



NO. 369/14

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO. 575 OF 2008

IN THE MATTER OF THE ESTATE OF ELIJAH KILONZO KITHUMA (DECEASED)

VERSUS

REGINA MUTONO ELIJAH.....1<sup>ST</sup> ADMINISTRATOR

PAULINE MUMBUA KITHUMA.....2<sup>ND</sup> ADMINISTRATOR/APPLICANT

WINFRED MUENI MUASYA.....3<sup>RD</sup> ADMINISTRATOR

RULING

1. **Pauline Mumbua Kithuma** the 2<sup>nd</sup> Administrator /applicant has filed an application pursuant to the provisions of **Rule 73** of the **Probate and Administration Rules** and any other enabling provisions of the law. She seeks orders that would allow her to amend form **P & A 5** to include the proper inventory of assets of the deceased and also to include liabilities of the estate of the deceased.

2. The application is premised on grounds that the property forming the estate of the deceased is not properly described, part of it cannot be subject of the succession cause, and some other assets belonging to the deceased were not included in the inventory of assets. Some dependants of the deceased were not included and all liabilities of the deceased were not disclosed.

3. In the affidavit in support of the application the applicant states that having come into the matter after pleadings commenced, she perused form P & A 5 and found that property described as **Kyanguli home** is actually **Plot No. Mumbuni/Kasinga/536** which is in the name of **Kithuma Ndunda** and subject of another **Succession Cause No. 128 of 2008 (Machakos)**; property described as **Mutituni home** which is **Plot No. Mavoko Town Block 3/31** registered in the name of the deceased; the **Lukenya Shares** is **Plot No. Mavoko Town Block 3/31** registered in the name of the deceased; **Kasinga Village** is **Plot No. 467 and 2117 Kathalani Adjudication** area but subject to **Succession Cause No. 128 of 2002**; **House Kimathi Estate** is **LR No. 209/7383141**; shares of **Katelembo** area not included.

4. The son of the deceased, **Ambrose Nzioki** had a wife who is the 3<sup>rd</sup> Administratrix, a child and adopted daughter, **Nancy Nzisa Nzioki**.

5. Prior to his demise the deceased was hospitalised at **Mater Hospital** and subsequently **Kenyatta National Hospital**. He incurred a bill of **Kshs. 990,000/=**. Upon his demise funeral expenses were

estimated at **Kshs. 1,370,000/=**.

6. The 3<sup>rd</sup> Petitioner/ Administratrix conceded to prayer 1 of the application being granted but opposed the hospital bill and funeral expenses being included as liabilities as the bills were settled by family members. She objected to construction costs being recovered from the estate of the deceased and stated that the applicant has been collecting rent from **L.R 209/7383/41** which is unjust.

7. The 1<sup>st</sup> administratrix on her part opposed the application arguing that the administrators should take unilateral proceedings. Her name is omitted as a surviving widow. The liabilities quoted are fictitious and non-existent. Some assets are omitted; they include **Plot No. 529, 185 and 194 at Lukenya, Katelembo shares**. She denied having drawn form P & A 5.

8. Further she stated that the application should fail as it does not conform to **rule 14** of the **Probate and Administration rules (Rules)** and **form 62** as to the amendment of a grant. This would require a new amended form to be drawn by mutual consent of all administrators and beneficiaries.

9. The deceased herein had two (2) households. The 1<sup>st</sup> administratrix is the 2<sup>nd</sup> wife to the deceased. The 2<sup>nd</sup> administratrix is the daughter of the 1<sup>st</sup> wife (deceased) while the 3<sup>rd</sup> administratrix is a wife to the son of the deceased who is also deceased- from the 1<sup>st</sup> household.

10. This application was made pursuant to the provisions of **Rule 73** of the **Probate and Administration** which provides:-

***“Nothing in these rules shall limit or otherwise affect 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 process of the court.”***

11. Although as submitted by counsel for the applicant the application was not brought under rule 14(1) of the Rules, the later rule specifically provides for an amendment of the application. Rule 14 of the Rules provides:-

***“an applicant for a grant may amend his application before the making of the grant by notice in Form 62 to be filed in the registry in which his original application was filed and serving forthwith a copy of such notice upon every objector who as lodged an objection and cross-application in the matter, and he shall pay to every such objector such costs (if any) as the court may direct:***

***Provided that where the proposed amendment is of a minor nature the registrar may permit the amendment to be made forthwith without notice to any party”.***

12. The locus standi of the applicant has been questioned, having not been a petitioner at the initial stage, the applicant having been enjoined in the cause as an administratrix of the estate of the deceased and applicant herein has capacity to seek an amendment.

13. Taking into consideration the requirement of **rule 14(1)** of the **rules**, for an amendment to be effected, the applicant has to make it by way of notice as provided in **form 62** that is filed at the registry.

14. A perusal of the court record shows that a full Grant of Letters of Administration Intestate is yet to be issued. This being the case the applicant could be at liberty to seek the amendment. She has the discretion to do so. However, she must comply with the provided for procedure laid down by **Rule 14(1)** of the **Rules**. Having failed to do so, the application becomes incompetent. In the premises, it stands dismissed.

15. This being a succession matter, each party shall bear their own costs.

16. It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 23<sup>RD</sup> day of SEPTEMBER, 2014.**

**L.N. MUTENDE**

**JUDGE**