



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1077 OF 1993

IN THE MATTER OF THE ESTATE OF ROBERT MUNGAI GICHINJI (DECEASED)

RULING

1. The application dated 3rd December 2014 seeks two (2) principal orders – stay of execution of orders made on 19th May 1995 and 17th November 2014, and review of orders that were made on 19th May 1995. The primary prayer is for the review of the orders of 19th May 1995.
2. The cause relates to the estate of Robert Mungai Gichinji, who died on 12th July 1986.
3. Representation to his estate was sought in this cause in a petition lodged herein on 1st August 1993, by Anne Mugure Muinami and George Livingstone Ndung'u, in their purported capacities as widow and son, respectively, of the deceased. The deceased was expressed to have been survived by nine (9) individuals, being a widow and eight children, one (1) son and seven (7) daughters, with some of the daughters unmarried. He was said to have died possessed of Dagoretti/Thogoto/151 and T296.
4. A grant of letters of administration intestate was accordingly made to the petitioners on 29th January 1994.
5. The grant was confirmed on 19th May 1995 on an application by the administrators dated 12th September 1994. The principal affidavit in support of that application was by the first administrator. She stated that the deceased had married twice and had eight (8) children, and that the first wife had died. She did not list the assets available for distribution. There is an affidavit sworn on 19th May 1995 by the second administrator which expresses support for the application dated 12th September 1994. The said affidavit was apparently filed pursuant to orders made on 24th March 1995. The affidavits sworn in support of the application dated 12th September 1995 did not propose any mode of distribution. The order recorded by the court (DKS Aganyanya J.) on 19th May 1995 read:-

'Issue of grant intestate made on 25/1/94 is hereby confirmed in the names of Anne Magure Maina and George Livingstone Ndung'u Mungai alias George Livingstone Ndung'u.'
6. A certificate of confirmation of grant was issued out of that order dated 19th May 1995 and it distributed Dagoretti/Thogoto/151 and T296 between the two administrators.
7. The application I am called upon to determine turns on the order made on 19th May 1995. The applicants, who are daughters of the deceased, complain that the proceedings leading up to the orders made on 19th May 1995 were conducted without their participation for they were never served with court process nor notified to appear in court. They state that the distribution did not take them into account,

especially the unmarried daughters who resides on the land and who were not provided for in the distribution. They also complain that the equal distribution ordered by the court did not take into account the fact their mother's house had many more children than other house, and therefore the distribution was inequitable. They also urge that an asset, Kikuyu/Kikuyu/805 was not distributed, although it belonged to the estate and the first administrator had subsequent to the demise of the deceased transferred it unlawfully to her name and sold it to someone else. It is their case that the distribution be revisited.

8. The response to the application dated 3rd December 2014 is through an affidavit of the first administrator sworn on 26th January 2015. She states that the application is *res judicata* in view of the orders made by the court on 3rd October 2014 when an application dated 14th November 2012, which in her view was in similar terms as the instant one, was dismissed. It is her case that the applicants were represented in the proceedings by the second administrator, who was from their house.

9. The application before me is for review. Can orders made by a probate court be reviewed and is there provision for review under the Law of Succession Act, Cap 160, Laws of Kenya, and the Probate and Administration Rules? The answer to those questions should be in the affirmative. The Act itself is silent on the matter, but the Probate and Administration Rules has, through Rule 63, imported a number of processes from the Civil Procedure Rules. Among those processes and procedures is that for review. The orders of the probate court can therefore be reviewed as per the provisions of the Civil Procedure Rules.

10. An order can be reviewed by the court on three (3) general grounds – error on the face of the record, discovery of new and important evidence that was not available at the time the order was made and any other sufficient reason.

11. I have had occasion to carefully look through the affidavit sworn in support of the application. I have noted that the deponent of the affidavit did not make an effort to identify any error on the face of the record, or at any rate to demonstrate that there was an error on the face of the record. She did not also attempt to show that there had been discovery of an important matter of evidence that was not available on 19th May 1995. Nor was any effort made to demonstrate that there was another sufficient reason for the review of the subject order.

12. It appears that the task now falls on the court to assess whether the application before me merits consideration as an application for review of the subject court order. The applicants complain that they were not involved in the court process, they did not participate as a result and the resulting order was adverse to their interests. Whether their exclusion or non-participation amount to an error on the face of the record will depend largely on whether the procedures required their involvement. So the court will have to scrutinize the procedural requirements prior to the making of the order. Does the issue of discovery of new and important matter of evidence arise? None has been pleaded so far as I can glean from the material placed before me. Is there sufficient reason for the court to intervene? That may well depend on what the procedure required.

13. Before I venture to look at the process, however, I have to dispose of the issue of *res judicata* raised by the respondents. It is their view that the instant application turns on the same questions as that dated 14th November 2012 that was determined on 3rd October 2014.

14. Looking at the record, I note that the application dated 14th November 2012 was premised on section 76 of the Law of Succession Act and sought to have the grant set aside for bestowing the estate on the administrators. The instant application is not founded on section 76 but invokes the inherent powers of the court to have the order impugned reviewed. The two applications, however, both focus on the order of 19th May 1995. The ruling I delivered on 3rd October 2014 was that the orders sought in the application of 14th November 2012 were not available on an application premised on section 76. The determination did not go into the merits of the order of 19th May 1995, which left it to the parties to bring an appropriate application. It is my conclusion that the instant application is not *res judicata*.

15. Confirmation of grants is provided for under section 71 of the Law of Succession Act. For the

purposes of the instant application, the relevant provisions of section 71 are subsection 2(a) and the proviso to subsection (2). The two (2) provisions state as follows:-

‘(2)The court to which application is made, or to which any dispute in respect thereof is referred, may –

(a) If it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or...

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities of the all persons beneficially entitled: and when confirmed the grant shall specify all such persons and their respective shares.’

16. According to the provisions of section 71(2) (a) and the proviso, where the deceased died intestate, as is the case here, the court should be satisfied of several things before it confirms the grant, that is to say: that the grant was rightly made to the administrators, that the applicant in the confirmation application is administering or will administer the estate according to the law. The court can only satisfy itself of those matters if no protest has been filed against the proposed confirmation, and such a protest can only be filed in cases where all the persons beneficially entitled, the would be protestors, have been fully involved in the process. It would be only then that those protesting would point out that the administrator had not followed the right process to obtain the grant, or was not administering the estate thus far in accordance with the law, or given his past conduct or his state of mind he would not most likely administer the estate according to the law.

17. The question then that needs to be asked is whether all the persons beneficially entitled were involved in the process of obtaining the grant and its confirmation.

18. I have looked at the documents that were lodged with the petition for the grant. I have noted that there was full disclosure of all the survivors of the deceased. I am however not satisfied that there was compliance with Rule 7(7) of the Probate and Administration Rules. The siblings of the second administrator had equal right to his to apply for probate, yet their written consent to the making of the grant to him was not obtained.

19. Regarding confirmation of the grant, I have noted that Rule 40(6) envisages filing of affidavits of protest by person who wish to object to the proposed confirmation of the grant. Persons can only wish to object to the application for confirmation of grant if they are aware of it. This, to my mind, suggests that the said application ought to be brought to the attention of all persons who are beneficially entitled so that they can decide whether to object to the proposed confirmation or not.

20. Rule 40(6) ought to be read together with Rule 40(8), which deals with circumstances where no affidavit of protest is filed. The said provision allows the court to dispose of the application without the attendance of the parties where it has received a consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled. This sub rule envisions that all the survivors of the deceased sign a consent to support the confirmation application before the same can be allowed in cases where there is no protest.

21. I have scrupulously perused through the file of papers before me to satisfy myself that there was compliance with Rule 40(8) with respect to there being a consent duly signed by all the survivors of the deceased in Form 37, and I have not come across one. This is case where there was no protest filed, and therefore it fell squarely within Rule 40(8), Form 37 ought to have been signed by all. There was clearly no compliance with Rule 40(8).

22. Then there is Rule 41 of the Probate and Administration Rules. It deals with the actual hearing of the application for confirmation for grant. The language of Rule 41(1) suggests that the grant, the application, the supporting affidavits and the protest affidavits ought to be read to the administrator applicants, any

protestors and 'any other person interested.' This would mean that all those interested in the estate ought to be notified of the hearing in order that they may be present when the grant is being confirmed, so that they can raise any issues of concern to them.

23. The record of 19th May 1995 indicates that apart from counsel for the administrators, there was no attendance by any other person, including the applicants herein. There is nothing on record to indicate that they had been notified of the hearing. They ought to have been so notified in compliance with Rule 41(1) of the Probate and Administration Rules.

24. For the purpose of being able to exercise discretion under section 71(2) (a) of the Act, the court needed to be satisfied that Rules 7(7), 40(6) (8) and 41(1) of the Probate and Administration Rules had been complied with. These provisions had not been complied with. The court proceeded to confirm the grant despite the non-compliance and the record does not indicate any reasons having been given or recorded for that. It is my view that there are errors on the face of the record to the extent that the grant was confirmed despite those errors. It would also be a sufficient reason for review.

25. The proviso to section 71(2) of the Act states that the court ought not to confirm the grant before it is satisfied as to the identities of the survivors and beneficiaries and their respective shares. The identities of the survivors and their respective shares are to be provided by the administrator applicants. Any person taking out a summons for confirmation of grant ought to take cognizance of this provision, and provided material in the supporting affidavit to satisfy that requirement.

26. The affidavits sworn by the two (2) applicants in support of the application do not fully satisfy what is expected of the administrators by proviso. The affidavit of the first administrator does identify the persons who are beneficially entitled to the estate, but it does not identify or specify the respective shares of those beneficiaries. The only inference to draw from that would be that there was therefore no basis upon which the court could be satisfied as to the respective shares of all the persons beneficially entitled. There could be no way the court could be so satisfied without there being a proposal on how the estate was to be distributed as between all the survivors of the deceased.

27. The second aspect of the proviso is that when confirmed the grant should specify all such persons and their respective shares. The order made on 19th May 1995 made no reference whatsoever to how the estate was to be distributed, and therefore the order confirming the grant did not conform to the latter part of the proviso. In short, the order of 19th May 1995 as crafted did not distribute the estate, and it cannot logically be said to be the basis for the certificate of confirmation of grant dated 19th May 1995. The order of 19th May 1995 as recorded by the court merely confirmed the administrators; it did not distribute the estate. That is another grave error on the face of the record.

28. I need not say more. There is sufficient material upon which the order made on 19th May 1995 ought to be reviewed.

29. An issue has been raised concerning Kikuyu/Kikuyu/805. It is alleged that it was estate property wrongfully, or even fraudulently, transferred to the name of the widow after the deceased died. This property was not listed in the schedule of assets in the petition, nor was it distributed at the alleged confirmation. It is matter that was placed before the Environment and Land Court in ELC No. 1519 of 2014. I note that the Environment and Land Court has referred that case to this court to deal with the issue.

30. Having taken into account all the matters raised I shall dispose of the application dated 3rd December 2014 in the following manner:-

(a) That I do hereby set aside the order made on 19th May 1995 purporting to confirm the grant herein;

(b) That the certificate of confirmation of grant dated 19th May 1995 is hereby cancelled, and

all transactions carried out on its basis are hereby nullified;

(c) That the administrators are hereby directed to file, within thirty (30) days, a fresh application for confirmation of their grant, in which they shall specifically propose distribution of the assets of the estate amongst all the persons beneficially entitled;

(d) That the said application shall be served on all the persons named in the petition as survivors of the deceased, who shall be at liberty to file affidavits in protest to the proposed confirmation of the grant should they be so minded;

(e) That the issue as to whether Kikuyu/Kikuyu/805 is estate property shall be disposed of at the hearing of the confirmation application to be filed in compliance with (c) above;

(f) That the estate comprises of assets situated within Kiambu County, consequently the matter is hereby transferred to the High Court of Kenya at Kiambu for disposal; and

(g) That this being a family matter there shall be no order as to costs.

31. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 26TH DAY OF OCTOBER, 2016.

W. MUSYOKA

JUDGE