



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**SUCCESSION CAUSE NO. 1207 OF 2014**

**IN THE MATTER OF THE ESTATE OF LABAN MBUGUA GIKONYO (DECEASED)**

**RULING**

1. The application for determination is a summons for confirmation of grant dated 17<sup>th</sup> March 2017. They have listed the beneficiaries of the deceased's estate and proposed distribution.
2. A notice of objection, dated 17<sup>th</sup> June 2016 and an affidavit of protest, sworn on 23<sup>rd</sup> June 2017, against the proposed confirmation of the grant of letters of administration, were filed herein. In it, the protester avers that the applicants have failed to render a true and actual account of the assets of the estate and that some of the assets have been left out while others have been undervalued. She also contends that the applicants have failed to manage the estate in a proper, accountable and transparent manner. She further claims that her daughter has not been adequately provided for in the proposed mode of distribution. The protester avers that one of the assets of the estate, Malindi-Plot No. [particulars withheld], proposed to go to her daughter in fact belongs to her, having allegedly bought it while she was working at the Ministry of Health and a member of Afya Sacco Society Limited. She has attached documents to show that she bought the plot under Afya Sacco Society Limited but the deceased fraudulently caused it to be registered in his name. She urges the court to appoint her as trustee of her daughter's share of the estate, since she is best suited to safeguard her daughter's interests.
3. The applicants filed a further affidavit, sworn 1<sup>st</sup> December 2017, in which they have denied the protester's allegations. They state that the protester was never married to the deceased but the two sired a child, J L W C, who is properly listed as one of the beneficiaries. They contend that the protester failed to produce proof of payment or a sale agreement to support her claim of ownership of Malindi-Plot [particulars withheld]. They urge that the protester's allegations lacked merit and ought to be dismissed.
4. The Court directed on 26<sup>th</sup> July 2017 that the application be disposed of by way of affidavit and oral evidence. The protester gave sworn testimony during which she stated that the deceased was the father of her daughter, L W C. She conceded that she and the deceased never married, but she described him as having been her companion. She reiterated that the applicants had failed to list all the assets of the estate of the deceased and that one of the properties, Malindi-Plot [particulars withheld], belonged to her. She, however, stated that she did not have any documents on record as proof of the ownership. She admitted to signing a document but stated that at the time, she did not understand that she was consenting to the brothers of the deceased being administrators of the estate on behalf of her child. She also admitted to receiving money from the 2<sup>nd</sup> applicant through his Mpesa account, which money she thought was from the rental income from a property at Thika. She further stated that she did not know to whom a Toyota Land Cruiser belonging to the deceased was sold to.
5. The 2<sup>nd</sup> applicant, Patrick Kuria Gikonyo, also gave sworn testimony in support of the application. He admitted knowing the protester and the protester's daughter. He conceded that the child was a beneficiary of the estate of the deceased. He urged that the child be assigned a fair share of the deceased's assets. He further testified that the administrators had no objection to the protester being trustee for the assets to be assigned to the child. He averred that he had rendered a true account of the estate of the deceased. He asked the court to trust the inventory they had presented. He, however, stated that the account might not have been complete since it only listed the assets that they were able to trace. He noted that only the deceased knew what he owned. He maintained that Malindi-Plot No. [particulars withheld] was owned by the deceased, asserting that the protester had not presented any documents to negate that. He stated that a meeting had been held with all the beneficiaries, where the modality of sharing the deceased's assets was agreed upon. He further stated that they had agreed to sell the estate's vehicles and the Thika plot to raise money for administration. The vehicles had been grounded after the deceased's demise as no one took over conduct of his tour company business. He stated that he was not opposed to having the proceeds of the sale of the motor vehicles disposed of instead. He asserted that he was the one who had been paying school fees for the deceased's children, saying that he had spent about Kshs. 1,400,000.00 on education and that he had records as proof. He added that he had been forking out the said money out of his own pocket but had by then ceased to have ability to continue paying for the deceased's children's education from his own resources. He stated that he did not get any money from either Booker Academy or income from the cars.
6. The protester and the applicants herein have raised various issues. I have considered the affidavits, the oral evidence of the parties and the proposal on the distribution of the deceased's estate presented before this court. In my view, the only issues for determination are whether Malindi-Plot No. [particulars withheld] forms part of the estate of the deceased and whether the protester is the rightful trustee of the share to be assigned to her daughter.
7. The applicants herein filed a proposed mode of distribution and consent signed by the widow and the parents of the deceased. It has not

been established that the parents of the deceased were dependants of the deceased entitled to inherit from the deceased's estate as they had not filed an application under section 26 of the Law of Succession Act, Cap 160, Laws of Kenya. Distribution of an intestate estate is governed by Part V of the Act, and not Part III thereof. Under Part V, priority in distribution goes to the surviving spouse and the children of the deceased. The other relatives only benefit where the deceased was not survived by spouse or children. Where he was survived by spouse and children such other relatives as parents and siblings can only access the estate through Part III on an application mounted under section 26.

8. On Malindi-Plot No. [particulars withheld], the protester alleges that the property belongs to her, whereas the same is registered in the name of the deceased, thereby making it an asset in his estate. All the protester has done is to state that she bought the property and to file an affidavit sworn by the alleged seller's attorney. The alleged attorney has, however, not presented an instrument appointing him attorney of the alleged seller. A copy of the sale agreement has also not been provided.

9. While it is not for this court to determine the issue of ownership and title to land, it is important to examine section 26 of the Land Registration Act, No. 3 of 2012, which states thus:

*“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-*

*(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or*

*(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”*

10. The effect of this section is that the court will consider any property registered in the name of the deceased as part of his estate. In this instance, the administrators have only provided a copy of a property rates payment request form dated 27<sup>th</sup> March 2013 issued by the Municipal Council of Malindi for Malindi-Plot No. [particulars withheld] as opposed to a copy of a certificate of title or copy of official search. This raises doubt as to whether the deceased is the absolute owner of the plot. For this reason, the court will consider the disputed plot as not forming part of the estate of the deceased until proper documentation is presented. It cannot therefore be allocated as a share going to any of the survivors of the deceased.

11. The protester's challenge on the ownership of the land can only be determined by the Environment and Land Court which has the jurisdiction to hear disputes concerning ownership of and title to land by virtue of Article 162 (2) of the Constitution and section 13 of the Environment and Land Court Act, No. 19 of 2011. Until the issue of ownership is determined, the property cannot form a part of the estate. The alternative would be that the administrators avail copy of the certificate of title to the land which would be conclusive proof of its ownership by the deceased.

12. The second issue is whether the protester is the proper trustee on behalf of her child with regard to the estate of the deceased. Section 41 of the Law of Succession Act provides that property that devolves upon minors shall be held in trust for them until they attain majority age. Article 53 of the Constitution of Kenya, 2010 provides that a child's best interests are of paramount importance in every matter concerning the child. Article 53 (1) (e) further provides that a child is entitled to parental care and protection. This means that it is for a parent to safeguard the interest of a child thus it would be proper for the mother herein to be named trustee on behalf of her child over the share of the deceased's estate granted to her.

13. Having considered the material before me I shall allow the application dated 17<sup>th</sup> March 2016 in the following terms –

**(a) That the grant on record is hereby confirmed;**

**(b) That the estate of the deceased shall be distributed as proposed, save that –**

**(i) Malindi-Plot No. [particulars withheld] shall be removed from the schedule of the assets distributed herein; and**

**(ii) The share of L W C shall devolve upon the protestor herein, M J M, to hold the same in trust for the minor until the former reaches majority age;**

**(c) That a certificate of confirmation of grant to issue accordingly;**

**(d) That each party to bear their own costs; and**

**(e) That any party aggrieved by the orders made herein shall be at liberty to challenge the same on appeal at the Court of Appeal within twenty-eight (28) days.**

**DATED, SIGNED and DELIVERED at NAIROBI this 31<sup>ST</sup> DAY OF MAY, 2018.**

**W. MUSYOKA**

**JUDGE**