REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2120 OF 2005

IN THE MATTER OF THE ESTATE OF SAMUEL WAMBUGU NGUNYI (DECEASED)

RULING

1. On 9th April 2014, Kimaru J directed that written submissions be filed and exchanged in respect of the applications dated 27th February 2014 and 10th February 2013. These are the two applications that should be the subject of this ruling.

2. I have carefully perused the record. I have noted that the application dated 27th February 2014 is in the file before me, the application dated 10th February 2013 is not. I am not able to tell whether any such application was ever filed.

3. Following the directions of 9th April 2014, it would appear that only one party filed written submissions. I am referring to the administrators' submissions dated 17th September 2014 and filed herein on 19th September 2014. The said submissions are on the applications dated 10th December 2012 and 27th February 2014. I have noted however that no directions were given on 9th April 2014 relating to the application dated 10th December 2012.

4. As I have not been able to trace copy of the application dated 10th February 2013, and I do not have before me directions on the application dated 10th December 2012, I shall in this ruling confine myself to the application dated 27th February 2014.

5. The application dated 27th February 2014 seeks several orders relating to the assets that were placed by the court with the administrators in the confirmation proceeding to hold in trust for named beneficiaries.The applicants would like the administrators to render accounts with relation to the said assets and to have the said assets transferred to the beneficiaries.

6. The grounds upon which the application is predicated are set out on the face of the application and on the affidavit in support sworn on 27th February 2014 by the applicant. The applicant states that certain assets had been placed under the charge of the administrators to hold in trust for certain beneficiaries. The said beneficiaries are now of age and would like the property to vest in them rather than being held in trust. They would also like accounts rendered in respect of the assets that are said to be generating income. The administrators are accused of making efforts to sell some of the assets they are holding in trust.
7. The reply to the application is comprised in the affidavit sworn on 17th March 2014 by one of the administrators, Ileen Maitha Wambugu. She seeks to explain the status of the assets the subject of the trust. She describes Plot No. 388 – Noonkopir Trading Centre as her home and says that Plot No. 563 has been grabbed by unknown persons. She explains that Kajiado/Kaputiei North/ 5825

was subdivided into Kajiado/Kaputiei North/11914 and 11917, which were subsequently sold and the proceeds therefrom shared equally among all the beneficiaries.

8. The deceased herein passed away on 13th March 2005. Representation to his estate was granted on 27th February 2006 to Ileen Maitha Wambugu and Faith Njambi Wambugu, his widow and daughter, respectively. The said grant was confirmed on 26th March 2007. The bulk of the estate, that is to say a total of 57 assets, devolved absolutely upon the widow, with only five (5) being held in trust by the administrators on their own behalf and on behalf of the other children: J N W, J M W and S N W

9. It is the assets held in trust that are the basis of the application under consideration. The assets that were to be held in trust were listed as Kajiado/Kaputiei North/11914, Kajiado/Kaputiei North/11917, Kajiado/Kaputiei North/5825, Plots Nos 388 and 563/Residential Noonkopir Trading Centre.

10. The reason for the holding of the property in trust is not explained, but it would appear that the named children were minors at the time of the confirmation of the grant. That is what the applicant avers, which averment has not been contradicted by the respondents. As the children are now of age, the applicant would like the trust terminated and the property distributed.

11. On their part, the administrators aver that Kajiado/Kaputiei North/5825 on the one hand and Kajiado/Kaputiei North 1194 and 11917 on the other are actually one and the same asset. The assets do not exist anymore for they are said to have been sold and the proceeds shared equally amongst the beneficiaries. That raises several questions. Why then did the administrators present Kajiado/Kaputiei North/5825 as if it was a separate property from Kajiado/Kaputiei North/11914 and 11917? The administrators have not provided proof of sale of the said assets and the distribution of the proceeds of sale amongst the beneficiaries. The said sales beg questions – when were the assets sold, why and on whose authority?

12. On Plot No. 388/Residential – Noonkopir Trading Centre, the widow asserts that that asset is her residential home and that she derives income therefrom. She also asserts that another property, Kajiado/Kaputiei North/8906, which is not subject to trust is her matrimonial home. So which of the two is actually her home? It also raises questions as to why she caused Plot No. 388 to be held in trust for the children if it was actually her own home.

13. On Plot No. 563, the widow asserts that the same has been grabbed by persons she does not know. This is a property she and her co-administrator hold in trust. It is their duty to protect and preserve the estate. The administrators do not attempt to explain the steps that they have taken to wrest control of the property from the alleged grabbers. It is their obligation to do so, failing which they would be deemed to lack diligence in their duties as administrators.

14. When an asset is placed in the hands of a person to hold as a trustee on behalf of others, the trustee stands in a fiduciary position with respect to the said property and in his relationship with the beneficiaries. The property is held on behalf of others. The trustee incurs a duty to act in the best interests of the beneficiaries and ultimately to account to them in connection with his dealings with the property.

15. The certificate of confirmation of grant dated 26th March 2007 created a trust over the assets described above and made the administrators trustees thereof for the benefit of the three children of the deceased named therein. The administrators have a duty to the said children. They must deal with the said assets for the best interests of the beneficiaries and should account to them. The applicant is therefore within her rights to call the administrators to account.

16. Ideally, where assets are held in trust for minors, they are not to be disposed of without leave of the court. Where the beneficiaries are of age, it is prudent to obtain their written consent before any action, which is adverse to the interests of the beneficiaries, is taken on the assets.

17. In view of everything that I have said above, I do hereby make the following orders in respect of the application dated 27th February 2014:-

a. **That prayer 2 of the application is granted in the following terms:-**

i. **An account be rendered in respect of Kajiado/Kaputiei North/5825, 11914 and 11917 which should include details as to where and on whose authority Kajiado/Kaputiei North/5825 was subdivided, when and with whose authority Kajiado/Kaputiei North/11914 and 11917 were sold, for what consideration and how the proceeds of sale were applied;**

ii. **An account be rendered in respect of Plot No. 388/Residential – Noonkopir Trading Centre, which should include detail on how much is and has been collected as rent from the premises on the said property from 26th March 2002 todate and details of how the money raised therefrom has been utilized; and**

iii. **An account be rendered in respect of Plot No. 563/Residential – Noonkopir Trading Centre, which should give a breakdown of the steps taken by the administrators to recover the said asset from the alleged grabbers;**

b. **That prayer (4) can only be granted upon the accounts in (a) above having been given to the satisfaction of the court; and**

c. **That the said accounts are to be rendered within thirty (30) days of the date of this order.**

18. Regarding the applications dated 10th December 2012 and 10th February 2013, fresh directions to be taken after the existence of the application dated 10th February 2013 has been established.

19. Costs to be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 30TH DAY OF OCTOBER, 2015.

W. MUSYOKA

JUDGE