



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

P & A CAUSE NO. 60 OF 2001.

NYANDUKO MAOKA MOGAKA ::::::::::::::::::::::::::::::::::::::: DECEASED

AND

PHILIPH MAOKA MOGAKA ::::::::::::::::::::::::::::::::::::::: PETITIONER

RULING

1. The late **Philip Maoka Mogaka**, was the surviving husband of the late Nyanduko Mauka Mogaka, who passed away on 7th November, 1992 after which he (Philip) made the necessary application for grant of letters of administration intestate respecting the estate of the said Nyanduko, comprising of a parcel of land described as Goseta farm ltd measuring eight (8) acres.

George N. Bundi and **Bickford Bundi**, grandsons of the deceased Nyanduko opposed the application and cross-petitioned for the same grant. They were apparently not included as beneficiaries in the main application which included as beneficiaries the daughters of the deceased Nyanduko i.e. **Alice Bonareri Birimo**, **Elizabeth M. Birimo** and **Pamela Kemuma Bundi**. They (objectors) claimed a share of the estate property on grounds that it was purchased by their late father, Charles Francis Bundi, only son to Nyanduko who therefore held the property in trust of the estate of their late father.

2. After a protracted hearing of the objection, the court in its judgment or ruling dated 29th July, 2011, ordered that the letters of administration respecting the estate of the late Nyanduko Mauka Mogaka be issued to the late Philip Maoga (sic) Mogaka and that the estate property being land parcel **No. Kwanza/Namanjalala/Goseta/103**, be shared equally between the petitioner, her three daughters and the objectors for the estate of the late Francis Bundi.

However, before the confirmation of the grant and the distribution of the estate as ordered by the court, the petitioner (Philip Maoga Mogaka) passed away on the 31st May, 2012. His three daughters filed a consent dated 29th July, 2013 in which they agreed to have the name of their late father substituted for that of Alice Bonareri Birimo, as the administrator of the estate.

Instructively, the consent of the objectors as representatives of the estate of the Late Charles Francis Bundi was apparently not sought or was omitted for purposes of the substitution which was formally made vide the chamber summons dated 29th July, 2013.

The application was made pursuant to section 47 of the Law of Succession Act and Rules 49 and 73 of the Probate and Administration Rules. It was based on the grounds contained in the chamber summons as supported by the averments contained in the affidavit dated 29th July, 2013 deponed by Alice Bonareri Birimo.

The application was granted by this court on the 10th October, 2013 and a fresh grant in the name of Alice Bonareri Birimo, was issued on that date.

3. On the 10th March, 2014, Alice Bonareri Birimo, filed an application for confirmation of the grant dated 24th February, 2014 and this was opposed by the objectors through their application dated 20th May, 2014 seeking orders that the application by Alice dated 24th February, 2014, be held in abeyance, that the order made by this court on 10th October, 2013, be set aside, that, the grant, issued to Alice be revoked and that the objectors be granted leave to respond to the application for substitution dated 29th July, 2013.

Alice opposed the objector's application on the basis of the facts contained in her replying affidavit dated 17th June, 2014. She also filed a further affidavit dated 24th November, 2014, in support of her previous application dated 29th July, 2013, which is in effect the subject of this ruling after the parties entered a consent on 10th November, 2013 and granting leave to the objectors to respond to the application by Alice dated 29th July, 2013, (i.e. the subject application). Such response was not forthcoming thereby implying that the grounds by the objectors in opposition to the application are those contained in their compromised application dated 20th May, 2014 as confirmed by the oral submissions by their advocate, **Mr. Samba**, at the hearing of the application in which Alice was represented by **Mr. Onyancha**.

4. Having heard arguments from both sides, it is apparent to this court that the basic issue for determination is whether fresh grant of letters of administration should be issued to Alice Bonareri Birimo, following the demise of the previous administrator, Philip Maoge Mogaka, her father and husband to the deceased Nyanduko Maoka Mogaka.

In effect, Alice is asking the court to substitute the name of the late Philip Maoga Mogaka, for her own name as the succeeding administrator for purposes of effecting the distribution of the estate property as per the judgment or ruling of the court made on 29th July, 2011. The application is premised on section 47 of the Law of Succession Act and Rules 49 and 73 of the Probate and Administration Rules.

5. Section 47 of the Law of Succession Act gives this court jurisdiction to entertain any application and determine any dispute under the Act while rule 49 of the Probate and Administration Rules provides for the procedure applicable in making applications relating to the estate of a deceased person for which there is no specific provision.

Rule 73 of the Rules provide for 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 Court Process.

Herein, it is evidently clear that the late administrator Philip M. Mogaka, passed away before confirmation of the grant issued to him vide the judgment of the court dated 29th July, 2011 which arose after the hearing of an objection raised by the current objectors George Bundi and Bickford Bundi together with their mother Mary Nyamoita Bundi who did not actively participate in the objection proceedings.

In the same judgment, the court ordered that the estate property i.e. land parcel No. Kwanza/Namanjalala/Goseta/103 be shared equally between the estate of the late Francis Bundi represented by the three objectors, the late petitioner/administrator and his three daughters Alice, Elizabeth and Pamela.

6. It was therefore expected that the late administrator would equally divide the estate property for his own benefit, that of his three daughters and that of the estate of the late Francis Bundi represented herein by George N. Bundi and Bickford Bundi.

But, the late administrator passed on before he could implement the distribution order made by the court. This necessitated that any of the surviving beneficiaries be appointed as a successor to the late administrator so as to commence and complete the process of distribution of the estate property and hence, the formal confirmation of the grant.

Alice Bonareri Birimo, appeared to have been the preferred successor of their late father as demonstrated by the consent of her two sisters Elizabeth and Pamela in letting her make the present application for necessary substitution and issue of a fresh grant in her name. She and her sisters together with the estate of the late Francis Bundi, are the current surviving beneficiaries of the estate of the late Nyanduko. It was therefore necessary for the consent of the estate of the late Francis Bundi to be obtained prior to Alice making the present application.

7. The actual representative of the estate of the late Bundi is apparently the first objector to this application i.e. George Bundi, and just as the consent of Pamela was sought by Alice in making this application, his consent ought to have been sought and granted prior to the prosecution of the application if only to ensure and guarantee the rights of his father's estate in the estate of the deceased Nyanduko.

In his reply to this application, George Bundi, introduces issues and property which were not subject in the proceedings which culminated in the judgment or ruling of the court made on 29th July, 2011 which was specific in so far as it related to the estate property known as Kwanza/Namanjalala Block 1/Goseta 103. Those issues and property are irrelevant for the purpose of this application.

And while the application is evidently made in good faith and intended to cover the void in the administration and/or distribution of the estate of the deceased occasioned by the death of the previous administrator, it would be fair and just and in the interest of all beneficiaries that Alice Bonareri Birimo succeeds the late administrator but that the representative of the estate of the late Francis Bundi (i.e. the first objector, George Bundi) be co-opted as a second administrator to ensure that equal distribution of the material estate is achieved in terms of the ruling of the court made on 29th July, 2011.

For the avoidance of doubt, the “**material estate**” means and includes the parcel of land known as Kwanza/Namanjalala Block 1/Goseta/103 within the County of Trans Nzoia.

A fresh grant may issue in the names of Alice Bonareri Birimo and George Nyakora Bundi as joint administrators and may be confirmed prior to the expiry of the prescribed period (i.e. six (6) months).

Ordered accordingly.

[Read and signed this 17th day of February, 2015]

J.R. KARANJA.

JUDGE.