



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO. 366 OF 2015

IN THE MATTER OF THE ESTATE OF THERESIA NUNDU

MWAU alias THERESIA RHODA PETER MWAU (DECEASED)

HON. ADELINA NDETO MWAU.....1ST PETITIONER/APPLICANT

PETER MULINGE MWAU.....2ND PETITIONER/APPLICANT

RULING

The Application

The Petitioners herein presented a Petition to this Court for Grant of Letters of Administration with Will Annexed on 23rd June 2015 with respect to the estate of the Theresia Nundu Mwau alias Theresia Rhoda Peter Mwau (hereinafter referred to as “the Deceased”), in which they attached the will made by the deceased.

They subsequently filed an application by way of summons dated 10th June 2016 pursuant to Rules 49 and 73 of the Probate and Administration Rules, seeking orders that this Court be pleased to review the directions given by the Deputy Registrar in a letter dated 12th November 2015 requiring consent from beneficiaries to the Petitioners being made administrators, and that the Court be pleased to give such other or further orders or directions to facilitate the progress of the succession proceedings herein.

The 1st Petitioner in a supporting affidavit sworn on 10th June 2016 averred that the deceased died on 23rd August 2008 leaving her last known will which was executed on 23rd November 1994. Further, that the two executors appointed in the will, Fr. Thaddeus Mutuku and Fr. Lawrence Kavita, both died before petition for Grant of Probate. It was also explained that although the deceased died on 23rd August 2008, the filing of this Petition took over 7 years as her children were not in agreement on how to proceed.

The Petitioners deponed that after filing the Petition, their advocates on record wrote to the Court request for directions on gazettelement, upon which the Deputy Registrar replied on 12th November 2015 giving the following directions :-

"As the executors appointed in the will have died, the beneficiaries of equal rank in priority need to consent to the Petitioners being made administrators and if there is an issue you can take a mention before the Judge for directions'

The Petitioners annexed copies of their letter dated 22nd September 2015 and the Deputy Registrar's letter dated 12th November 2015.

According to the Petitioners, it will be difficult and take a long time to comply with the directions given by the Deputy Registrar, for the reasons that one of their siblings Angelina Mukii Mwau lives and works in Afghanistan, and a niece Irene Nundu lives and works in Australia. Further, that in testate succession, consent from other beneficiaries is not provided for under the Probate and Administration Rules in cases where the Executors have died before applying for Grant of Probate, and no prejudice will be occasioned to the other beneficiaries or third parties since once the Succession Cause is gazetted, they will have an opportunity to participate.

It was averred that it is therefore necessary for the Court to review the Deputy Registrar's directions to enable the succession proceedings to progress to gazettelement and objection, if any.

Mr. Mugambi, the Petitioner's Advocates, reiterated the above facts in submissions made in Court on 16th November 2016, and submitted that the Court has inherent powers to review the directions by the Deputy Registrar. He relied on Rules 16, 20 and 26 of the Probate and Administration Rules as read together with Forms 38 and 39.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made herein. The issue to be decided is whether the directions by the Deputy Registrar that the consent of the other beneficiaries be sought should be reviewed, and whether the said consent can be dispensed with. An application for grant where a deceased has made a will but the executors die before the grant of probate is governed by section 63 of the Law of Succession Act which provides as follows:

“When a deceased has made a will, but—

(a) he has not appointed an executor; or

(b) the only executors appointed are legally incapable of acting, or have renounced their executorship, or have died before the testator or before receiving a grant of probate of the will, or have failed within the time limited by a citation to apply for probate thereof; or

(c) all proving executors have died before completing administration of all the property to which the will applies, a universal or residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered.“

Under section 65, when there is no executor, and no residuary legatee or representative of the residuary legatee, any person who would be entitled to the administration of the estate of the deceased if he had died intestate, or the Public Trustee, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly.

The requirements as to giving of consent to an application for grant by any of the aforementioned persons is found in the rules as to the procedure for the making of grants. Rule 7(7) of the Probate and Administration Rules provides for consent to grant of administration intestate as follows:

“(7) Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has—

(a) renounced his right generally to apply for a grant; or

(b) consented in writing to the making of the grant to the applicant; or

(c) been issued with a citation calling upon him either to renounce such right or to apply for a grant.”

Rule 26 on the other hand requires notice to, and consent by all persons entitled to a grant in equality or priority to the Applicant as follows:

“ (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

(3) Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree.”

It is notable in this regard that Rule 2 of the Probate and Administration defines letters of administration to mean letters of administration intestate or with the will annexed. In the absence of such renunciation, or such written consent by the other persons entitled to a grant, the Applicant is required to file an affidavit explaining why such consent cannot or has not been given.

In the present application, as regards the first issue, the Applicants urged that the Deputy Registrar was in error in seeking that the consent by all other beneficiaries be filed. However the applicable law and procedure as shown in the foregoing requires such consent be given unless otherwise explained or directed by the Court, and the decision by the Deputy Registrar is therefore not amenable to review.

Likewise as regards the second issue, the Applicants in their supporting affidavit sworn on 10th June 2016 listed the children of the deceased as follows:

- a. Angelina Mukii Mwau,
- b. Peter Mulinge Mwau alias Peter Nalasco January Mulinge Mwau,
- c. Elizabeth Alexia Nzisa w/o Manyenze,
- d. Julius Mutua Mwau (Deceased),
- e. Ernest Muli Mwau,
- f. Adelaide Mbaika Mbithi,
- g. Stella Mukulu w/o Mwangi.

The Applicants have however not indicated why the consent of the other children of the deceased other than the two who are named to be out of the country has not been sought or provided. No evidence that the deceased's children said to be out of the country was also provided.

In the premises no grounds have been established by the Applicants for dispensing with the consent of the children of the deceased to their application for letters of administration. The Applicants shall accordingly file the consent of the children of the deceased, and an affidavit as appropriate for those children of the deceased who are not able to provide their consent, to facilitate the grant of letters of administration.

Arising from the foregoing, I decline to grant the orders sought in the Applicants' summons dated 10th June 2016. There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 30th day of January 2017.

P. NYAMWEYA

JUDGE