



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO 646 OF 2009

IN THE MATTER OF ESTATE OF WILLIAM NZIOKA MUTISYA (DECEASED)

BETWEEN

ESTHER KALONDU NZIOKA.....PETITIONER/APPLICANT

-AND-

JOSEPH NZIOKA.....PETITIONER/RESPONDENT

RULING

Introduction

1. By Summons for Revocation or Annulment of Grant dated 30th September, 2013 and amended on 17th October, 2017, the Applicant herein, **Esther Kalondu Nzioka**, an administratrix of the estate of **William Nzioka Mutisya** (the Deceased) seeks an order that the grant of letters of Administration to **Esther Kalondu Nzioka**, **Joseph Nzioka** and **Muoki Nzioka** on 4th October, 2011 be revoked and that a new grant be issued to the Petitioner/Applicant, **Esther Kalondu Nzioka**, **Martin Kivinda Nzioka** and **Anne Muthike Kilungu**.

2. The grounds upon which the application was based were that the applicant being the surviving spouse of the deceased stands in priority for the purposes of grant of letters; that the Respondent has failed to proceed diligently with the administration of the estate and his conduct subsequent to the issue of the grant has rendered the grant useless and inoperative; that by the summons for rectification of the grant to which the Petitioner/Applicant and the other beneficiaries save for **Martin Kivinda Nzioka** were not privy, the Respondent has clearly manifested his intention of depriving all the other beneficiaries including the Petitioner/Applicant of their rightful shares and interest in the estate of the deceased; that the Respondent cannot be trusted with the administration of the estate; and that the Respondent is not in a position to handle matters independently and without bias since he already placed himself in a conflict path with the interests of the Petitioner/Applicant and those of the other beneficiaries.

Applicant's Case

3. According to the Applicant, she is a widow of the deceased herein and the mother to the Respondent herein. It was her case that she had been authorised by all the beneficiaries of the estate of the deceased save for the Respondent herein to depose on their behalf.

4. It was deposed that none of the beneficiaries to the estate save for **Martin Kivinda Nzioka** and the Respondent were made aware of the application without her participation or involvement, the Respondent applied to this Court for rectification of the grant whereupon the 2nd Respondent was substituted for the late **Muoki Nzioka** as a co-administrator of the estate.

5. According to her, following family meetings, the beneficiaries resolved that the Respondent be removed as a co-administrator and be replaced by **Ann Muthike Kilungu** since it was their view that the Respondent had acted without the knowledge, consent, information, authority and mandate of the other beneficiaries and their benefit.

6. According to the applicant the administration of the estate is yet to be concluded and that in particular as regards the vesting order of some 7 assets mentioned. The Applicant lamented that the Respondent's proposal on distribution of **Ndithini Mananja/Block 5/1** as set out in the summons for rectification filed on 5th February, 2013 would only serve to deny the other beneficiaries of their entitlements which proposal also purports to reverse the Applicant's entitlement under the grant. The Respondent was further accused of having excluded beneficiaries of female gender as well as other assets from the list of assets of the estate contrary to section 51(2)(h) of the **Law of Succession Act** despite the fact that their distribution had been discussed and agreed upon by the family.

7. The Respondent was also accused of having acted without instruction, knowledge, consent, information, authority and mandate of the beneficiaries and co-administrators and not for the benefit of the estate by filing documents signed by persons other than the beneficiaries and failing to keep the beneficiaries informed of the proceedings or to attend the Court. Further the Respondent was accused of attempting to sale some assets of the estate without the knowledge of the beneficiaries and instead frustrating the sale and transfer of a property distributed to the Applicant without the Applicant's knowledge or information thus forcing the Applicant to refund the purchase price.
8. The Respondent was therefore accused of engaging in acts prejudicial to the estate of the deceased by being uncooperative, disrespectful and always at loggerheads with the other beneficiaries thus frustrating the administration of the estate. He was accused of always failing and or blatantly refusing to attend family meetings convened to discuss matters related to the state of the deceased despite being one of the administrators of the Estate of the Deceased. The Applicant further contended that the since Respondent through his firm Nzioka & Co Advocates acted for all the beneficiaries in obtaining the grant of letters, is conflicted in so far as he is both their lawyer and a beneficiary of the estate and is thus not in a position to handle the matters independently and without bias and should therefore not be allowed to continue acting as a co-administrator.
9. As regards the claim by the Respondent that the proceeds from coffee bushes, Plot No. 138-Kangundo Motel, Plot No. 197-Montana and Motor Vehicle Reg. No. KSV 984 were unaccounted for by the Petitioner, the Applicant averred that these properties were left to her by the family during the distribution of the estate of the deceased while the coffee bushes were left to **Ben Munyao** as the last son and **Lydia Ngii**. According to her the rents from the Kangundo Motel and Montana are what she uses in sustaining herself as the widow of the deceased. In her view, **Ben Munyao Nzioka** qualifies under the law to be appointed as one of the administrators of the estate of the deceased.
10. It was therefore deposed that the Respondent has not proceeded diligently and honestly in the administration of the estate of the deceased and it is only fair and just that the Respondent that the Respondent, **Joseph Muisyo Nzioka**, is removed and the orders sought herein granted.
11. It was submitted on behalf of the Applicant that the preliminary objection that was filed by the Respondent is not a proper preliminary point and should be disallowed.
12. In her submissions the Applicant relied on **section 76** of the *Law of Succession Act*.
13. According to the Petitioner, of the provisions above, the ones relevant to this Application are subsections (b) and (d)(ii). According to the Applicant, under section 51(2)(h) of the *Law of Succession Act* it is mandatory for the Application to include a full inventory of all the assets and liabilities of the deceased person. However a look at the Application by the Respondent's firm clearly indicates that there are a number of assets that were excluded from the Application for Grant of Letters of Administration, namely, the Coffee Bushes, Plot No 197- Montana, and Motor Vehicle Registration No. KSV 984. On the other hand, the Application for Grant included a number of assets that are not in the Schedule of Distribution, namely a bank account number 001488 at KCB Tala, and a 4 acre plot of land at Kangundo/Isinga.
14. It was submitted that the Respondent went against that which was agreed upon by the family members in that he listed in the Schedule of Distribution of the Assets of the deceased and altered the acreage that was agreed upon and also excluded the female beneficiaries.
15. In support of her case, the applicant relied on **In re Estate of S T M [2017] eKLR** and **Moses Ole Senja vs. William Ole Senja [2016] eKLR** and submitted that the concealment of material facts as well as representation of untrue facts and allegations to the court is sufficient to warrant the court to annul and or revoke the Grant of Letters of Administration herein.
16. It was further submitted that the Respondent through his firm did not advise the administrators on the requirement to produce to the court an inventory or account of administration of the estate. To date no such inventory or account of administration of the estate has been filed. In this respect the Applicant relied on **In re Estate of Cecelia M'Naituri (Deceased) [2018] eKLR**.
17. According to the Applicant, she has demonstrated that the Respondent in acting without the instructions, knowledge, consent, information, authority and mandate of the beneficiaries and the co-administrators was not acting for the benefit of the estate and it follows that lack of diligence can be imputed from his conduct. Further since the other beneficiaries of the estate have come to a consensus that the Respondent be removed from being an administrator and be replaced by **Ann Muthike Kilungu**, it is only fair that the court effects the resolution and desire of the family that the Respondent be excluded from being an administrator of the estate of the deceased. To the Applicant, since the Respondent has alluded to the fact that he has fallen out with the family members, since 2012 and most particularly the co-administrators and the beneficiaries of the estate, it would be infeasible (sic) to allow him to continue in the administration of the estate as against an environment where communication has broken down.
18. It was further submitted that the Respondent in his application for rectification has deliberately excluded her and the beneficiaries of the female gender from the estate of the deceased. This is against the agreement of the family and in contravention to the provisions of the Constitution and International Law with regard to entitlement to property. In this respect the Applicant relied on **Eliseus Mbura M'Thara vs. Harriet Ciambaka and Another [2012] eKLR** and **Stephen Gitonga M'murithi vs. Faith Ngira Murithi [2015] eKLR** and submitted she had demonstrated to this court that the requirements under subsections (b) and (d)(ii) have been fulfilled and there is sufficient ground to warrant revocation and or annulment of the grant.
19. In the event that the court was not inclined to grant an order of revocation and or annulment of the grant because of the unique circumstances of the case, the Applicant urged the court to consider what remedies it would grant so as to afford justice and **in doing so to be guided by the provisions of section 47** of the *Law of Succession Act* which gives the court jurisdiction to entertain any dispute under the *Law of Succession Act* without due regard to technicalities. In this respect the Applicant referred to **HCSC 2226 of 2008 - Lucy Wanjiru Kibaba & Another vs. Lucy Wanjiru Muchene (2013) eKLR** that technicalities of procedure in succession matters are treated less seriously than in civil matters because of the nature of succession proceedings and the great need to focus on substance, with a view to do justice to the parties. The Applicant also cited **section 66** of the *Law of Succession Act* and **rule 73** of the *Probate and Administration Rules*.

20. According to the Applicant, in **Mary Wangari Kihika vs. John Gichuhi Kinuthia & 2 Others [2015] eKLR**, Justice M Muigai took into account the period of time the case had taken and the fact that the revocation of the confirmed grant would take the parties back to the drawing board and prolong the conclusion of the distribution of the estate and found that it was more appropriate for the court to have the confirmed grant amended and ordered for that amendment. The Applicant therefore urged the Court to, if it deems it fit and proper, consider the circumstances of this case and order for the rectification of the Grant of the Letters of Administration to remove **Joseph Muisyo Nzioka** as an administrator of the estate herein and in his stead substitute **Anne Muthike Kilungu** as this would give effect to the desire of the beneficiaries of the estate. In this respect the Applicant relied on **Eric John Mutemi & another vs. Agnes Mumbanu Kinako [2016] eKLR** where **Mutende, J** invoked the provisions of section 66 of the *Law of Succession Act* and directed all beneficiaries to the estate to come up with names of persons who were to administer the estate within two (2) weeks, in default of which she was to exercise her discretion and proceed to appoint persons(s) to whom the grant would issue.

Respondent's Case

21. In opposing the application the Respondent averred that the grant was issued to him, the Applicant herein, **Esther Kalondu Nzioka** who is his mother and his late brother **Muoki Nzioka Mutisya** which grant was confirmed on 4th October, 2011 based on the consent of all the beneficiaries. However **Muoki Nzioka Mutisya** died on 7th October, 2012. According to the Respondent, as the estate of his late father is a continuing trust there was an urgent need to substitute his late brother hence their application for substitution. It was his position that the Applicant and the rest of the beneficiaries were fully aware of and consented to their elder brother **Martin Kivinda Nzioka** substituting the late **Muoki Nzioka** as one of the administrators of the estate which was done by an order of this Court on 12th February, 2013.

22. According to the Respondent since the Applicant is also an administrator, she cannot purport to say that the other administrators cannot be trusted with the administration of the estate of the deceased since as co-administrators they need each other's consent when administering the state. It was his view that the Applicant as a co-administratrix was fully aware of the said substitution and the fact of the sale of the two parcels in Komarock which was sold and proceeds shared by the family with approval of this Court. According to him, **Kangundo/Isinga/1254** has not been subdivided among the beneficiaries as per the confirmation of the grant in accordance with the deceased's wishes. It was his averment that the proposed division of **Ndithini Manaja/Block 5/1** was as per the Schedule in the confirmed grant which all the beneficiaries consented to. The Respondent however admitted that there were other assets of the estate which were excluded in the distribution schedule and that the Petitioner is keeping all the monies therefrom while the same should be equally share among all the beneficiaries after taking her money for her upkeep.

23. According to the Respondent, since the Petitioner is already an administratrix of the estate she cannot claim to rank higher than any of the beneficiaries and place herself in the highest order of preference. To the Respondent the estate is quite big and the Petitioner who is over 90 years cannot purport to be able to administer the same on her own. The Respondent asserted that they had faithfully administered the state of the deceased as required of them as per the law hence the allegations by the Petitioner are baseless and unsupported and are aimed at derailing the administration of the estate. It was also his view that since **Ben Munyao Nzioka** resides in Maryland, Washington DC USA he cannot purport that he can administer the deceased's estate which is mainly comprised of immovable assets.

24. It was the Respondent's case that the Petitioner has been influenced by some of the siblings and has split the family and has ignored the maintenance and school expenses of the late **Muoki's** children despite the fact that she has been receiving the rental and coffee proceeds. To the Respondent the Petitioner should be ordered to render account of the assets of the deceased's estate since the death of the deceased. According to him family disagreements arose after the death of **Muoki Nzioka** in 2012, and that since then no family meetings have been called and he has never been invited to any such meeting.

25. It was submitted on behalf of the Respondent that it is an applicant for annulment or revocation of a grant who has the duty to demonstrate the existence of any, some or all of the alleged grounds, as the case may be. In this case it was however submitted that the case does not meet the threshold set out by the aforesaid provisions of section 76 of the *Law of Succession Act* since the allegations made against the Respondent amount merely to personal differences and do not warrant and support the lack of trust in the Respondent. Based on **Josephat Murrithi Mwaura vs. Jane Njoki Gachoki [2015] eKLR**, it was submitted that for the Applicant to seek that the Court revisits the circumstances under which the substitution would amount to this Court sitting on appeal in an application for revocation of grant hence amount to an abuse of the court process.

26. The Respondent further relied on **Arthi Highway Developers Ltd vs. West End Butchery Ltd & 6 Others [2015]** where it was held that the doctrine of purchaser without notice does not enable a purchaser to take free from legal rights as opposed to equitable rights.

Determination

27. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

28. Section 76 of the *Law of Succession Act* provides as hereunder:

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) that the proceedings to obtain the grant were defective in substance;

(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;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(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; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

29. According to the Petitioner, of the provisions above, the ones relevant to this Application are subsections (b) and (d)(ii). According to the Applicant, under section 51(2)(h) of the *Law of Succession Act* it is mandatory for the Application to include a full inventory of all the assets and liabilities of the deceased person. However a look at the Application by the Respondent's firm clearly indicates that there are a number of assets that were excluded from the Application for Grant of Letters of Administration, namely, the Coffee Bushes, Plot No 197- Montana, and Motor Vehicle Registration No. KSV 984. On the other hand, the Application for Grant included a number of assets that are not in the Schedule of Distribution, namely a bank account number 001488 at KCB Tala, and a 4 acre plot of land at Kangundo/Isinga.

30. It is conceded even by the Respondent that some assets were omitted from the assets forming the estate of the deceased. However, the Applicant has herself disclosed that the omitted assets were meant for her own sustenance. That position, in my view resonates with the principle of section 35 of the *Law of Succession Act* which provides that subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to the personal and household effects of the deceased absolutely and a life interest in the whole residue of the net intestate estate as long as the surviving spouse, if a widow, remains unmarried.

31. The rationale for this provision was given by **Musyoka, J** in **Tau Katungi vs. Margrethe Thorning Katungi & Another [2014] eKLR** where he held at page 4 paragraph 18 that:

“18. The device is designed to safeguard the position of the surviving spouse. The ultimate destination of the net intestate estate where there are surviving children is the children. It is the children who are entitled of right to the property of their deceased parent. However, if the property passes directly to the children, in cases where there is a surviving spouse, he or she is likely to be exposed to destitution. This would particularly be the case where the surviving spouse was wholly dependent on the departed spouse. She would be left without any means of sustenance. The other aspect is that life interest ties up with the concept of matrimonial property: the said property would in most part be property acquired during marriage and with the contribution of the surviving spouse. Direct devolution of such property to the children would deny the surviving spouse of enjoyment of their own property.”

32. What the said section provides is that upon the death of a spouse, the surviving spouse is entitled to the personal and household effects of the deceased absolutely. However as regards, the whole residue of the net intestate estate, he/she is only entitled to a life interest. This means that the surviving spouse's interest in the said residue is commensurate to the duration of her life. In other words he/she holds the same in trust for the children and other heirs who are the ultimate beneficiaries thereof. Therefore once she dies or remarries, if a widow, the rights of the children and the other heirs crystallises.

33. Therefore if the beneficiaries agreed that the said property be omitted from the distribution in order to sustain the Applicant, I do not see why the Respondent should raise an issue thereat.

34. It was further submitted that the Respondent through his firm did not advise the administrators on the requirement to produce to the court an inventory or account of administration of the estate. To date no such inventory or account of administration of the estate has been filed.

35. Section 83(e) of the *Law of Succession Act* which sets out as one of the duties of personal representatives states as being to:

...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.

36. In **Willis Ochieng Odhiambo vs. Kenya Tourist Development Corporation & Another Kisumu HCCC No. 51 of 2007**, it was held by **Mugo, J** that:

“In the case of co-trustees of a private trust, the office is a joint one. Where the administration of the trust is vested in co-trustees they all form as it were one collective trust and therefore must execute the duties of their offices in their joint capacity...Although a strict definition of “trustee” does not apply to personal representatives who hold property upon trust for the estate, the legal responsibilities and liabilities of executors and administrators of estates are the same and are treated similarly where matters of procedure are in issue.”

37. It therefore follows that the duty 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 pursuant to section 83(e) aforesaid falls squarely on all the Administrators jointly. The Applicant cannot therefore purport that she is unaware the duty imposed upon her as a joint administrator to comply with the law. As to the failure by the Respondent to advise the administrators being their lawyer, nothing bars the estate from

relieving Respondent of his responsibilities as the estate lawyer as long as the procedure is followed. That however does not necessarily justify his being removed as an administrator. It may well be that the beneficiaries of the estate have come to a consensus that the Respondent be removed from being an administrator and be replaced by **Ann Muthike Kilungu**. However that is not one of the grounds upon which an administrator may be removed. It is however my view that the administrators may be removed from their duties where, due to wrangles and disagreements amongst themselves, it is impossible for them to *proceed diligently with the administration of the estate*.

38. In this case it is clear that the administrators of the estate are not proceeding diligently with the administration of the estate of the deceased. What I am not convinced of is who among them is the culprit based the material laced before me. In my view if the Court finds that the administrators are unable to properly administer the estate due to their disagreements, nothing stops the Court from removing them from the administration and appointing new administrators notwithstanding the issue of priority or preference. **This must be so because section 66 of the *Law of Succession Act* provides that:**

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.

39. Similarly, rule 73 of the *Probate and Administration Rules* provides that:

Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

40. I however agree with the position adopted by **Muigai, J** in ***Mary Wangari Kihika vs. John Gichuhi Kinuthia & 2 Others [2015] eKLR***, that in exercising its discretion the Court ought to take into account the effect of either revoking the grant or relieving all the administrators of their duties and where more injustice would be caused by such action to instead opt for an alternative that would ensure that the estate is properly administered.

41. In this case just like **Mutende, J** in ***Eric John Mutemi & another vs. Agnes Mumbanu Kinako [2016] eKLR*** it is my view that **parties ought to be given a time frame within which to comply with section 83(e) of the *Law of Succession Act* and to show commitment towards diligently administering the estate of the deceased for the benefit of all the beneficiaries failure to do which this Court would be left with no alternative but to replace the administrators.**

42. **It was further contended that** the Respondent in his application for rectification has deliberately excluded her and the beneficiaries of the female gender from the estate of the deceased, an action which is against the agreement of the family and in contravention to the provisions of the Constitution and International Law with regard to entitlement to property. I agree with the decision of **Lesiit J** in ***Eliseus Mbura M'Thara vs. Harriet Ciambaka and Another [2012] eKLR***, that:

“The Law of Succession Act does not discriminate between gender in matters of succession or inheritance. Under the Law of Succession Act and indeed under the Constitution a child is a child and every person has equal rights under the law irrespective of gender. The Law of Succession Act does not discriminate between married or unmarried daughters but gives them equal rights to inheritance as the other children (sons) of a deceased person.”

43. I also agree with the decision in ***Stephen Gitonga M'murithi vs. Faith Ngira Murithi [2015] eKLR*** that:-

“Section 38 enshrines the principle of equal distribution of the net intestate estate to the surviving children of the deceased irrespective of gender and whether married and comfortable in their marriage or unmarried...”

44. I further associate myself with the sentiments of **Rawal, J** (as she then was) in ***In The Matter of the Estate of Lerionka Ole Ntutu [2008] KLR 452*** where she held that:

“Kenya has ratified all the international covenants and treaties before the amendments to section 82(3) which included the words “or sex” was made in the Constitution. Section 82(a) of the Constitution was enacted along with the original provisions of section 82(3) which did not include discrimination on the ground of sex, and after the passage of several treaties and covenants and their ratification, it was found necessary to make the amendment to include prohibition of discrimination on the basis of sex. In the circumstances, one can safely presume that the said amendment was found necessary after Kenya was exposed to international laws, its values and spirit. Kenya was aware of the discriminatory treatment of women in all aspects of customary and personal laws. Hence Kenya knowingly and rightly took a bold step to eliminate the discrimination of all manners and types against women. That is where the country’s aspiration has reached and has rightfully intended to stay.”

45. In this case however the Applicants aver that it is only an application that has been made. That application is yet to be heard. It is not contended that upon hearing the said application the Court will grant it and nothing stops the Applicant from opposing the same on the self-same grounds which she I advancing herein.

46. In the premises while I disallow the instant application, I hereby direct the Co-administrators of the estate of the deceased herein to put their act together and comply with section **83(e) of the *Law of Succession Act*** within sixty days. During that period the said administrator must take concerted efforts directed at progressively and lawfully administering the estate of the deceased.

47. In conclusion I note that while the Applicant partly complied with the directions of this Court to furnish soft copies of the pleadings and submissions, by furnishing a soft copy of the Submissions only, the Respondent did not do so. Section 1A(3) of the ***Civil Procedure Act*** provides as hereunder:

A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

48. One of the overriding objectives of the *Civil Procedure Act* is the facilitation of expeditious resolution of the civil disputes governed by the Act. The direction that Advocates and parties do furnish the Court with soft copies of their pleadings and submissions is geared towards that same objective and where they fail to comply therewith, it amounts to a failure to comply with a statutory mandate which may call for a penalty in costs or deprivation of costs even where the same would have been granted. Accordingly, I award half the costs of this application to the Applicant.

49. It is so ordered.

G V ODUNGA

JUDGE

Read, signed and delivered in open Court at Machakos this 26th day of October, 2018.

D KIMEI

JUDGE

Delivered in the presence of: