



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1008 OF 2014

IN THE MATTER OF THE ESTATE OF MILDRED AKINYI OCHILO (DECEASED)

CYNTHIA ATIENO OWINO.....ADMINISTRATOR/APPLICANT

VERSUS

MONICA OCHILO.....RESPONDENT

RULING

1. On 9th January, 2019 the Applicant herein filed an application by way of summons dated 9th January, 2019. In it, she seeks for orders that:

1. The Confirmed Grant issued on 14th January, 2017 be amended by changing one of the properties Title No. KAJIADO/KAPUTEI NORTH 15343 to read KAJIADO/KAPUTIEI-NORTH/5343;

2. The Respondent be compelled to release to the Applicant all the Original title documents of the estate which are in her possession.

3. In the event that Order 2 is granted and the Respondent fails to comply within 14 days from the date thereof, the Land Registrar and National Transport and Safety Authority (NTSA) be authorized and or directed to facilitate the process of registration of the deceased's properties in the name of the Applicant without requiring production of the original title documents.

2. The grounds on the face of the application are that the Respondent has refused to hand over to the Applicant the original title documents of the deceased's properties to facilitate the process of winding up the estate. Further that the Confirmed Grant issued to the Applicant on 14th November, 2017 erroneously lists one of the properties as Kajiado/Kaputei North 15343 instead of Kajiado/Kaputiei-North/5345.

3. The application is supported by an affidavit sworn by the Applicant on 9th January, 2019 in which she deposes that she is the sole administrator and beneficiary of the deceased's estate.

4. The Applicant had applied for letters of administration in the year 2014 in her capacity as the deceased's child having been adopted by an order of the court. The deceased's siblings who include the Respondent herein objected to the issuance of letters of administration to the Applicant. On 8th September, 2014 the court directed that the Applicant and one Paul Ochieng Ochilo, a brother to the deceased, be jointly issued with a Grant of letters of administration intestate of the deceased's estate pending the hearing and determination of the main cause.

5. The matter was finally heard and determined on 14th June, 2017 when this court issued a ruling in which it dismissed the objection and declared the Applicant as the sole administrator and beneficiary of the deceased's estate. The Applicant consequently filed an application for confirmation of grant, which grant was on 14th November, 2017 confirmed to her as the sole administrator and beneficiary.

6. The Respondent filed a Replying Affidavit dated 3rd April, 2019 in response to the application in which she deposed that the Applicant had not annexed copies of a search or provided any proof that the Respondent is in possession of any of the title documents as alleged or that the Respondent is interfering with the deceased's property in any way.

7. It was the Respondent's statement that she had in fact objected to the Applicant being stated to be the sole beneficiary of the deceased's estate as there were several beneficiaries to the deceased's estate. That the court erred in granting the order since the alleged adoption order relied on was limited to an education policy and not property. She asserted that she has since filed an appeal against the decision.

8. The Applicant filed a further affidavit sworn by herself on 6th May, 2019 in response to the Respondent's Replying Affidavit. She deposed that this cause was heard and determined on merit before this court and there is no appeal that is pending before the Court of Appeal. She asserted that while the Respondent alluded to having filed an appeal, she did not avail the case number or documentary proof thereof. That in any case, even if there was an appeal pending, the mere filing of an appeal cannot itself act to stay these proceedings. She urged that all that

is left is for the Respondent to release the original documents to enable the Applicant enjoy the fruits of her favorable judgment.

9. The matter proceed by way of written submissions. Learned Counsel Mr. Nyamu filed written submissions dated 25th July, 2019 on behalf of the Applicant in which he asked the court to dismiss the averments in the Respondent's Replying Affidavit and compel her to produce the original title documents to the deceased's assets, and order that the confirmed grant be amended to facilitate the process of winding up the estate.

10. Mr. Nyamu contended that since confirmation of grant, the Applicant has been unable to transfer the properties of the deceased, apart from the bank accounts, since the Respondent continues to hold on to the original title documents of the deceased that are needed to facilitate the transfers and winding up of the estate. Counsel referred to the Respondent's assertion in her replying affidavit that "the Applicant should not be in a hurry to transfer the properties" stating that this is a clear indication that the Respondent is hell bent on frustrating the Applicant's attempts of winding up the deceased's estate.

11. It was Mr. Nyamu's contention that the Respondent has failed to appreciate that this court made a determination in this matter and cannot therefore sit on appeal against its own decision. That the Respondent is therefore misguided to seek reasonable time to present a defence at this stage. Counsel asserted that whereas the Respondent alluded to having filed an appeal against this court's decision, the Applicant has never been served. That in any event, the mere filing of an appeal cannot itself act to stay these proceedings.

12. Mr. Nyamu asserted that it is in the interest of justice that the court issues orders directing the Respondent to surrender to the Applicant all the original title documents of the deceased's properties within fourteen (14) days. Further that in the event the Respondent fails to comply, that the court authorize the Land Registrar and the National Transport and Safety Authority (NTSA) to facilitate the process of registration of the deceased's properties in the name of the Applicant without requiring production of the original title documents.

13. In opposition, Ms. Nyang filed written submissions dated 8th November, 2019 on behalf of the Respondent in which she asked the court to disallow the application and arbitrate between the parties, for a fair and just conclusion to this matter.

14. Ms. Nyang asserted that the Applicant failed to attach proof of ownership and variation for the court to make a ruling on whether the title referred to belongs to the deceased or not and whether the titles are in the possession of the Respondent. Counsel asserted that the Applicant is in possession of the deceased's properties and has access thereto, and the instant application is therefore a witch hunt aimed at tormenting the Respondent. Counsel urged that without proof thereof, it would be unjust and unfair for the court to order the Respondent to produce documents which are not in her possession.

15. It was Ms. Nyang's submission that the application is an afterthought which seeks fresh issues which never arose during the hearing of the petition for confirmation of grant. She asserted that some of the properties itemized in the Applicant's application were never subject of the succession cause and it is now too late for the Applicant to raise them. She urged that this cause was heard and determined on merit and the court is therefore *functus officio* in the matter.

16. The properties comprising the deceased's estate and which are listed in the Certificate of Confirmation of Grant issued on 14th November, 2017 and rectified on 20th December, 2017 are:

- a. Death gratuity and Pension benefits.
- b. Monies in Barclays Bank of Kenya A/c No. [...].
- c. Monies in Barclays Bank of Kenya A/c No. [...]
- d. Housing Finance Co-operation of Kenya (HFCK) Account No. [...]
- e. Title No. Kajiado/Kaputei North 15343
- f. Motor Vehicle No. KBF 258H Nissan X Trail.
- g. Monies in United Nations Federal Credit Union Bank (UNFCUB)
- h. Plot No. 246 Buruburu Phase 5.
- i. Plot No. 10 Elite Arcade situated on L.R. No. 209/4520
- j. Safaricom Shares.

17. In her application, the Applicant had alleged that the Respondent was in possession of various title documents of properties comprising the deceased's estate namely:

- i. Title Deed to Kajiado/Kaputei-North 5343
- ii. Title Deed to Plot No. 246 Buruburu Phase 5.

iii. Certificate to Plot No. 10 Elite Arcade situated on L.R. No. 209/4520.

iv. Logbook for Motor Vehicle Registration No. KBF 258H, Nissan X-Trail.

18. There is no question that the estate of the deceased herein was by a ruling made by this court on 14th June, 2017 granted to the Applicant as the sole beneficiary of the deceased. I wish to reiterate that the **Children’s Act No. 8 of 2001** does not provide for degrees of adoption and an adoption cannot therefore be conditional. The orders of the court, having not been overturned on appeal, are therefore valid and enforceable.

19. A grant of letters of administration intestate was consequently confirmed to the Applicant as the sole beneficiary and administrator of the deceased’s estate. By virtue of **section 79** of the **Law of Succession Act**, the property of the deceased therefore vests in the Applicant. It is noteworthy that the court is never *functus officio* until the estate is finally distributed and wound up.

20. Looking at the record however, I note that there is nothing to demonstrate that the Respondent is in possession of the title documents as alleged or that she is intermeddling in any way with the properties of the deceased. All there is is the word of the Applicant against that of the Respondent, none of which have been corroborated by additional evidence. This is a court of equity and it is trite law that equity does not act in vain. In the absence of additional evidence therefore, this court cannot issue orders compelling the Respondent to produce documents which have not been demonstrated to be in her possession.

21. The upshot of the foregoing is that the Applicant has failed to demonstrate that the Respondent is in possession of the documents as alleged and hereby decline to grant the orders sought against the Respondent. Since neither the Applicant nor the Respondent have any certainty on the whereabouts of the title documents to the assets in the estate of the deceased, the Land Registrar, the National Lands Commission and the National Transport and Safety Authority (NTSA) are hereby authorized to proceed under the law applicable where such documents cannot be traced.

22. With regard to the property listed in the Certificate of Confirmed Grant as KAJIADO/KAPUTEI NORTH 15343 I hereby direct that the property be amended to read KAJIADO/KAPUTIEI-NORTH/5343 as indicated in the copy of the title deed presented at the time of petitioning for the grant of letters of administration.

It is so ordered.

SIGNED DATED AND DELIVERED IN OPEN COURT THIS 18TH DAY OF DECEMBER 2019.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Administrator/Applicant.

In the presence ofAdvocate for the Respondent.