeditious manner was unnecessarily delayed by the conduct of one of the beneficiaries cum administrator of the estate of the late **Patroba Nduri Mbai** (deceased) in filing several applications intended to forestall the imminent confirmation of the grant of letters of administration intestate dated **26th April 2013**, in terms of the consent; order entered herein on 15th July 2014. The order was effectively a compromise of the summons for confirmation of grant dated 5th June 2014, filed herein on 10th June 2014 and the protests in respect thereof by the beneficiary cum administrator, Henry Humphrey Nduri, dated 8th July 2014 and an interested party, Samuel Okech Omer, dated 14th July 2014.

[2] In that previous application, the court cited the said Henry Humphrey Nduri, described therein as the applicant/objector as the person responsible for the unnecessary delay in the expeditious disposal of this matter. It was noted that he was one of those who petitioned for the necessary grant of letters of administration intestate and could not therefore be heard to claim that this was a testate succession rather than intestate succession. It was also noted that he was in essence, a party to the consent order made on 15th July 2014 which compromised the summons for confirmation of grant dated 5th June 2014, in terms of distribution of the estate property in favour of all the four houses of the

deceased who was a polygamist with four (4) wives.

The import of the consent order was the distribution of the deceased's four parcels of land equally among his four houses upon valuation of the same. The parcels were then to be held in trust by the deceased's four widows for the children of the deceased with the second house taking care of the interested party and protestor's interest in the estate.

[3] In as much as the consent order was never invalidated and/or set aside by any court, it remained valid and remains valid today. It was against that background that this court stated in its ruling of the 25th October 2018, that:-

“If the objector is so aggrieved by the consent order, he had more than enough time and opportunity to have it set aside even after the dismissal of his initial application for setting aside orders. He cannot use the consent order as a reason for the delay in this matter, neither can he use the narrative that this is a testate succession.

His conduct in this matter if not changed would definitely cause further delay much to the disadvantage of the entire estate of the deceased and its beneficiaries including himself. The court would in the circumstances be tempted to label him (objector) a “vexatious litigant” and would not sit back and watch the delay progress as it would use its powers under Section 76 of the Succession Act to revoke the grant and let the parties go back to the drawing board”.

[4] Apparently, the re-newed summons for confirmation of grant dated **10th July 2019**, by the second administrator cum beneficiary, **Martin Okoth Nduri**, on behalf of all the other administrators and/or beneficiaries was the answer to this court’s caution of the 25th October 2018, and effectively accords with the vital consent order entered herein on 15th July 2014, with a view to having the entire estate of the deceased shared equally among the four houses of the deceased.

However, the fourth administrator’s cum beneficiary, **Henry Humphrey Nduri**, eldest son of the deceased with his second wife,

Mahetebel Aloo Nduri, answer to the caution was a disagreement with the summons expressed not in an affidavit of protest but a document dated 9th October 2019, with the heading “**what is the dispute**” and another document dated 11th October 2019, with the heading “**Notice to court**”. He therefore became the respondent in this application.

[5] The first document dated 9th October 2019, poses irrelevant questions and purports to educate all and sundry on the respondent, concept of the law relating to testate succession and boundary disputes.

And, to appear “learned in law”, the respondent invokes the so called “**Cypress doctrine**” which is a doctrine of law that allows the court to amend the terms of a charitable trust as closely as possible to the original intention of the testator or settlor to prevent the trust from failing. Clearly, this doctrine would not apply in the present circumstances.

The second document dated 11th October 2019, purports to give notice that the respondent had raised certain issues with his co-administrators cum beneficiaries which they were required to respond to, after which he could file his written submissions as directed by the court on 19th

September 2019. Nonetheless, the respondent did file his submissions on the 7th November 2019, after the applicants had filed theirs on the 15th October 2019.

All the aforementioned documents filed herein by the respondent were treated as his protest to the material summons for confirmation of grant now that he avoided, declined or neglected to file a proper affidavit of protest to the summons and indeed the proposed mode of distribution.

[6] Clearly, the protest is an answer to the caution given by this court on 25th October 2018, with an obvious intention to have this court revoke the impugned grant on its own motion. This is aptly demonstrated in the respondent’s submissions to the effect that: - “the court should invoke Section 76 of the Succession Act to enable a new application for proper inheritance succession if necessary”.

Whereas it is true that this court cautioned the parties that it may apply the powers granted to it under Section 76 of the Succession Act to revoke the grant instead of sitting back and watch the delay in this matter progress, the exercise of such powers is never done capriciously or

whimsically but judiciously. Herein, such powers cannot be exercised especially at the instance of the respondent who in furtherance of his unchanged deplorable conduct is “**hell**” bent on delaying the court process without justifiable or credible cause.

[7] Indeed, this court’s consideration of the present application on the basis of the supporting grounds, the parties rival submissions and the history of the matter, compels it to make a definite finding that the purported protest to the subject summons for confirmation of grant is devoid of merit and made in bad faith such that it amounts to nothing short of a gross abuse of the court process and contemptuous treatment of the consent order entered herein on 15th July 2014 at the family division of the High Court in Nairobi.

In the premises, the protest must and is hereby dismissed and/or overruled with the ultimate result that the summons for confirmation of grant dated 10th July 2019, be and is hereby allowed to the extent that the impugned grant dated 26th April 2013, is confirmed forthwith in terms of the proposed mode of distribution set out in paragraph six (6) of the supporting affidavit dated 10th July 2019 which clearly accords with the material consent order.

Each party shall bear their own costs of the application.

Ordered accordingly.

J.R. KARANJAH

JUDGE

21.11.2019

[Delivered and dated this 21st day of November, 2019 in the presence of Mr. Ochieng for Applicant and the respondent in person.]