

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 2417 OF 1999

IN THE MATTER OF THE ESTATE OF LATE MUTISO MBITI (DECEASED)

RULING

1. The Summons General dated 25th February 2015 seeks orders relating to Plot No. 148 Section SS54 (LR No. 4/148 Thika). The applicant would like to have the said property valued, sold and its proceeds distributed equally amongst the survivors of the deceased in the first house. She also seeks to be appointed co-administratoor of the estate.

2. The application is brought at the instance of one Elizabeth Mwelu Mailu. She swore an affidavit on 20th February 2015. She avers that the property known as Plot No. 148 Section SS54 (LR No. 4/148 Thika) had been allocated to the widow in the first house, Wanza Mutiso Mbiti (who has since died) during the confirmation of the grant. She has attached a copy of the certificate of confirmation of grant to support the assertion. She proposes that the said property be divided equally between members of the first house. She also states that the administrator is not acting in the best interests of the first house, and it is for that reason that she proposes to be appointed a co-administrator so as to represent the first house. She would like to take the place of the dead first wife of the deceased, who was also a co-administrator.

3. She has attached a copy of the certificate of death in respect of the death of the first wife of the deceased. The attached certificate of confirmed grant indicates that Plot No. 148 Section SS54 (LR No. 4/148 Thika) had been allocated to her at the confirmation of the grant on 24th February 2001.

4. There is an affidavit of service on record sworn on 8th May 2015 and filed herein on 14th May 2015. It indicates that the application dated 25th February 2015 was served on 7th May 2015 on the advocates for the respondent administrator. The attached hearing notice dated 7th May 2015 bears a date stamp of the firm of Koceyo & Company, Advocates, with a handwritten endorsement indicating that the same was received at the said law firm on 7th May 2015. The said notice is of a hearing scheduled for 26th May 2015.

5. On 26th May 2015, the advocate for the applicant attended court, but the respondent was absent and so was his advocate.

6. I note that the application 25th February 2015 is unopposed, as there is no response to it by the respondent administrator despite service.

7. The grant was confirmed in 2001. The property in question, Plot No. 148 Section SS54 (LR No. 4/148 Thika), had been allotted to the first widow. It should have by now been vested in her estate. Allowing a distribution of the property in this cause amongst members of her household would amount to the distribution of her estate within the estate of her dead husband. The applicant should commence a cause for the administration of the estate of the first wife and have the asset in question vest to her estate for distribution within that cause.

8. On the appointment of the applicant as a co-administrator, I do note that her dead mother-in-law was a co-administrator before her demise. She had been so appointed to represent the first house. Upon her demise the said house was left without an administrator. It is prudent that the said house be represented in

the administration of the estate. What I should consider in the circumstances is whether the applicant is entitled to be so appointed.

9. The record indicates that the first wife had seven children, including the applicant's husband. The law envisages that at the time of the making of a grant, or appointment of administrators, all the persons with equal or superior right to administration give their consent to the appointment proposed. That is the law according to section 66 of the Law of Succession Act, Cap 160, Laws of Kenya, and Rule 7(7) of the Probate and Administration Rules.

10. The first wife had five sons – Mwinza, Ngui, Mutiso, Mailu and Wambua. The applicant is a widow of one of these sons. The deceased also had one daughter, Wayua. The children of the first wife have a right to administration which is superior to that of the applicant, who is a daughter in law. It is the applicant's children who can claim equal right to administration with their uncles and aunt. The applicant can only be appointed as co-administrator of the estate with the consent of the surviving sons and daughter of the deceased.

11. The applicant has not, in her application, provided any evidence as to the status or whereabouts of the children of the first wife. Neither has she provided any proof that they, if alive, have consented to her being appointed co-administrator of the estate. Should they be dead, the concurrence of their children should be obtained before the applicant can be appointed as administrator of the estate to represent their house.

12. The application dated 25th February 2015 is clearly without merit. It is hereby dismissed. There shall be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 27TH DAY OF MAY, 2016.

W MUSYOKA

JUDGE