



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 292 OF 2015

**IN THE MATTER OF THE ESTATE OF ROBERT KINYUA MWANGI ALIAS ROBERT
MWANGI KINYUA (DECEASED)**

VIRGINIA WANGARI NDINDI.....APPLICANT

AND

ANN NGIMA MARI.....1ST RESPONDENT

NANCY WAKERA KINYUA.....2ND RESPONDENT

RULING

1. VIRGINIA WANGARI NDINDI who is one of the administrators herein by virtue of grant of letters of administration *ad litem* issued on 15th August, 2016, filed this summons under **Section 45** and **55** of the **Law of Succession Act Rules 49, 59** and **73** of **Probate and Administration Rules** seeking the following orders:

i. Spent

ii. That Nancy Wakera Kinyua and Ann Ngima Mari do produce to Court a full and accurate account of all assets of the estate to include funds received by and spent by themselves on behalf of the Estate as previous Administrators of the estate herein.

iii. That to the extent of the assets or sums with which they may be found to have intermeddled, an order issues for reinstatement/refund in full forthwith.

iv. That the Claims Manager, Madison Insurance Company Limited to produce before court details of payment(s) made out on account of the deceased herein to Nancy Wakera Kinyua and Ann Ngima Mari as the previously appointed Administrators of the estate herein.

v. That a current statement of accounts for Account Number [particulars withheld] at Equity Bank, Kerugoya Branch in the name of Nancy Wakera Kinyua and Ann Ngima Mari be produced and made available before Court.

vi. That Nancy Wakera Kinyua and Ann Ngima Mari be and are hereby restrained from selling, alienating, transacting in or in any other manner disposing of LAND TITLE NUMBER MWERUA/KIANDAI/2050 pending hearing and final determination this application.

vii. That Nancy Wakera Kinyua and Ann Ngima Mari be and are hereby restrained from selling,

alienating, transacting in or in any other manner disposing of LAND TITLE NUMBER MWERUA/KIANDAI/2050 pending hearing and final determination the suit herein.

viii. That the costs of this application be provided for.

2. The Summons is supported by the affidavit of the applicant Jackline Virginia Wangari Ndindi. The brief facts are that the respondents Nancy Wakera Kinyua and Anne Ngima Mari applied for the grant of letters of administration *ad litem* to the Estate of **Robert Kinyua Mwangi** alias **Robert Mwangi Kinyua**, in their capacity as wife and mother of deceased. The grant was issued on 4th June, 2015 limited for the purpose of litigation. The applicant applied for the grant to be revoked but even before the application was determined the two administrators, received compensation proceeds from the deceased's former employer Madison Insurance Company Limited. The applicant contends that the administrators are intermeddling with the Estate of the deceased and continues to do so. This despite the fact that the applicant had written to the former employer to hold the proceeds pending the determination of the application to revoke the grant.

3. The two administrators Nancy and Anne confirmed to the applicant that they had received payment from Madison Insurance and had opened an account at Equity Bank Kerugoya Branch No. 0100164028630 where the proceeds were banked.

4. They have gone ahead and withdrawn the proceeds which they used to purchase land parcel No. **Mwerua/Kiandai/2050**. The applicant filed this application seeking these prayers.

5. The respondents opposed the application and state that the applicant cannot use the limited grant to collect the estate. That they are not intermeddling as they had obtained a grant of letters of administration which has not been revoked. They further contend that the applicant is not a beneficiary of the estate of the deceased as she was not married to the deceased.

6. I have considered the application. **Section 54** and **55** of the **Law of Succession Act** (to be referred to as the "Act") provides:

"A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act.

Fifth Schedule (14)

When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.

Section 55 (1) Law of Succession Act states:

"No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71."

These provisions are clear. The grant which the administrators obtained was limited to filing a suit. The respondent has admitted that she received the money and bought land for the wife of the deceased. I am in agreement with the applicant that the respondents had no authority to do that. The issue is whether the applicant can restrain the respondents by way of injunctive orders. Under the Act, an administrator can only exercise those powers subject to the limitations imposed by the grant. The applicant obtained a grant

ad litem for the purpose of filing a suit. The applicant has not obtained letters of administration in the estate of the deceased other than the Limited grant. None of the parties have obtained letters of administration in the Estate. The respondent has received proceeds and went ahead to use the to buy land Title Number **Mwerua/Kiandai/2050** registered in the name of Anne Ngima Mari and Nancy Wakera Kinyua without obtaining letters of administration. The respondent has gone against the order in the Limited grant by purporting to receive proceeds which should go to the Estate of the deceased and distributing it without letters of administration and without a confirmed grant of letters of administration. She had no authority to do so. She has abused the Limited grant.

7.The High Court has in persuasive decisions held that the Act does not give the Court powers to give injunction. In **Tabitha Ntibuka Mbariki -V- Julius Gitonga M”Marete Succ Cause No. 48 of 2014**. Justice Gikonyo relying on **Rule 73** of the **Probate and Administration Rules** held that where the respondent had violated the law and abused Court process, the Court had to invoke the Rule. The Rule provides:-

“Saving of inherent powers of Court”

“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.”

He further went on to hold that where there is a violation and abuse of Court process, by the respondent the matter is a perfect candidate for invocation of the rule. That a restraining order or preservation order or remedy by whatever name called is a relief available under a succession cause to preserve the property *inter-alia*. I am persuaded to follow this decision because the respondent obtained a limited grant to file a suit and could not use the grant for any other purpose. If she is not restrained she will use the limited grant to distribute the estate without a confirmed grant of letters of administration. **Section 79** of the **Act** provides:

“The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”

Under **Section 3 (1)** of the **Act** personal representative is defined as “executor” or “administrator” of a deceased person. The duties of personal representative are defined under **Section 82** of the **Act**. It is provided:

“Personal representative shall subject only to any limitation imposed by their grant, have the following powers:

- a. To enforce by suit or otherwise, all causes of action which by virtue of any law, survive that the deceased or arise out of his death for his estate;**
- b. To sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties all or any part of the assets vested in them, as they think best: provided that.....”**

I emphasise the words *“Subject only to any limitation imposed by limited grant.”* **Rule 73 (supra)** gives Court inherent powers to make orders in the interest of justice or to prevent abuse. The rule imposes a duty on the Court to make orders to protect from waste or to preserve the estate of a deceased. The Court is not toothless in the event of abuse. In the case of **In re the estate of Helena Wangechi Njoroge (Deceased) (2015) eKLR** the Court held the following concerning letters of administration ‘*ad litem*’;

“Section 79 vests the property of the deceased in the personal representative, so that the latter can then exercise the powers set out in Section 82 and discharge the duties set out in Section

83 of the Act. It should be pointed out that that the provisions in Section 82 can only be fully exercised by a substantive administrator, that is the person holding, not a limited grant, but a full grant. Likewise, the duties imposed by Section 83 are to be discharged to their fullest by the holder of a substantive grant of representation.....

It was limited to the purpose of filing suit to preserve the three assets of the estate. It is what is called a grant of letters of administration ad litem. The suit envisaged to be filed on the strength of a grant *ad litem* is not a probate or succession case, or an interlocutory application within a probate or succession cause, but rather a civil suit. Indeed, one need not obtain a grant of any sort to enable him file a succession cause. A grant of representation is only necessary where one intends to file a civil suit to protect or defence the estate against third parties.

From the foregone, it is clear that a Limited Grant of Letters of Administration *Ad Litem* is usually used when the estate of a deceased person is required to be represented in court proceedings. The grant issued to Nancy Wakera Kinyua and Ann Ngima Mari on 4th June 2015 was also limited for purposes of filing suit. They had no authority to deal with the proceeds from Madison Insurance Company. The respondent herein has admitted that she used the limited grant to obtain monies which belongs to the estate and put it to her own use by opening bank accounts in her name and purchasing land in her name and others without obtaining letters of administration and a confirmed grant. She has abused the limited grant. This is intermeddling with the estate of the deceased. In the supporting affidavit to the application for grant of letters of administration '*ad litem*' at paragraph 4 she stated that, 'the deceased died as a result of the traffic road accident that occurred on 6th April, 2015 and we intend to file a suit'. She did not file a suit but went ahead to receive monies and buy property. **Section 45** of the **Act** provides for protection of the estate. It is provided under **Section 45 (1)**:

"Except so far as expressly authorized by this Act or by any other written law, or by a grant of representation under this Act no person shall, for any purpose, take possession or dispose of or otherwise intermeddle with any free property of a deceased person."

The provision makes it an offence to intermeddle and the person who intermeddles is answerable to the rightful administrator etc. Rule 49 of the Probate and Administration rules provides:

"A person desiring to make an application to the Court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit."

The applicant in her application for revocation of the Limited grant claims that she is the widow of the deceased. The suit she would file is a succession cause and not a civil suit. If the estate is not conserved in the light of abuse by the respondent, there will be nothing for her to administer or to receive on her own behalf and that of her child who are claiming as beneficiaries. **Rule 63 (1) Probate and Administration Rules** which provides for the applicable rules of the **Civil Procedure Rules**. Procedure rules should not bar Court from doing substantial justice. **Article 159 (1) (d)** of the **Constitution** provides that;

"Justice shall be administered without undue regard to procedural technicalities."

I am of the view that this Court is not precluded from making orders in the interest of justice and to prevent abuse of Court without undue regard to procedural technicalities. None of the parties has obtained a grant of letters of administration. They all have a limited grant. The prayers in the summons are calling upon the respondent to be answerable for intermeddling. I am of the view that nothing stops this Court from granting the orders including the injunctive orders to prevent abuse and conserve and protect the estate. I find that the application has merits and so I allow it as prayed. I make no orders as to costs.

Dated and delivered at Kerugoya this 17th day of November, 2017.

L. W. GITARI

JUDGE

Ruling read out in open court in the presence of M/S Kiragu holding brief for Wanyonyi for applicant, Respondent absent; Court Assistant Naomi Murage this 17th day of November, 2017.

L. W. GITARI

JUDGE

17.11.2017