



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 651 OF 2012

TERESIA WANJIKU WAINAINA.....1ST APPLICANT

MARTIN MUIRURI WAINAINA.....2ND APPLICANT

VERSUS

DORCAS NYOKABI NYOKABI1ST RESPONDENT

JULIUS KAMAU WAINAINA.....2ND RESPONDENT

EVA WANJIKU WAINAINA3rd RESPONDENT

RULING

1. Samuel Wainaina Muiruri, the deceased to whose estate these proceedings relate died on 15th November 2011. He was survived by one widow Teresia Wanjiku Wainaina and nine children. Vide an application dated 29th March 2012 the widow cited Dorcas Nyokabi Wainaina, Julius Kamau Wainaina and Eva Wanjiku Wainaina as being unwilling to consent to Teresia Wanjiku Wainaina and Martin Muiruri Wainaina applying for grant of letters of administration. On 24/4/2012 Teresia and Martin applied for grant of letters of administration and gazetted on 27/7/2012. Subsequently on 22/6/2012 Dorcas Nyokabi Wainaina, Julius Kamau Wainaina and Eva Wanjiku Wainaina objected to the making of the said grant and it was during this time that it emerged that there were two succession causes in respect of the administration of his estate HCCC 651/12 and 871/2012 and the two were consolidated. On 28th July 2014 Justice L. Kimaru appointed Teresia Wainaina and Dorcas Wainaina as administrators of the deceased's estate. Vide an application dated 18/9/2014 Teresia wanjiku Wainaina sought revocation of the grant as the same had become inoperative due to the hostility between her and the co-administrator Dorcas Nyokabi Wainaina. This court on 6th February 2015 revoked the said grant ordered a fresh grant to be issued to Teresia Wanjiku Wainaina and Eva Wanjiku Wainaina to substitute Dorcas as the co-administrator to the deceased's estate. On 10th February 2015 the Court directed the administrators to apply for confirmation of the grant with proposals of the mode of distribution of the estate within 30 days.
2. The application the subject of this ruling is dated 23/1/2015. The applicant sought the issuance of a limited grant for the purposes of withdrawing a sum of Kshs. 5,063,460/- or such other amounts as the court may deem reasonable from deceased's bank a/c no.2022816872 (held with Barclays of Kenya) to cater for college fees for the children of the deceased namely;

- i. Eva Wanjiru Wainaina
- ii. Rose Alison Wainaina
- iii. Brian Wainaina
- iv. Mercy Wainaina

3. The application is grounded on grounds that the Court on 16th December 2014 ordered the petitioners to pay school fees for Eva Wanjiru Wainaina that though willing to comply there is no sufficient funds to comply due to unavailability of funds and that there are other school going children who need school fees and deceased's Barclays Bank account No. 2022816872.

4. Teresia Wanjiku Wainaina the applicant filed an affidavit in support of her application. She depones that she was unable to comply with the order of this court given on 16th December 2014 due to lack of funds adding that the deceased's Barclays Bank account has sufficient funds to cater to the education of the deceased's children. That in addition to Eva Wanjiru Wainaina, 3 more of the deceased's children namely Brian Wainaina, Mercy N. Wainaina and Rose Alison Wainaina are also in urgent need for fees and it is in the interest of justice that funds from the above mentioned account be made available to enable her comply with the said court order. She further urged the court to allow access into the said account to make a lump sum withdrawal of Kenya shillings Kshs. 5,063,460/- for the following;

- i. Eva Wanjiru Wainaina Kshs. 300,000/-
- ii. Rose Alison Wainaina 11,400 Pound Sterling
- iii. Brian Wainaina 13,360 US Dollar
- iv. Mercy N. Wainaina 21,834 US Dollar.

5. Eva Wanjiru in her affidavit dated 27th February 2015, the co-administrator to the deceased's estate states that the application is aimed at frustrating the application dated 11th February 2014 and the amounts sought are only meant to make sure that all available funds in the deceased's estate are depleted so that nothing is there to pay her fees or distribution in terms of money between the two families. She further points out that the applicant has not accounted for the rental income she has been collecting since her father died in 2011. That the applicant has not availed proof that the deceased's account has the funds to for the exorbitant fees and urges the Court to compel her to adduce evidence on the same by adducing bank statements from the date the deceased passed away to-date. That request for fees for Rose Alison, Brian and Mercy is not made in good faith as Rose Alison who has been in the UK from 2006 studying Pharmacy graduated in 2014 and any other pursuit of further education and school fees is therefore not genuine nor a necessity. That Mercy Wainaina who studied at Argsoy University in USA also graduated on 4th November 2012 she has benefited from the estate and should at least allow her get her first degree. That Mercy Wainaina has already obtained 2 degrees, she can now stand on her own or meet the expenses herself. That Brian got a scholarship by Boeing to study aeronautic engineering and his fees is therefore out rightly not sincerely and is only calculated to defraud the estate to reap from the deceased estate selfishly adding that the annexure by the applicant was not evidence of admission. She claimed that it was absurd for the applicant to raise such an application whilst being in control of the estate that generates millions of shillings per month claiming that that could only imply that either the applicant is living beyond her means or is squandering the estate. That whilst seeking exorbitant monies for fees she and her siblings are in dire need of basic needs like food, shelter and that though her and her siblings wish to pursue education they lack financial means to do so until the estate is distributed. That is only fair that the applicant gives account of all the rental income she has collected since the demise of the deceased on L. R. No. 209/1534 and L.R. 209/1536, L. R. 209/1537 and L. R. 209/1538 from the date of the death of deceased 15th November 2011 to date and all business income from the estate's businesses. That Dorcas had gone beyond her means to provide for Julius and her in terms of food and accommodation since the applicant chased them from Muthaiga and saw no relevance of contribution to the deceased's estate vis a vis wasting the estate in lavish life of flights to the UK and USA whilst leaving the dependants hungry in dire need of shelter and fees. She avers that there is no urgency in the application for school fees for people who have already graduated before whilst she and Julius

have not been to school. That the applicant forgets that she in control of 2 families but has used it to benefit only her family and fails to realize that Dorcas and Julius want to have the best. She avers that it would be unfair to have the estate pay their fees and should they feel they want to persue education to the highest level they should do so with their share of the estate. She urged the court to dismiss the applicant's application.

6. The matter came for hearing on 3rd March 2015. Miss Ontiti, argued that the applicant was seeking access to the deceased's Barclays Bank account to pay the children's school fees. She further informed the court that Kshs. 76,000/- was paid to Methodist Kenya University as Eva's school fees and she was given the remaining Kshs.24,000/-. She argued that the fees is necessary and referred the court to the annexed fee structures and that it was not in dispute that the children are going to college. That section 76 and 26 allows for reasonable provisions to be made for children's education. That that funds being sought for Rose are not to support her extravagant lifestyle but to complete her education. She directed the Court to look at Brian's fee structure adding that there was double standards. That Mercy has completed her master's degree and is being admitted to the doctorate degree. Though Brian has been admitted to the University there was no proof of scholarship. That the deceased passed on in 2011 and at the time still supported his children.
7. Mr. Ngurigo for Martin Waniaina supported the applicant's application and stated that the 3 beneficiaries the subject of this application is people in a far away land and that they are in financial distress.
8. That the respondent opposed the application noting that the order in the application as is worded was in regards to Eva only and not the other children. That there is money from rental income collected from 2011 which can be utilized to pay school fees of 5 million for the other children and that she should be given on account of what has been allocated for 2011. That the applicant has not proved that she failed to comply with the court order due to lack of funds. She added that the picture of Rose was taken during her graduation adding that Kshs. 1.7 million for masters is high and exorbitant as the other family members are entitled to a share in the estate. That this was the second payment for Eva had she not paid the fees she would be deregistered adding that a master's can be deferred. That Mercy has graduated twice and should give a chance to the others and has been in the USA for over 15 years and can get a job to fend for herself. On Brian she stated that he seeks about 2 million and his application is not merited as he is on scholarship and the applicant is selfish and is calculated to defraud the estate. That there was no urgency for withdrawing Kshs. 5 million. It was further stated that the respondents have been kicked out of the Muthaiga property, adding that there are 2 houses, they have no jobs, and Dorcas houses them as the estate is being squandered. That what the respondents are seeking money for daily needs while Kshs.300,000/- is reasonable. That the issue of Dorcas marriage does not make her illegible and her children are adults who are adults and self dependant. That the other family lives from hand to mouth. That the applicant's should wait for the estate to be distributed. The other family is in their second degrees. On issue of double standards it was argued Eva's fees have been pending since 2012 and was only paid 2 days earlier.
9. I note that the supplementary affidavit by Teressia Wanjiku Wainaina is undated. The Oaths and Statutory Declaration Act at section 5 states;

“Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly the jurant or attestation at what place and on what date the oath or affidavit is taken is made”

These are mandatory provisions. There is no discretion for this court to vary these provisions as these are statutory provisions with regard to what constitutes a valid disposition to matters before court. The omission to indicate the date of swearing of the affidavit attached to the application before court renders the same defective and is struck out.

10. I have considered what has been deponed, submitted and attached as annexures. As relates to

Rose Wainaina there is the annexed document TWW 2(a) which is a letter of offer for Rose Wainaina to attend a master's in Pharmaceutical Science in January 2015. The documents annexed pertaining to Brian Wainaina just shows various charges but does not amount to a fee structure as such or an admission letter for the said course of aeronautical Engineering course. In regards to Mercy Wainaina the email dated 12th January 2015 does not give the name of institution, no letter head the same just gives figures for the doctorial course. The applicant's children have been studying abroad some even before the deceased's demise. It is not disputed that the deceased paid for the children school fees. Eva is also a daughter to the deceased and a dependant of the deceased estate. She is currently pursuing her 1st degree and it had taken almost 2 years before the applicant could pay school fees for her. The applicant's children Rose Wainaina intends to pursue masters in Pharmaceutical science, while Mercy intends to persue a Doctorate. The two as at the time of filing this application had not begun the said courses and I find no urgency in the said application. Further no prejudice would be caused to them if they said funds are not released to pay the said fees. In regards to Brian no fee structure has been tendered before this court to prove the amount of fees he pays per semester if any. Eva is pursuing her 1st degree and as such is more deserving of the funds to pay her school fees. The applicants shall continue to pay Eva's fees as and when the same falls due. In my view the applicant has failed to demonstrate to this court that she is entitled to the limited grant for purposes of withdrawing the sum of Kshs. 5,063,460/- or any amount from the Barclays bank account.

11. The respondent has raised issue on the accountability of funds generated by the deceased's estate. The applicant though acknowledges that the deceased's estate generates income claims that the same is not enough to pay the children's fees as some of the funds she claims is used to pay off loans that were subsisting when the deceased died. On the other hand the respondent claims that the rental income from the said estate together with income from other deceased's businesses runs into millions. Section 83 of Law of Succession Act, Cap 160 provides for the duties of the personal representatives, one of the duties at 83(h) is ***“to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;”***

12. I have considered what has been deposed by the parties and their current relationship and I find that it is only just and fair that the administrators having control of the deceased's estate to jointly procure the services of an accountant to prepare an inventory of assets and liabilities and render a true and accurate account of the income generated from the deceased's estate and dealings of the same to dispel the allegations that the funds generated therein are being mismanaged by the applicant within 45 days from the date of this ruling. The administrators shall file for confirmation of grant noting therein the preferred mode of the distribution of the estate of deceased. Cost shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 26th day of March 2015.

R. E. OUGO

JUDGE

In the presence of:-

.....**For the Applicants**

.....**For the Respondents**

.....**Court Clerk**