



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
FAMILY DIVISION
SUCCESSION CAUSE NO 1724 OF 1994
IN THE MATTER OF THE ESTATE OF G N C (DECEASED)

RULING

INTRODUCTION

The deceased died on the 5th March, 1994 at Nairobi.

He was survived by;

1. F G C- mother
2. N K C-widow
3. B (V) C-Brother
4. T (T) C-Daughter (infant)

The Applicant was the only child and daughter of the Deceased. She was a one year old baby at the time of her father's death. The Administrators applied for Grant of Letters of Administration Intestate on 30th April, 1994 and the same was issued on 21st March, 1995. The grant was issued to N K C and B C widow and brother of the deceased respectively.

PLEADINGS

The Applicant T C; daughter of the deceased, filed application on 18th December 2014 brought under **Section 47 of Law of Succession Act Order 51 CPR Section 1A,1B,3 & 3BCPA Article 159 of COK 2010** and sought Orders inter alia that:

1. **The property known as Land Reference Number [Particulars withheld], situated in Nairobi, bought using the proceeds of the estate of G N C be included in the list of assets/inventory of the petition filed in respect of his Estate and the Applicant' interest in it be transferred to her.**
2. **N K M, the mother of the Applicant and one of the Administrators of the estate of G N C, do give an account of a sum of USD 448,871 received from her grandmother, mother to deceased, in her capacity as the mother and guardian of the Applicant and as an Administrator of the estate of G N C for her (the Applicant's) education, maintenance and benefit and transfer the net to the Applicant.**

3. There be a Declaration that N K M, one of the administrators herein, has held and continues to hold two thirds of G N C's Estate bequeathed to the Beneficiary/Applicant, or proceeds of sale representing that share of the Estate and/or assets, investments, rents, profits, dividends and interest made from proceeds representing her share of the Estate, and/or money received on her behalf from her late grandmother as her mother, guardian and administrator for the benefit of the Applicant herein.

4. The Administrators be ordered to give an account to the Applicant for the income, interest, investments, profits, savings, dividends and rents received by them jointly and severally or any other persons or person by the order or the use of the administrators or either of them in respect of Property known as L.R. No. [Particulars withheld]

5. The Court do give directions on the confirmation of the Grant of letter of administration issued on 21st March, 1995 to N K M and B C upon inclusion of all assets the Applicant is entitled to

6. Costs be provided for.

The Applicant relied on the following grounds;

That the Administrators after obtaining the grant in 1995, did not apply for confirmation of the grant for over 20 years.

In her supporting affidavit filed on 16th December 2014, the Applicant outlined in detail her claim to her late father's estate. She was born on 20th May 1993 to the Respondent and deceased. Her father died when she was barely 1 year old. Her mother, the Respondent obtained a grant and assumed the role of managing her father's estate including her inheritance. In the process she received funds and assets as administrator for her father's estate and for her as her guardian.

The Applicant was unaware of this Succession Cause filed by the Respondent and brother to her father to obtain grant of letters of administration, she filed **High Court Civil Case 309 of 2013** which was transferred to the **ELC Division of the High Court and assigned 547 of 2014, T C Vs N K M** in which she was claiming her interest on L.R. [Particulars withheld] bought using proceeds of her inheritance.

The Applicant filed the case because since the Respondent remarried, she drove the Applicant away from the house she bought and developed using the Applicant's inheritance. The Applicant accused the Respondent that she was no longer managing the Applicant's inheritance for her education, subsistence and benefit. The Applicant is in dire straits and stays with relatives and enjoys their goodwill. The assets, proceeds, profits and investments of the estate have not been included in the inventory and/or list of assets and are in danger of being wasted, disposed of if not added and the grant issued in 1995 confirmed to facilitate distribution of the estate. The Applicant learnt from her mother, that her father was entitled to 3/8 of the property shared with her his brother, B C and mother F C in Greece as confirmed by her letter dated 28th march 2003 annexed as **TC2**.

The properties that the deceased had a beneficial and shared interest with other beneficiaries from his late father's estate as follows;

a) A house in Glifadha

b) A plot in Athens

c) A plot and house in an island called Kithera in Greece

In 2002 the Respondent received USD 1,000,000 for proceeds of sale of the house in Gilfada as admitted by the Respondent in her Replying affidavit. By an email of 27th March 2003 annexed as **TC7**, the Respondent's lawyer in Greece, wrote to the Respondent and advised her not deprive the applicant of her

inheritance. By an email of 10th May 2004 annexed as **TC6** to her affidavit, the Respondent confirmed to the Applicant that she bought her property in Spain for 95,000 Euros. By an email of 6th June 2003 annexed as **TC8**, the Respondent suggested to the bank, she forms a trust in the deceased's name. In 2009, the Respondent received USD 99,500 cash and USD 353,261 was transferred by the Applicant's paternal grandmother F C to hold in trust for the Applicant. This transaction is confirmed by acknowledgement of receipt annexed as **TC4** to her affidavit of 15th April 2013.

The Respondent paid her college fees and related expenses and then stopped as she continued to hold, collect and control assets, proceeds, investments and interest, dividends representing the inheritance from her father, and investments from proceeds out of sale of her share of properties bequeathed to her by her late father and money received from her late grandfather.

The Respondent by an email of 15th November 2012 and 20th June 2012 annexed as **TC 18** to her affidavit, the Respondent confirmed she could no longer pay her school/college fees, pay rent for her premises in South Africa. She confirmed holding in trust the family home in Runda L.R. No **[Particulars withheld]** which is co-owned by herself and the Applicant. The Respondent stated she was no longer responsible for her affairs.

The Applicant's mother created illegal trust to circumvent her obligation to transfer to the Applicant her inheritance after she attained the age of majority or upon confirmation of the Grant. She used the illegal trust to exercise exclusive control over the Applicant's inheritance for her personal benefit and to the detriment of the Applicant.

The Respondent utilized the Applicant's inheritance to purchase Land Reference Number **[Particulars withheld]** in Nairobi's Runda area (A copy of the certificate of title is at page 65-66 of the **Application/Appendix 1**) where she constructed a residential house and a guest house using the Applicant's inheritance. This was the home of the Applicant and her mother until sometime in 2013 when her mother drove her away from the home. The Applicant's mother remarried after the Applicant's father death. The Applicant is destitute and now wholly dependent on the goodwill of her relatives for accommodation and subsistence after the Respondent withdrew any kind support to her and drove her out of a house substantially constructed from the Applicant's inheritance. Her education has stalled. Her inheritance is in the hands of her mother who refused to pay for her education or subsistence.

The Applicant was unaware of this Succession Cause until she filed **High Court Civil Case 309 of 2013** which was transferred to the **ELC Division of the High Court and assigned 547 of 2014, T C Vs N K M** in which she was claiming her interest on L.R. No. **[Particulars withheld]** bought using proceeds of her inheritance. She also sought to have her mother give account of the state and transfer her share of inheritance.

In **ELC case No. 547 of 2014, T C Vs N K M**, the Court granted a one year temporary injunction stopping N K M, one of the Administrators herein from transferring the above parcel of land and directed that the Applicant's claim to the said parcel of land and any claim regarding her inheritance be determined in this Succession Cause.

She averred that her action prompted by the fact that her mother could not provide for her college fees or her subsistence and had driven her out of a house on Land Reference Number **[Particulars withheld]** bought from proceeds of my inheritance and/or my late father's estate. Simply put she was not managing my inheritance for my education, subsistence or interest.

She stated that on 13th August, 2013, the Court granted a temporary injunction inter alia restraining her mother from transferring Land Reference Number **[Particulars withheld]** pending the determination of application as well as ordering her to pay for her university education.

The Respondent, Applicant's mother filed her Replying Affidavit on 14th February, 2014 and a further affidavit on 4th July 2014. She admitted she was married to deceased and they 1 child, daughter, the Applicant on 5th March 1994. She was later married to L P M and had a son born on 25th April 2002.

She confirmed that the deceased left behind his entitlement to his shares in properties in Greece from his parents.

The Respondent stated she received USD 1 million in 2002 as proceeds from the house in Glyfada, Greece that was sold. She spent the funds on herself and daughter. In 2003 she purchased Land Reference Number **[Particulars withheld]** in Runda for Ksh 9 million. She developed the land, built a house, landscaping, swimming pool, boundary stonewall, electric fence, security alarms, furnishings, fixtures and spent approximately Ksh 50 million. She put up a guest wing and furnished the same at a cost of Ksh 1million. She spends Ksh 300,000/= each month on maintenance and utility bills which include electricity, water, house phones, mobile phones, workers salaries groceries, fuel, security and alarm backup expenses. She lived with the Applicant until 2012 when she said she was grownup and could handle her own affairs as confirmed by documents annexed and marked **NKC -2**.

The Respondent admitted she received from her daughter's paternal grandmother USD 450,000/=in July 2009. She utilized the funds and paid for the Applicants College fees at [Particulars withheld] College, her school expenses pocket money, shopping and trips. She paid for her apartment's lease while in College, bought her electronic equipment laptop, ipad and cameras. She redecorated her room.

The Respondent admitted she bought the Applicant property in Spain and she sold it the same year so that the proceeds would cater for the Applicant's College fees in South Africa.

The Respondent denied refusing or stopping to pay the Applicant's College fees and her subsistence and claimed that her brother had taken over the responsibility. She was not made aware of any financial difficulties that the Applicant had or any arrears of outstanding College fees. The Respondent asserts that she took care of her daughter from when she was in kindergarten all the way to College and paid all expenses and made sure she catered for her food, clothes, medical, air fare and her upkeep. She also expended on legal fees, payment of duty and taxes over the properties in Greece before they were disposed off. The Respondent lost Ksh 15 million to one pursuant to an agreement she entered into so as to reduce payment of taxes. This is the subject of litigation in Court.

The Respondent drew a deed of Settlement in 2004, a trust to secure and safeguard the beneficial interest of the Applicant over her 2/3rd interest in Land Reference Number **[Particulars withheld]** as it was bought and developed using proceeds of her inheritance. The Respondent is of the view that the Applicant though adult is not mature enough to handle her inheritance or share of the said property until she attains the age of 30 years old.

ISSUES

- 1. Are N K M (widow) and T C (daughter) beneficiaries of the deceased's estate?**
- 2. What assets comprise of the deceased's estate?**
- 3. What is the role of administrators(s) in administration of the estate?**
- 4. Why was the grant not confirmed to date and instead the widow drew a deed of settlement and wrote her Will without disclosure of the grant?**
- 5. What remedies are appropriate in the circumstances?**

DETERMINATION

The law that governs the administration of the deceased's estate is the Law of Succession Act Cap 160. **Section 29 & 35 & 66** of the Act provides who the beneficiaries and/or dependents of the deceased's estate are, the appointment of administrators or named executor(s) in the Will and the mode of distribution of the deceased's estate is provided by **Sections 35,38 39 & 40 of the Act**.

In the instant case; it is not in dispute that N K C -widow and T (T) C-daughter are the immediate family of the deceased and therefore beneficiaries of his estate. The grant of letters of administration was granted to the deceased's widow, the Respondent and the deceased's brother as administrators of the estate respectively on 21st March, 1995.

The petition for grant of letters of administration at paragraph 6 the full inventory of all assets and liabilities by the deceased at the date of his death as had arisen or became known were as follows;

a) Account number [Particulars withheld] Standard Chartered Bank Karen branch Nairobi.

b) Liabilities were K.F.C. loan

The 1st administrator did not disclose any other assets that comprised of the deceased's estate. Later, when she received information on the deceased's share of his father's estate as follows;

a) A house in Glifadha

b) A plot in Athens

c) A plot and house in an island called Kithera in Greece

The Respondent did not disclose the share of the assets due to the deceased's estate and amend the pleadings. Since these assets were in a different jurisdiction, the administrators did not have the grant or equivalent document from Greece that outlined the Deceased's share of his father's estate revealed in Kenya as required by **Section 77 of the Act and read with Rule 42(1) of the Probate and Administration Rules** that provide;

Where a Court or other Authority, having jurisdiction in matters of Probate or administration in any Commonwealth country or in any other foreign country designated by the Minister by Notice or Gazette, has, either before or after commencement of this Act, granted probate or letters of administration, or an equivalent thereof, in respect of the estate of a deceased person, that grant may, on being produced to, and a copy thereof deposited with the High Court, be sealed with the seal of the Court, and thereupon shall be of the same effect and have the same operation in Kenya, as if granted and confirmed by the Court.

Rule 42(1) & (2) of the Probate and Administration Rules;

Every application shall be brought by petition.....supported by affidavit.....and shall be dealt with by a judge of the High Court

The role of administrators and/or executors in administration of estates is provided by **Sections 79, 81, 82, 83 & 84 of the Act.** **Section 79** prescribes that subject to any limitation of the grant the administrators shall be personal representatives of the deceased and all property shall vest in them.

Section 81 states as proviso;

where there has been a grant of letters of administration which involve a continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of the trust until the Court has made further grant to one or more persons jointly with him.

Section 82 of the Act outlines the powers of the personal representative of the deceased's estate. These include the power to enforce suit on behalf of the estate, to sell or otherwise account for any assets vested in him/them; provided the sale is after confirmation of grant; to assent at any time after confirmation of grant to the vesting of a specific legacy; to appropriate at any time after confirmation of grant any assets vested in them in the actual condition or state of investment towards satisfaction of any legacy

bequeathed as may seem just and equitable according to their respective rights.

The Administrators' duties are espoused in **Section 83 of the Act** and these entail payment of funeral expenses, collecting all free property of the deceased, pay off liabilities, pay all expenses accruing from administration of the estate and within 6 months from the date of grant, to produce to the Court a full inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith upto the date of account and subject to **Section 55**, to distribute or to retain on trust all assets remaining after payment of expenses and debts.

The evidence on record is that mother to the Applicant and Uncle (brother to her late father) were appointed administrators in 1995. The annexure to the Applicant's affidavit marked **TC-3** a letter dated 27th February 2002 confirmed that the 2nd Administrator B C relocated with his family to USA. Therefore the administration of the deceased's estate was solely by the widow from then till now. This is in contravention of **Section 81 of the Act** that requires more than 1 personal representative where there is a continuing trust; in this case to protect the beneficiary's interest of the deceased's only child, the Applicant in his estate.

The mother to the Applicant and widow of the deceased actually administered the deceased's estate solely from 2002 to date and did not seek to replace her brother-in-law with another administrator in order to safeguard the beneficial interest of the Applicant. The Respondent failed to have the grant issued in 1995 confirmed and the estate distributed to the beneficiaries; she deliberately failed to disclose the deceased's assets accruing from his beneficial interest in his father's estate and funds released to the Respondent by her mother-in-law in trust for the Applicant. The Respondent failed to put up a trust in favour of the Applicant and safeguard her beneficial interest as she was a minor at the time and hold the trust for her until she reached the age of majority so as to release the same to her.

Instead, upon the deceased's death, the Respondent remarried and had a son of the marriage and later divorced. On receipt of **USD 1,000,000 in 2002** as the deceased's share of his father's estate and after sale of the house in Gilfada Greece and **USD 99,500 cash and USD 353,261** in 2009 from the deceased's mother for upkeep and subsistence of her granddaughter the Applicant and she was to hold in trust for her, the Respondent bought suit property Land Reference Number **[Particulars withheld]** (Title No: I.R. **[Particulars withheld]**) the family home at Ksh 9 million, developed the same with Ksh 50 million; put up a guest house at Ksh 1million and continues to pay running expenses. She also incurred legal fees and paid taxes. She also expended the funds to the Applicants upkeep and subsistence education and school expenses upto College level. However, in 2012, the Respondent evicted the Applicant and stopped maintaining her.

In **ELC case No. 547 of 2014, T C Vs N K M**, the Court granted orders that the Applicant shall be taken care of by the Respondent and in the meantime the Applicant was to obtain her beneficial interest in her father's estate from the Family Court under the Succession Cause. Of importance after *interpartes* hearing Hon. Justice Nyamweya found as follows at Pg8 of the Ruling;

Therefore going by findings notwithstanding, it is evident that the Plaintiff has a prima facie case as the fact that the Plaintiff is a beneficiary of the estate of G C, and that the Defendant has received and applied inheritances from the said estate for the Plaintiff's benefit is not contested. The Defendant also admitted that part of the said inheritance was used to purchase the parcel of land known as [Particulars withheld]. The issues that are contested are as to the application and accounting for the said inheritance, which are not within the Province of this Court. This includes the issue as to whether the trust deed created by the defendant in favour of the Plaintiff with respect to the parcel of land known as L.R.No. [Particulars withheld] is valid or not.

This Court being of equal and competent jurisdiction to the Trial court in the above case, concurs on admitted evidence before the Trial Court and lacks basis to revise the finding. The Respondent as administrators held the Applicant's share as beneficiary of her late father's estate which included a share of her grandfather's estate. The Proceeds received on the Applicant's behalf by the Respondent were utilized to purchase the current developed family home in Runda **L.R. [Particulars withheld]**. The

Applicant does not reside on the said home after she and her mother fell out. The Applicant has no benefit of the home. According to her, she was evicted from the said home by her mother who also stopped paying her College and living expenses while she was in South Africa until the Trial Court intervened.

Further, after the Respondent obtained the grant in 1995, she circumvented this Court's jurisdiction over the deceased's estate not only through non disclosure of material facts of the Deceased's assets from his father's estate to be included in the grant and/or resealed the grant or equivalent from Greece, but she had prepared a Deed of Settlement in 2004 appointing trustees to hold the suit property **L.R. [Particulars withheld]** and deprive the Applicant her interest until she attained 30 years. Whatever, misgivings the Respondent has as to her daughter's capability to take care of her part of the estate cannot have any basis as she is on her own now and has attained the age of majority 18 years old. The deed of settlement entered into without the Applicant's consent and co administrator's knowledge and consent is invalid, illegal and irregular to the extent of ousting this Court's jurisdiction over the administration of the deceased's estate after issuing the grant as it contravenes **Section 84 of the Act** which provides;

Where the administration of the estate of a deceased person involves any continuing trust whether by way of life interest or for minor beneficiaries or otherwise, the personal representatives shall unless other trustees have been appointed by a will for the purpose of the trust, be trustees thereof.

The deceased did not appoint trustees for his daughter's beneficial interest he died intestate. Therefore once the Court appointed the Respondent and her brother in law as administrators of his estate invariably they were trustees of the continuing trust of the minor's beneficial interest in the deceased's estate. They could not legally appoint other trustees through the deed of Settlement and subsequent Will of the Respondent which as long as she is alive is at liberty to change its terms.

This position is fortified by the relationship between one with life interest in the estate and one with beneficial interest. The Court in **TAU KATUNGI VS MARGRETHE THORNING KATUNGI AND ANOTHER, SUCCESSION CAUSE NO. 1040 OF 1991** observed that:

“[19] Life interest confers a limited right to the surviving spouse over the intestate estate. He or she does not enjoy absolute ownership over the property. They cannot deal with as if it was their own. By virtue of Section 37 of the Act, a surviving spouse cannot during life interest dispose of any property subject to that life interest without the consent of all the adult children, co-trustees and the court. This is meant to safeguard the interest of the children who are the ultimate beneficiaries of the property the subject of life interest. It is in this respect that the life interest operates as a trust over the property the subject thereof, a trust held by the surviving spouse for the benefit of the surviving children.

[20] At life interest there is a convergence of the interests of the surviving spouse and those of the children. The device seeks to secure the interests of both. Where the deceased therefore is survived by both a spouse and children, the net intestate estate will not pass absolutely to either of the two categories of survivors during the life time of either. The holder of the life interest in this case is still alive, and has not remarried, she is therefore still entitled to the property at this time and the same cannot be conveyed to the children. Conversely, all the children of the deceased are still alive, consequently the widow cannot have the property absolutely to herself, but she is entitled to whatever income that derives from it.”

DISPOSITION

After analysis of pleadings and written submissions filed by parties this Court finds as follows;

- 1. The Respondent contravened Sections 71, 81, 83(e) & 84 of Law of succession Act Cap 160.**
- 2. Instead of this Court revoking grant of 21st March, 1995 the Court shall amend the grant in light of the fact that Co administrator B C relocated to USA and hereby include the**

Applicant T C as Co administrator of the deceased's estate with N K M the Respondent, her mother. Both administrators shall administer the estate jointly and equally.

3. All the assets and funds received pursuant to the issuance of the grant shall be included in the petition for grant and resealing done for properties outside this Court's jurisdiction.

4. The Respondent N K M shall provide full and accurate account of all dealings of the deceased's estate from obtaining the grant to the date of account to the Applicant and the Court within 90 days from today.

5. In default, the Applicant T C and Respondent N K M shall confirm the grant and have the Applicant and respondent share the suit property L.R. *[Particulars withheld]* 2/3 to the Applicant T C and 1/3 N K Mathews AND

6. The suit property L.R. *[Particulars withheld]* shall be registered in joint names of joint administrators and beneficiaries Respondent N K M and Applicant T C.

7. If either of the parties shall not cooperate in the transfer and registration process of the suit property L.R. *[Particulars withheld]* The Deputy Registrar Family Division High Court shall sign transfer documents.

8. Any aggrieved party is at liberty to apply

9. Each party to bear own costs.

It is hereby ordered.

DELIVERED SIGNED & DATED IN OPEN COURT IN NAIROBI ON 30TH OCTOBER, 2017.

M.W.MUIGAI

JUDGE