



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO
SUCCESSION CAUSE NO. 17 OF 2017

IN THE MATTER OF THE ESTATE OF MARY WANJA WAIRIMU - DECEASED

PETER KANIARU WANJAAPPLICANT

-VERSUS-

MATHEW ANGIRA ONDEGO.....OBJECTOR/RESPONDENT

RULING

PETER KANIARU WANJA, the son to the deceased had sought by an application dated 7th April, 2017 to be appointed the sole administrator of the estate. His application was for Letters of Administration Ad Colligenda Bona under section 67 of the Law of Succession Act (Cap 60).

In the petition the applicant prayed for the following orders:

- (a) That in my capacity as a son of the deceased and by reason of the fact that owing to the special circumstances of the case, the urgency of the matter as appears from the affidavit filed herewith is so great that it would not be possible for the court to make a full grant to the person who is by law entitled thereto in sufficient time to meet the necessities of the estate of the deceased.**
- (b) That according to law he will faithfully administer according to law all the estate which by law devolves upon and vests in personal representative of the deceased and will render a just and true account of such estate whenever required by law so to do and will deliver up thereto the said grant.**

In support of the petition the applicant deponed in his affidavit that he is the duly son of the deceased and therefore the duly beneficiary. He further deponed that the deceased died on 27/2/2017 at Lankia Nursing Home as it appears in the copy of the death certificate. That upon death the deceased assets land parcel Ngong/Ngong/12033 valued at Ksh,40,000,000 and total liabilities owed to Virginia Wairimu Kiarie of Ksh.1,300,470 for purposes of determining the issue the applicant further deponed that the deceased is a tenant in common in the particularized property Ngong/Ngong/12033 which currently has tenants who have leased various sections of the building developed on it.

The point of contention necessitating the petition according to the applicant is the conduct of the other tenant – in common who has started harassing tenants and this is likely to lead to wastage of the estate. The court on perusal of the petition and supporting affidavit gave direction that the applicant serves the other tenant – in common to the estate of the deceased one Mathew Angira Ondego filed the necessary suit papers together with the replying affidavit by the objector to the making of the grant in favour of the applicant.

In view of the issues raised in the replying affidavit I invited the parties to a brief hearing just for the court to appreciate the background of the matter. That on the scheduled hearing date Mr. Njaramba learned counsel for the applicant raised a preliminary objection on the procedure adopted by the court to convert an ex-parte application into an interparties one. He argued that on the application for Letters of Administration Ad Colligenda Bona for preservation of the estate of the deceased there is no room for the objector to stand on the way for the applicant.

Pausing here for a moment it would appear to me that Mr. Njaramba, counsel for the applicant was acting on the mistaken belief that the court had no jurisdiction to order for service of the petition of grant of Letters Administration Ad Colligenda Bona.

It is under the circumstances I set out to determine the issue in dispute. The starting point would be to restate the provisions of rule 36 under the Probate and Administration Rules which reads as follows:

“36(1) where owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant Ad Colligenda Bona defuncti of the estate of the deceased.”

The applicant petition for Letters of Grant Colligenda Bona was within the provisions of section 67(1) of the Law of Succession but for purposes described under rule 36(1). As per the heading of the petition and prayer No. 1 the applicant is interested in the estate of the deceased specifically the collection and preservation of the same without powers to dispose or distributing them. What attracted my attention in the course of the proceedings was learned counsel Mr. Njaramba contention that the applicant main intention is to obtain the grant for purposes of filing suit against the respondent.

In my considered view the learned counsel application for Letters of Administration seem to fall under section 54 and the Probate Rules provided for in the 5th schedule. My understanding of the application was that the purpose to be served by the Letters of Grant applied for was to prosecute or defend proceedings in a court of law. This type of grant under the Law of Succession is the grant limited Ad Litem and not grants Ad Colligenda Bona under section 67(1) of the Act.

It is not in dispute that the two categories of grants are classified as grant for special purposes and made to achieve a particular administration of the estate of the deceased. It is evident from the 5th rule 14 of the Law of Succession that Mr. Njaramba counsel for the applicant was seeking a grant for special purpose of filing suit as provided for under ruled 14 which states:

“When it is necessary that the representation of a deceased person be made a party to a pending suit and the executor or person entitled to administer is unable or unlikely to act, Letters of Administration may be granted to the nominee of a party in the suit, limited of the purposes of representing the deceased therein, or in any other cause or suit which may be commenced in the same or in any other court between the parties, touching the matters at issue in the cause or suit and until final decree shall be made and carried out into complete execution.”

It is not in dispute that the deceased died intestate on 27/2/2017. There is only one real estate particularized as Ngong/Ngong/12033, the nature of interest being absolute with proprietorship divided into a half share each for the deceased and the respondent Mathew Andego. It is also not contested that none either of the parties to this petition has applied for grant of Letters of Administration. According to Mr. Njaramba for the applicant they are not interested in petitioning for the making of the grant intestate for the estate of the deceased at this point in time.

Here again I pose a question to learned counsel whether it would not be desirable to lodge such an application which will conclusively sort out the dispute. The answer to that question showed that learned counsel main interest is to obtain the special grant without going through the process applying for a full

grant. This to me is a shorter route but which eventually would not answer the important question to the grant of probate to the half share registered in the name of the deceased as a tenant in common with the Mathew Andego.

Secondly there is even a more critical question which concerns this court whether the objector/respondent Mathew Andego was married to the deceased prior to her death. In the same breath a perusal of the affidavits filed in the court reveal that there is a contestation as to the nature of the interest registered for the benefit of the deceased and the objector/respondent.

Addressing myself to this issue from a position of the objector/the suit property was jointly owned with the deceased as his wife during her lifetime while on the other hand the applicant deposes to the fact the ownership is a tenancy in common. That in my view is not matters to be resolved within the scope of grant of letters of administration for a special purpose Ad Colligenda Bona.

I can very well understand the anxiety and fears expressed by the applicant on the basis that the respondent is intermeddling with the estate and may be wasted if not preserved. What the applicant failed to tell this court is the nature certainty and extent of the deceased estate he intended to collect and preserve. With profound respect to the applicant section of the Law of Succession is clear on the definition of free property. In relation to the deceased person means the property of which that person was legally competent freely to dispose during his lifetime and in respect of which his interest has not been terminated by his/her death. (*See section 3 of Cap 160 of the Laws of Kenya*).

Accordingly in my view on the death of the deceased the interest in land parcel Ngong/Ngong/12033 is that prescribed as a half share. It is quite clear that the applicant can not purport to make a grant to administer the interest registered in the name of the respondent.

Secondly the applicant and the respondent filed affidavits to demonstrate that there are tenants occupying the suit premises. However there was difficulty from each of the parties to disclose the particulars of the rent the deceased collected which is now being wasted by the respondent. This court therefore was incapable of making orders in absence of material disclosure the nature of intermeddling and wastage envisaged warranting the intervention of this court. There is ample evidence for this court not to grant the orders sought by the applicant for the prayer for Letters of Administration Ad Colligenda Bona.

It follows therefore that this court has to invoke the inherent jurisdiction under rule 73 of the Probate and Administration Rules which states as follows:

“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.”

In the result applying rule 73, I do invoke section 66 of the Law of Succession Act and do issue the following orders:-

1. That both the applicant Peter Kaniaru Wanja and the respondent Mathew Angira Ondego do apply and be issued with Grant of Letters of Administration in the matter of the estate of Mary Wanja Wairimu.
2. That pending the process of making of the grant in favour of the administrators the following order as to the preservation of the estate shall abide:
 - (a) That a joint account in the names of both counsels to this succession cause with the respective parties Peter Kaniaru Wanja and Mathew Angira Ondego as joint signatories be opened in a bank acceptable to both parties within thirty (30) days from today's date to be used for the tenants to deposit rent collectable till the final/or other directions from this court.
3. That for purposes of maintenance, urgency and expediency in any event the parties be at liberty

to apply to the Deputy Registrar High Court Kajiado to withdraw and expend any money from the joint account arising from rent in Ngong/Ngong/12033.

4. That for avoidance of doubt any management agent appointed by the parties to manage the property on their behalf be made to comply with this order in so far as the collection and deposit of the rent in the common account as stipulated herein.

5. The costs of this order be in the cause.

Dated, delivered and signed in open court at Kajiado on 22/9/2017

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R. NYAKUNDI

JUDGE

Representation:

Mr. Muchangi for Njaramba for the applicant - present

Mr. Kahuthu – absent

Peter Kaniaru Wanja – present

Mathew Angira Andego - present