REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

IN THE MATTER OF THE ESTATE OF J E D N (DECEASED)

SUCCESSION CAUSE NO. 450 OF 2012

RULING

1. There are two applications for determination, both dated on 18th July 2016 and filed in court on the same date. It is not clear which application was lodged first, but in the court file that by R C A N and F E O N is placed ahead of that by N S O. I shall hereafter refer to the application by R C A N and F E O N as the first application, while that by N S O shall be referred to as the second application.

2. Several orders are sought in the first application. The first one seeks the summoning of the Registrar of Persons to avail to court the personal file of the respondent, N S O; while the second prayer is for stay and variation of the order of 6th February 2014. There are also prayers for the stay, review or setting aside of the orders made on 3rd June 2016; for orders prohibiting the respondent from intermeddling with the estate; and orders to facilitate a speedy trial, justice, justice, equity and fairness. The factual background to the first application is given in the affidavit in support of the application sworn on 12th July 2016 by the second applicant, F E O N. He contends that the family was unaware, prior to the deceased's death, that he had fathered a child out of wedlock. He argues that they had done investigations and established that the respondent lied when he claimed to be a child of the deceased. He alleges that the respondent is in fact a child of M O O and J O O, and it is in that respect that they seek that the Registrar of Persons be compelled to avail certain records in that behalf.

3. The respondent has replied to the first application in a short affidavit sworn on 2nd August 2016. He contends that if the applicants were unhappy with the orders made on 29th January 2014 and 3rd June 2016 they ought to have appealed. In his view, without an appeal against the orders there would be no basis for seeking stay thereof. He accuses the applicants of ignoring court orders.

4. The second application is at the instance of the respondent in the first application, and it has named as respondents the persons who are the applicants in the first application. He seeks that the applicant be allowed to take possession of a named asset of the estate, appointment of estate management companies to manage estate assets, an order for accounts, and inclusion of the applicant in the petition for letters as a co-petitioner. The grounds upon which the second application is premised are set out on the face of the said application. It is argued that the applicant had been adjudged, in a ruling delivered on 3rd June 2016, to be a child of the deceased, that the estate was being exposed to wanton destruction by the respondents, that the respondents were fraudulently engaged in transferring capital assets of the estate so as to disinherit the applicant and that they had taken control of the estate to his inclusion. In the affidavit in support, the applicant has deposed to facts that are geared at supporting his grounds. He states that the respondents have clearly indicated that they have no intention of complying with court orders, and are doing everything to delay the finalization of the matter. He accuses them of wanton destruction of the estate, and has attached documents to the affidavit in support of that contention.

5. The response to the second application is through an affidavit sworn by the second respondent on 10th August 2016. He continues to assert that the applicant is not a child of the deceased, and has failed to establish paternity, and is therefore not entitled to occupy the property of the deceased. He denies that assets have been fraudulently transferred by them.

6. Directions were given on 27th July 2016 that the two applications be disposed of by way of written submissions. In compliance thereof both sides of the dispute have filed their respective written submissions. I have gone through the said written submissions and noted the arguments made therein by the parties. I shall determine the two applications sequentially, starting with the first application.

7. Prayers 2 and 3 of the first application can be dealt with together. The applicants would like to have the order made on 29th January 2014 for a deoxyribonucleic acid (DNA) test to be stayed and varied, and in its place the Registrar of Persons to be summoned to avail court records relating to the respondent. I suppose such records would relate to the parentage or paternity of the respondent. The material placed before the Registrar of Persons do purport to disclose the parents of the person applying to registration for the purpose of a national identity card. However, such records do not determine with finality the biological parentage of the applicant, and in particular with regard to paternity. The conduct of a DNA test is the most scientific way of establishing paternity. Whatever records the Registrar of Persons may hold and produce on the parentage of the respondent cannot override the results of a DNA test on paternity. There would be no basis for abandoning the path to a more scientific determination of paternity for a non-scientific one. In any event there is a valid court order on conduct of a DNA test. That order has not been appealed against, and there is no order of a higher court reversing it. The applicants have not sought review of the order, which is a process that the Probate and Administration Rules allows through Rule 63. They have applied for variation and stay of the order. However, neither coherent grounds nor reasons have been advanced for the variation and stay sought. No explanation has been given by the applicants as to why the court should adopt a non-scientific approach to determining a paternity over the more accurate scientific one.

8. Prayer 4 is related to prayers 2 and 3 in that it seeks review or rescission or variation of orders that were made on 3rd June 2016. The said orders germinated from the non-compliance by the second applicant with the orders of 29th January 2014. The foundation of those orders is that there was a determined effort by the second applicant not to submit to a DNA test, which could only be construed to mean that the applicants rued the test, leaving the court to make the rebuttable presumption that the respondent was indeed a child of the deceased.

9. The applicants invite the court to review that conclusion and or to vary it or to set it aside. Review of orders of a probate court is permissible under Rule 63 of the Probate and Administration Rules. That Rule adopts the process under the Civil Procedure Rules. Review is allowed where it is demonstrated that there was an error on the face of the record, or that the applicants had discovered a new and important matter of evidence that was not available as at the date the order was made, or that there was some other sufficient reason for review. It has not been argued before me that there was an error apparent on the face of the record as pertains to the order of 3rd June 2016. No effort was made to demonstrate that the applicants had discovered a new and important matter of evidence which was not available when the order of 3rd June 2016 was made. Neither was it demonstrated that there was any other sufficient reason for reviewing that order.

10. Should the order be rescinded or set aside? The probate legislation does not provide for setting aside of orders made in probate proceedings. However, the court does have inherent power and can, in appropriate cases, set aside or rescind its orders. The principles for so doing are to be gleaned from the civil process. The decisions in *Jesse Kimani vs. McConnell and another* (1966) EA 547, *Mbogo and another vs. Shah* (1968) EA 93 and *Girado vs. Alam & Sons (U) Ltd* (1971) EA 448 all point to the court's discretion to set aside its orders being unfettered. However, it would appear from these decisions that the discretion to set aside should be founded on procedural defaults by the applicant rather than on errors on the part of the court. The discretion appears to be available only where a party who was bound to take a certain step in the proceedings fails to and an order is made in default. It has not been

demonstrated that that was the scenario here. The court has not been invited to set aside the order on the grounds that the applicants had failed to take some step which then led to an order being made against them in default. It would appear there is no basis for considering setting aside the order in question.

11. The court is further invited to prohibit the respondent from interfering with the estate. I have carefully and scrupulously gone through the affidavit sworn by the second applicant in support of the application, and I have not seen any averments to support this prayer. It is no alleged that the respondent is interfering with the estate in any way, and no material has been placed before me of any such interference. Court orders ought not to be made in vain.

12. Regarding the second application, the court is invited in prayer 2 to order that the applicant be allowed to occupy and take possession of one of the assets of the estate. Making such an order would amount to partially confirming a grant or representation. Is possible to partially confirm grant at this stage? I do not think so. I have carefully perused through the record and noted that a full grant of representation is yet to be made in the cause. The petition was gazetted and a notice of objection was filed and the matter rested at that point. The respondents to the second application hold a grant *ad colligenda bona*, limited to collection and preservation of the estate. Such a limited grant does not carry with it the power to distribute the estate, and therefore it is not available for confirmation so as to pave way for distribution of any sort.

13. Prayer 3 of the application seeks appointment of estate management firms to manage the estate. I note that the court, as indicated above, has already appointed the respondents temporary administrators of the estate with the limited mandate to collect and preserve the estate. Appointing estate agents at this stage would be to defeat the appointment of the temporary administrators, yet that should only be done through a revocation of the grant. It is of course permissible to appoint agents to manage certain assets, but not the entire estate. Agents are only appointed in cases where specific expertise is required to manage certain assets. Prayer 3 does not invite me to appoint agents to manage certain assets, and, in my view, a proper case has not been made out for such appointment.

14. The applicant asks the court in prayer 4 to order the respondents, as the holders of the grant *ad colligenda bona*, to account for their administration of the estate from 4th February 2012 to July 2016. Administrators, whether holding a full or limited grant, are in fiduciary position with regard to the estate and the assets they manage. They hold the assets in trust. They are bound to account as trustees as required of them by the Trustee Act, Cap 167, Laws of Kenya, and the Law of Succession Act, Cap 160, Laws of Kenya. Giving an account is a statutory requirement. The administrators are appointees of the court, so they must account to the appointing authority of their management of the estate. They hold the property for the benefit of others, be they survivors or beneficiaries or creditors, they must account to them of their handling of the property that they are managing on their behalf.

15. The final prayer is that the applicant be made a co-petitioner in the pending petition for appointment of administrators. The process of appointment of administrators is set out in Law of Succession Act and the Probate and Administration Rules. There is no provision in that law that grants power to the court to make an order in the nature of prayer 5 of the application. A person who is not one of petitioners in an application for grant of representation and who desires to be appointed as such ought to comply with sections 68 and 69 of the Law of Succession Act and Rule 17 of the Probate and Administration Rules. He should file an objection, an answer to the petition and a cross-petition. I do note from the record that the applicant has filed notice of an objection in compliance with the above, but I have not encountered any answer by him to the petition, nor is there in the record before me a copy of a cross-application for grant. Rather than ask the court to make him a co-petitioner, the applicant should strive to comply fully with sections 68 and 69 of the Law of Succession Act and Rule 17 of the Probate and Administration Rules, so that there after the court can give directions on the conduct of the objection proceedings to determine whether he is entitled to appointment as administrator.

16. Taking everything into account, I will make the following final orders:

a. **That the first application dated 18th July 2016 is dismissed in its entirety;**

b. That the second application dated 18th July 2016 is allowed to the limited extent of its prayer 4, with the direction that the holders of the grant *ad colligenda bona* made on 5th April 2003 shall file the said account within thirty (30) days of this order;

c. That to move the matter forward, N S O shall, in the next fourteen (14) days of the delivery of this ruling, file and serve his answer to the petition on record and a cross-petition;

d. That the matter shall be mentioned after thirty (30) days for compliance with orders (b) and (c) above, and to give directions on the disposal of the objection proceedings; and

e. That there shall be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 25TH DAY OF NOVEMBER, 2016.

W. MUSYOKA

JUDGE