



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 3403 OF 2005
IN THE ESTATE OF DAVID KYULI KAINDI (DECEASED)

RULING

1. These proceedings relate to the estate of David Kyuli Kaindi. He died testate on 17th December 2004, having made a will on 17th March 1987.
2. Representation to the estate was sought by the executor named in the will, Muvisi Kyuli, by a petition lodged in court on 13th December 2005. A grant of probate of the written will was made to him on 12th April 2006. The executor applied for confirmation of the grant by a summons dated 15th December 2010. The application was allowed and the grant confirmed on 14th February 2011. A certificate of confirmation of grant of even date issued stating that the estate was to devolve as per the will of the deceased dated 17th March 1987.
3. The application before me for determination is the summons dated 7th February 2014, brought under rule 73 of the Probate and Administration Rules. It is brought at the instance of Anne Amanga Nthale, widow of one of the beneficiaries under the will of the deceased, together with her son, David Kyuli Nthale. They seek orders that the executor be compelled to complete execution of the will of the deceased in relation to the properties bequeathed to her dead husband, Nthale Kyuli.
4. The grounds upon which the application is predicated are set out on the face of it. The facts on which it is premised are deposed in the affidavit of the first applicant, Anne Amanga Nthale.
5. The applicants' case is that the deceased herein had died testate, leaving a will where their immediate relative, Nthale Kyuli, whose estate they are the administrators, was named a beneficiary and several properties bequeathed to him. They state that the grant has been confirmed but to date the properties bequeathed to Nthale Kyuli have not yet been vested in the estate of the latter. They mention that certain assets of the estate have been alienated by way of sale by some of the beneficiaries. She has attached agreements of sale in respect of LR No. 12715/280 and LR No. 44643, where Steve Kaindi Kyuli, John Nthale Kyuli and Christopher Muinde Kyuli sold the assets to third parties in 2010.
6. The executor replied to the application *vide* an affidavit sworn on 17th March 2014. He explains that the 300 acres bequeathed to Nthale Kyuli out of Nzii Farm cannot be transferred to the estate of the deceased for the title of the property is still in the name of Nzii Farm Co. Ltd. Regarding, LR No. 209/136/13, he states that he is aware that the applicants have sold their ½ share to a third party, Stanley Maina Mugethya Gathiuta, who he has sued for intermeddling. He avers that the said property is still in the name of the deceased and has not been transferred. He states further that he does not have possession of title documents relating to plot No. 104 Matuu Market, the plot

at Nunga Market and the shares in Jogoo Shoe Polish Company Ltd. He explains that the shares in Wendano/Matuu Farmers Co. Ltd are non-existent as the land belonging to the company was sold over bank debts. The motor vehicles are said to be still lying at the deceased's home at Lavington, Nairobi, but Nthale Kyule is said to have taken one vehicle, registration mark and number KNX 524. He says the livestock was distributed and Nthale Kyuli got his share thereof. He states, regarding shares in Tana Ranch Farm, that the same cannot be given out as the title is still in the name of Matungulu Farmers Co. Ltd. He explains that it would be premature for the estate of Nthale Kyuli to pursue their share of the gifts made to their late mother, Koki Kyuli, for representation is yet to be sought regarding her estate. He states that the bank accounts of the deceased had no balances and therefore there was nothing to be distributed.

7. The applicants replied to the averments made in the affidavit of the executor of 17th March 2014 through an affidavit sworn on 4th July 2014 by the first applicant. She contests the claim that the deceased's share in Nzii Farm could not be distributed by stating that the farm had been subdivided and title deeds issued out of Ndithini/Mananja/Block 7 in the executor's name. Copies of official searches are attached to her affidavit to attest to that fact. The executor is accused of lying when he says that the 300 acres due to Nthale Kyuli out of Nzii Farm could not be transferred to his estate. He is accused of having had some of the titles in Ndithini/Mananja/Block 7 registered in the names of strangers. She concedes to have sold the share of her husband in LR No. 209/136/13 for the maintenance of herself and her children. On the motor vehicles, she accuses the executor of having sold some of the motor vehicles.
8. The respondent replied to the applicants averments *vide* his affidavit sworn on 27th August 2014. He states in the affidavit that the late Nthale Kyuli's share of Nzii Farm should come out of Ndithini/Mananja/Block 7/21 and 40, but the same has been delayed by non-payment of surveyor's fees by the applicants. He concedes to have sold the motor vehicles KNX 524 and KAH 733H, but says the proceeds of sale were shared equally among the beneficiaries including the husband of the first applicant.
9. I directed on 29th October 2014 that the application be disposed of by way of written submissions. Following those directions both sides filed written submissions. The applicants' submissions are dated 2nd December 2014 and were filed in court the same day, while the respondent's submissions are dated 11th December 2014 and were filed in court the same day.
10. In their submissions, the applicants cite Section 83(g) of the Law of Succession Act to advance their case that the executor has overly delayed the distribution of the estate for under that provision distribution should have been completed six (6) months after confirmation of the grant. They underline the fact that the beneficiaries under the will are satisfied with the bequests made to them and there cannot be any lawful excuse for the failure so far to have the bequests vested in their respective names.
11. In his submissions, the executor accuses the first applicant of intermeddling and cites Section 45 of the Law of Succession Act to assert that fact. He also mentions what he alleges to be disputes in the estate of the first applicant's husband. He pleads for more time, saying that there are continuing trusts that prevent him from completing administration.
12. I have noted from the record that the validity of the will executed on 17th March 1987 has never been contested. I have noted too that the adequacy or otherwise of the bequests to the beneficiaries named in the will has never been called to question.
13. The grant herein was made on 12th April 2006. It was not confirmed until 14th February 2011, yet under Section 71 of the Law of Succession Act the same ought to have been confirmed after expiration of six (6) months or such shorter period as the court may allow. The application for confirmation of grant was filed in court on 15th December 2010; this was four (4) years after the six (6) months envisaged in Section 71 had expired. No explanation was proffered for the

inordinate delay in the seeking of the confirmation of the grant.

14. One of the duties imposed on personal representatives by Section 83 of the Law of Succession Act is that to complete administration within a stated timeline. Section 83(g) states-

“Personal representatives shall have the following duties ... within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration.”

15. Section 83 is in mandatory terms. It creates statutory obligations. Under (g) there is a statutory obligation on personal representatives to complete administration of estates within six (6) months after they obtain confirmation of the grants they hold. It is a command that the personal representatives must respect and comply with. It leaves them with no option, except that in cases of difficulty they can approach the court for extension of time. This rule is of critical importance. Firstly, to the economy, for it ensures that assets are released to circulation at the earliest possible time, and thereby avoid instances of property being tied down in administration for long periods of time to the detriment of the national economy. Secondly, to the beneficiaries, for it places property in their hands for their own maintenance and support.

16. In the instant case, the grant herein was confirmed on 14th February 2011. Going by the provision in Section 83(g), administration should have been completed by 14th August 2011. This means that the executor ought by 14th August 2011 to have had all the bequests vested in the beneficiaries and all the assets distributed, except where trusts of one kind or the other were created.

17. What emerges from the material placed before me in the application dated 7th February 2014 is a picture of failure on the part of the executor to discharge his statutory mandate as a personal representative appointed under the Law of Succession Act. It is plain that Section 83(g) of the Act has not been complied with. It would appear that none of the estate assets has not been distributed, four (4) years after the grant herein was confirmed on 14th April 2011. What is more, the executor has not gone back to court to obtain extension of the period within which he should have completed administration.

18. The most potent remedy in the hands of a beneficiary is that of calling personal representatives to account. Beneficiaries who are not personal representatives have no control over the estate. The property of the deceased does not vest in them. They have no power over it; neither do they have any obligations with respect to it. When aggrieved by the manner the estate is being run their remedy lies in seeking accounts from the personal representatives, and, in extreme cases of maladministration and misconduct by the personal representatives, in applying for revocation of the grant.

19. The obligation to account is tied up with the fact that personal representatives are also trustees. They are defined as such in the Trustee Act, Cap 167, Laws of Kenya, at Section 2. This is so as property belonging to another vests in them in their capacity as personal representatives, and they hold the same for the benefit of others – beneficiaries, heirs, dependants, survivors, creditors, among others. They stand in a fiduciary position in relation to the property and the beneficiaries. As they hold the property for the benefit of others or on behalf of others – they stand to account to the persons for whose benefit or on whose behalf they hold the property. It is an equitable duty and a statutory obligation.

20. The application dated 7th February 2014 is a classic beneficiary's suit calling upon a personal representative to account. The deceased died in 2004, representation was obtained in 2006 and the grant confirmed in 2011. Under the law, specifically Section 83(g) of the Law of Succession Act,

the administration of an estate should not take more than one year. In this case the deceased died testate, the executor's office became effective on death in 2004. It is now 2015, yet the executor has not completed administration of the estate. The applicants no doubt have a valid reason to raise concerns and to call the executor to account to court and to them for his administration of the estate.

21. Looking at the affidavit sworn by the executor on 17th March 2014, I am persuaded that he has not made any effort to account for his administration. Indeed, he does not even appear to appreciate that he is obliged to account to court and to the beneficiaries as and when questions are raised about his work. One would have expected that he would have sought to explain what he has done so far in terms of getting the bequests in favour of the late Nthale Kyuli vested in his estate, and the challenges that he has faced that are responsible for the inordinate delay in finalization of his administration of the estate.
22. Rather than giving an account he has resorted to being defensive. He accuses the first applicant of intermeddling with the estate of the deceased herein and wasting the estate of her own deceased husband. Yet the application before me is not about the applicants and their conduct in relation to the estate, it is about the executor completing administration by having the legacies and bequests in the will vested in the beneficiaries. If the executor has evidence of misdeeds by the first applicant which warrant action being taken against her by the court, he surely knows what to do.
23. He has also resorted to misleading the court. On the 300 acres out of Nzii Farm bequeathed to Nthale Kyuli, for example, he avers on oath, in his affidavit of 17th March 2014, that the title to the said property was still in the name of the original owner of the farm, Nzii Farm Co. Ltd, and therefore the 300 acres could not be transferred to the estate of the late Nthale Kyuli. When the first applicant in her affidavit of 4th July 2014 presented material to the effect that the executor had been registered on 22nd November 2013 as proprietor of several portions of land hived out of Nzii Farm, and that on 9th December 2013 title deeds had been issued in his name in respect of those portions; he implicitly acknowledged the fact but now blames the first applicant for not paying for survey work to facilitate transfer of the property to her husband's estate. His affidavit of 17th March 2014 was sworn three or so months after the property had been subdivided, portions of it registered in his name and title deeds issued. He was aware of these facts in March 2014 when he swore the affidavit, but he chose to mislead the court into believing that the property was still held in the name of Nzii Farm Co. Ltd.
24. As I have said elsewhere, the office of executor is one of trust. The executor, as personal representative, holds a position of trust. He holds property on behalf of other persons. He is entrusted with the property, that he would take care of it for the benefit of those others. It is a position of confidence. In view of the untruth told by the executor in his affidavit of 17th March 2014 regarding Nzii Farm, one is left to wonder whether he can be trusted, or, put differently, whether one should have confidence in his administration of the estate. I am left wondering whether there is any truth in his averments about the rest of the assets the subject of the application. It gives me a feeling that the executor is being less than candid with the court and the beneficiaries.
25. He gives no account at all about LR No. 209/136/13. The only averment he makes about it is in connection with the alleged intermeddling with it by the first applicant. He does not explain what he has done towards having the said asset vested in the beneficiaries, the difficulties he has faced, if at all, in the process of administration of the asset that has delayed its vesting in the beneficiaries and what remains to be done. Although he accuses the first applicant of intermeddling with the said property, there is no indication whatsoever that the alleged intermeddling has prevented him from causing the property or part thereof to be vested in the estate of Nthale Kyuli. Needless to say that the issue of intermeddling would not have arisen in the first place if the executor had moved timeously to distribute the estate. I dare opine that the alleged intermeddling, if at all there was such intermeddling, was undoubtedly prompted by the frustrations arising from the inordinate

delay in the finalization of administration.

- 26.Regarding Plot No. 104 Matuu, the plot at Nunga market and the shares in Jogoo Shoe Polish Company Ltd, he avers that he does not have the documents of title. I would assume that these assets were registered, either with the lands office or the relevant local authority or the companies' registry. The executor has not sought to demonstrate that he took steps of some kind to obtain proof of ownership of these assets from the relevant authorities so as to facilitate completion of administration. He should have done searches at the relevant registries or exchanged correspondence with the relevant authorities or even sued them if they proved difficult. It is not enough for the executor throw his hands in the air in despair and say that he does not have in his possession the documents of title, he should explain what he has done about it and where matters stand so far as that is concerned.
- 27.He states, regarding the deceased's shares in Wendano Matuu Farmers Co. Ltd, that he knows for a fact that the deceased had shares in that company, but adds that the said shares do not exist anymore because a bank sold the company's land. He has not provided any documentary proof to support what he is alleging. He has not explained what he has done with the knowledge that the deceased had shares in the company. He does not attempt to demonstrate how the disposal of the land belonging to the company renders the shares held in the company non-existent.
- 28.He says the deceased had nine vehicles; being cars, tractors and a lorry. He accounts for one car which he alleges was taken by the husband of the first applicant. He also states that the other eight (8) are still in existence, at the former home of the deceased at Lavington, Nairobi. Motor vehicles are movables. Movable property is easily amenable to depreciation unlike immovable property; and ideally it ought to be disposed of at the earliest possible opportunity. If these motor vehicles are still in existence ten years after the deceased owner died, it begs the question why the executor has allowed them to depreciate or go to waste. He should have accounted or explained why he did not sell them at the earliest chance.
- 29.Regarding the deceased's share in the Tana Ranching Farm, the executor gives a similar explanation as that he gives for Nzii Farm – that the title to the same is still in the name of Matungulu Farmers Co. Ltd and the shareholders have not been given their individual titles. In view of the untruth he has told regarding the 300 acres in Nzii Farm, what he says here should be taken with a pinch of salt. He has not explained the steps he has taken in respect of the said property, the difficulties that he has faced and what needs to be done to advance the interests of the beneficiaries who are entitled to a share in the Tana Ranching Farm. The same should apply to the share in Kyanzavi Farmers Co. Ltd.
- 30.On the bank accounts the executor stated that the said accounts held no funds as at the time of the deceased's death, and therefore there was no money for distribution. Curiously, no documents were exhibited to his affidavit to support this claim. He should have placed documents before court by way of statements of accounts in respect of each bank account as evidence that the accounts held no money; and if they did hold some money, to demonstrate what little money was in those accounts and how it was utilized.
- 31.Going back to Nzii Farm, the executor blames the applicants for failing to pay money meant for surveyor's fees. This accusation is startling, for the applicants are neither the administrators of the estate nor the personal representatives of the deceased. The estate of the deceased does not vest in them as the same vests in the executor of the will as the personal representative of the deceased by virtue of Section 79 of the Law of Succession Act, which, for avoidance of doubt, provides as follows –

'The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and subject to any limitation imposed by the grant, all the property of the estate shall vest in him as personal representative.'

32. By dint of the above provision, as read together with Section 83 of the Act, the applicants, as non-administrator beneficiaries, have no obligation whatsoever to raise funds for the purpose of facilitating survey of the landed assets for distribution purposes. Undertaking survey work and raising funds to pay for such work is part of the administration process. This is a responsibility of the personal representative and not that of the beneficiaries, and the executor in this case should not therefore blame the applicants for his own failures or shortcomings. He should raise the money required for the survey work from the assets of the estate that are vested in him by Section 79 of the Law of Succession Act. The beneficiaries should not have to spend their own resources to aid administration when the estate has resources that can be disposed of to raise funds for such purposes. In any case it should not be their business to administer the estate when there is a substantive personal representative in place.

33. I note that some of the issues raised by the applicants relate to bequests made to Koki Kyuli, the mother of the late Nthale Kyuli. The cause I am seized of concerns the estate of Daniel Kyuli Kaindi, and not Koki Kyuli. The estate of Koki Kyuli is not before me and I cannot therefore address myself to any matter concerning it. More importantly, it has not been demonstrated that the executor is the personal representative of Koki Kyuli, and therefore liable to account for that estate. The property of Koki Kyuli does not vest in him, consequently he is under no obligation to render any account regarding to do with the estate or properties of the said Koki Kyuli.

34. The executor has made a lot play about **Machakos HCSC No. 33 of 2012** and **HC ELC No. 56 of 2014**. These matters are not before me. They have not been consolidated with this cause. I am not seized of them and there is no basis upon which I can or should give consideration to them. In any event, it has not been demonstrated that the pendency of these suits has any bearing on the matter the subject of the application dated 7th February 2014.

35. In the end I find that there is merit in the application dated 7th February 2014 and I hereby grant the same in the following terms:-

- a. **that the executor of the will of the deceased made on 17th March 1987, who is also the personal representative of the deceased herein, is hereby directed to complete execution of the will in relation to the bequests and legacies made therein to the late Nthale Kyuli within ninety (90) days of the date of this ruling;**
- b. **that the executor/personal representative shall in the next thirty (30) days of the date of this ruling render a full and accurate account of his administration of the estate of the deceased from the date of the deceased's death to date, and especially as it relates to the legacies and bequests made in favour of the late Nthale Kyuli;**
- c. **that the matter shall be mentioned after 30 days to confirm compliance with (b) above, and after ninety (90) days to confirm compliance with (a) above;**
- d. **that in default of compliance with the orders in (a) and (b) above, the grant made to the executor on 12th April 2006 shall stand revoked; and**
- e. **that the executor shall bear the costs of the application.**

DATED, SIGNED and DELIVERED at NAIROBI this 31ST DAY OF JULY, 2015.

W. MUSYOKA

JUDGE