



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CAUSE NO. 219 OF 2011

IN THE MATTER OF THE ESTATE OF THE LATE NAUMI MULWA NZEKI (DECEASED)
SUCCESSION

RULING

1. A preliminary objection dated 11th December 2015 has been taken by the administrators to an application for confirmation dated 7th September 2015 filed a beneficiary Nthike Mulwa. The grounds of the Preliminary Objection were that –
 - a. **This Honourable court delivered a ruling on 5/2/15 whereby it specifically ordered the petitioner/administrators to file Summons for confirmation of grant, upon which the applicant would be at liberty to file an affidavit of protest.**
 - b. **The aforesaid order of this court (dated 5/2/2015) have not been set aside and or varied.**
 - c. **The summons dated 7/9/2015 cannot be entertained by this court, in view of the aforesaid orders, and should be struck with costs.**
2. The Court had on the 5th February 2015 in its ruling on an application for revocation of Grant herein on the ground that the estate assets were jointly owned by her deceased HUSBAND and herself but her co-wife had obtained the Grant without her knowledge found as follows:

“I have considered the application and the reply to the same. If the Applicant’s position is correct, then the applicant ought o have been reflected as a liability in the estate of the deceased. At this juncture, this court is not able to tell if the applicant is a joint owner of the property in question. Consequently, I order that the respondents do file a summons for confirmation and serve the same on the Applicant. The Applicant is at liberty to file an Affidavit in Protest. Orders accordingly. ”

3. Upon appearance before the court on 23rd July 2015 when the matter apparently came up for compliance with the order of 5th February 2015, then Counsel for the respondent (Administrators) had intimated to the Court that they had sought instructions and would be filing the application for confirmation shortly. The Court made further orders that –

“1. The Administrators to file and serve the Summons for Confirmation within 30 days from date hereof.

2. In default the applicant (Nthike Mulwa) to file.”

4. Faced with the Order of 23rd July 2015, Counsel for Administrators, Mrs. Nzeki, sought to be excused of the delay and extension of time to file the Summons for the Confirmation of Grant urging that it is the primary duty of the administrator to move the court for confirmation of Grant.

Counsel submitted that-

“I pray that the Court allows the Petitioner administrators to apply for Confirmation of Grant. The application may be withdrawn or struck out with no order as to costs. The said application is not capable of achieving the intended purpose. It is the duty of administrator to apply for confirmation of Grant. If the applicants are to proceed with confirmation are they able to render an account on the estate of the deceased? Confirmation is supposed to complete administration and they are not the administrators. I refer to section 71 of the law of Succession Act. The Order of 23/7/2015 is reviewable under Rule 73 of the Probate and Administration Rules in the interests of Justice.”

5. It trite that the duty to move the court for confirmation of grant lies with the administrator and indeed under section 73 of the Law of Succession Act the Court is empowered to direct the administrator who defaults to file for confirmation with one year as follows:

“73. Duty of court to give notice to holder of grant to apply for confirmation

*The court shall within one year from the date of any grant of representation, give notice to the **holder of the grant to apply for confirmation thereof.**”*

6. During an application for confirmation a person who objects to the proposed distribution may file a Protest which must be heard and determined before the Confirmation of Grant. Such was the intention of the Court when it directed in its ruling of 5th February 2015 that the administrators file application for confirmation and the applicant an affidavit of protest.
7. It is the administrators who may confirm to the court that all liabilities of the estate have been paid and therefore propose a suitable distribution of the net estate. Accordingly, I agree that the proper person to file for confirmation of the Grant is the administrator or holder of the Grant unless he has shown himself to be unable or unwilling to bring the administration of the Estate to an end, in which case the court may revoke the grant in accordance with section 76 (d) of the Act which provides for court’s power to revoke a grant on application by an interested party or on its own motion where it finds—

*“(d) that **the person to whom the grant was made has failed, after due notice and without reasonable cause either—***

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular;”

8. For those reasons, I would allow the administrators to move the court for confirmation of the Grant, and the court directions of 23rd July 2015 are, accordingly, reviewed to allow the compliance with the law by the holder of the grant applying for the confirmation of the Grant as contemplated by section 71 of the Law of Succession Act. In the hearing of the application for confirmation, the applicant’s interest will fall to be determined as a protest under rule 40 (6) of the Probate and Administration Rules. In the interest of Justice and expeditious disposal of the dispute, administrators shall file an application for confirmation of Grant within 14 days from today and the applicant’s application and affidavits filed by the applicant herein will be deemed to constitute as a composite the affidavit of protest for purposes of the Probate and Administration Rules.

9. The matter will be mentioned on 16th May 2016 for purposes of fixing it for hearing on priority basis. Costs will be in the Cause.

DATED AND DELIVERED THIS 27TH DAY OF APRIL 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Applicant in person with son Mr. Patrick Masila Mulwa

Mr. Musila for Ms Nzei for the Respondent

Doreen - Court Assistant.