



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2776 OF 1995

IN THE MATTER OF THE ESTATE OF NGUGI MUHIA (DECEASED)

RULING

1. There are several applications for simultaneous determination in this ruling. They are dated 25th August 2015, 26th February 2016 and 1st April 2016.
2. The Motion dated 25th August 2015, seeks leave to appeal against the ruling that I delivered herein on 10th July 2015 and stay of execution of the orders made in that ruling pending appeal. The application is at the instance of Stephen Nathaniel Mwaura, who claims that the deceased had given to him *inter vivos* a portion of Chania/Kanyoni/793, which he has extensively developed. His concern is that the court did not take that into account and he stands to lose substantially as a result. The applicant is supported by Elizabeth Wanjiku Ndung'u, who swore an affidavit on 30th October 2015.
3. There are two responses to the application. One is by Peter Kamiti Ngugi. He filed a notice of preliminary objection on a point of law, arguing that this court has no jurisdiction to grant leave to file a notice of appeal out of time. He has attached a decision of the Environment and Land Court in *Tasmac Limited vs. Roberto Marci, Reuggero Sciommeri, Shalin Chitranjan Gor & Nassau Limited* (2014) eKLR to support his case. The second response is through an affidavit sworn on 29th October 2015 by Zipporah Mumbi Ngugi. She accuses the applicant of greed, and blames him for the wrangles that have been there with regard to the estate, which have delayed the completion of administration herein. She swore a further affidavit on 13th June 2016 responding further to the said application.
4. The application dated 23rd February 2016 is brought by Zipporah Mumbi Ngugi. She would like the court to order the sealing of the certificate of confirmation of grant attached to her application, as well as an order commanding the administrators to complete administration within a specified time frame failure to which they be substituted. She complains that six months after the confirmation of grant a certificate of the confirmed grant was yet to be processed, adding that it was taking the administrators too long to complete administration, which was exposing the survivors of the deceased to hardship.
5. Elizabeth Wanjiku Ndung'u reacted to that application through her affidavit sworn on 1st April 2016. Although she agrees in principle to the expeditious distribution of the estate, she points out that there is a pending application for leave to appeal, dated 25th August 2015, and grant of the orders sought would render any intended appeal nugatory. As a way out, she proposes that Chania/Kanyoni/1372 be set aside to await outcome of the proposed appeal, as the other assets are being distributed.
6. The application dated 15th April 2016 is at the instance of Elizabeth Wanjiku Ndung'u, seeking review of the ruling delivered herein on 10th July 2015, to include distribution of rent paid by Total Kenya Limited for occupation of Chania/Kanyoni 643/22. She proposes that the same be shared equally amongst

all the three houses of the deceased. She also seeks that the house of Phyllis Njoki renders an account for the rent it had received in the period between 1st January 2009 and 31st December 2013. She deposes that there is an order recorded by consent on 9th October 2014 to the effect that the said rental funds be deposited in a joint account of the advocates on record. The money was never released by Total Kenya Limited and therefore it was never deposited into the subject account as ordered. She proposes that the said moneys be shared as between the houses, as that was the practice when the widows were alive.

7. The said application is supported by Zipporah Mumbi Ngugi, through her affidavit sworn on 13th June 2016, but with a rider that that the said funds be shared out equally as between the children of the deceased instead of the three houses.

8. Directions were given that the said applications be disposed of by way of written submissions. There has been compliance. All the parties have filed detailed written submissions, complete with copies of the authorities that they are relying on. I have read through the submissions and noted the arguments made therein.

9. I will deal with the said applications sequentially, starting with that dated 25th August 2015. As narrated above, the same seeks leave to appeal and stay of execution. The applicant complains about a property he describes as Chania/Kanyoni/793. The court distributed the estate on a confirmation application dated 9th September 2011, that was the foundation of the ruling delivered on 10th July 2015. In that application Chania/Kanyoni/793 did not feature, it was not listed in the affidavit sworn in support of the said summons as among the assets to be distributed, nor was it adverted to in the affidavits sworn in reply. Chania/Kanyoni/793 was therefore not before me, and I did not make any decision thereon which can be the basis for an appeal.

10. I have noted from the affidavits sworn in response to the application dated 25th August 2015, that Chania/Kanyoni/793 had been subdivided before the deceased died, creating Chania/Kanyoni/961 which was registered in the name of the applicant and Chania/Kanyoni/1372 which was registered in the name of the deceased. Chania/Kanyoni/1372 was in the schedule of the assets that I was called upon to distribute and it is one of the assets that I distributed. Curiously, the applicant makes no reference whatsoever to this property in his application, if it is the property whose distribution he is aggrieved about. It is the other parties who appear to identify the same as the one from which the three acres he claims should have come from. It is trite law that a party ought to be bound by his pleadings. The applicant does not complain about Chania/Kanyoni/1372, which is the property that I made orders on, but about Chania/Kanyoni/793 which does not exist, and upon which I did not make any orders.

11. The orders made on distribution were founded on the proposals made in the application made by Elizabeth Wanjiku Ndung'u. The estate is to be distributed substantially as per those proposals. The proposals did not have anything to do with Chania/Kanyoni/793 and I therefore find it surprising that Elizabeth Wanjiku Ndung'u supports the application dated 25th August 2015. She did not in her confirmation application mention anything about the applicant herein being entitled to three acres out of Chania/Kanyoni/1372.

12. In view of what I have stated above, I am not persuaded that I should grant the orders sought in the application dated 25th August 2015. The said application is no doubt poorly conceived.

13. The second application, dated 26th February 2016, seeks the issuance of a certificate of confirmation of grant founded on the orders made on 10th July 2015. The applicant complains that six months, as at the date of her application, after the confirmation of the grant the certificate had not been issued, delaying further the distribution of the assets and completion of administration. Upon the sealing of the certificate, she would like the administrators given a timeline within which to wind up administration, failing which their grant ought to be revoked. The only reaction to that application is by Elizabeth Wanjiku Ndung'u, who supports the application in principle, and her only concern relates to the proposed appeal by Stephen Nathaniel Mwaura. She goes on to say that the certificate could be sealed and administration completed after removing Chania/Kanyoni/1372 from the schedule of the assets to await the outcome of the appeal.

14. The said application is strictly speaking not opposed. I have already concluded that the first application, for leave to appeal, is not merited in my view, and therefore there is no impediment to grant of the orders sought in the second application.

15. The third application is dated 15th April 2016. It seeks orders relating to moneys being held by Total Kenya Limited with respect to a lease over Chania/Kanyoni 643/22. The applicant would like this money shared out equally between the three houses of the deceased. Her proposal has attracted only one reaction, by Zipporah Mumbi Ngugi, who supports the distribution, save that the money should be shared equally between the children of the deceased rather than as between the houses.

16. In the orders that I made on 10th July 2015, I had directed that Chania/Kanyoni 643/22 be sold and the proceeds of sale thereof be shared out equally between all the children of the deceased. It would be more equitable to share the money amongst the children rather than per the houses, given that the number of children in each house is disproportionate. In any event, the deceased died intestate in 1992, after the Law of Succession Act, Cap 160, Laws of Kenya, had come into force. The intestacy provisions in sections 35(5), 38 and 40 of the Act envisage equal distribution between the children of the deceased.

17. In the end, the orders that I shall make in the circumstances are:

(a) That the application dated 25th August 2015 is hereby dismissed with costs;

(b) That the application dated 23rd February 2016 is hereby granted in the following terms—

(i) that the Deputy Registrar is hereby directed to process a certificate of confirmation of grant in the format expressed in annexure ZMN3 in the affidavit of Zipporah Mumbi Ngugi sworn on 23rd February 2016 in support of the said application;

(ii) that the administrators are hereby directed to complete administration of the estate herein, or distribution of the assets the subject of the certificate to be prepared under (i) above, within six (6) months of the date of this order; and

(iii) that in default of (ii) above, the grant herein shall automatically stand revoked upon expiry of the six months, in the spirit of section 83(g) of the Act;

(c) That the application dated 15th April 2016 is allowed in the terms that the money held by Total Kenya Limited with respect to the lease over Chania/Kanyoni 643/22 shall be shared out equally amongst all the surviving children of the deceased;

(d) That the Certificate of Confirmation of Grant on record to be amended accordingly;

(e) That whoever is aggrieved by the orders made above shall have leave to appeal within thirty (30) days from the date of delivery of the ruling herein; and

(f) That each party shall bear their own costs.

18. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI THIS 30TH DAY OF JUNE, 2017.

W. MUSYOKA

JUDGE