



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI

Succession Cause No. 1872 Of 2012

In The Matter Of The Estate Of Godwin Guya Otieno (Deceased)

RULING

1. I am tasked to determine the Summons for Confirmation of Grant dated 1st November 2013.
2. The deceased herein died on 14th September 2008. He had married twice and therefore he was survived by two widows – Florence Janet Achieng and Kath Anyango. The first widow, Florence, had four (4) children aged between 7 years and 29 years; while the second widow, Kath, had three (3) children aged between 17 years and 23 years. Representation to his estate was granted on 4th December 2012 to the two widows.
3. The summons for confirmation is taken out at the instance of the second widow. She identifies the survivors of the deceased to be the two widows and the seven (7) children. The assets identified include LR No. 4280 Paw Akuche, LR No. 4143 Paw Akuche, LR No. 4040 Paw Akuche, LR No. 4145 Paw Akuche, LR No. 3940 Paw Akuche, LR No. 15428 Lower Kiambu Plot No. 68 Holo Market, Plot No. 31 Kisumu Town and motor vehicle registration mark and number KZS 899. She has also identified the liabilities and named the creditors.
4. She has proposed that LR No. 3940 Paw Akuche, Plot No. 68 Holo Market and Plot No. 31 Kisumu Town be sold and the proceeds realised be utilized to settle the liabilities. She proposes that the remainder of the assets be settled as follows – LR No. 4280 Paw Akuche and LR No. 4143 Paw Akuche to the first widow absolutely, LR No. 4145 Paw Akuche and LR No. 15428 Lower Kiambu to the second widow absolutely, LR No. 4040 Paw Akuche to the two widows in equal shares, and motor vehicle KZS 899 to the widows equally.
5. The other widow and co-administrator does not support the application. She filed a reply to it, comprised in her affidavit sworn on 18th February 2014. She raises a number of issues. One – that the distribution caters for the widows only and is silent on the children. Two – one of the children is a minor and there is need to secure his interests. Three – the sale of the properties set aside to settle debts and liabilities would not raise sufficient funds for that purpose. Four – the titles for the said properties have not been issued and disposal thereof would not be without difficulties. Five – Plot No. 31 Kisumu Town has not been fully paid for as there is still a balance on the purchase price. Six – the Kiambu properties was the most suitable for the purpose of settling debts and liabilities. Seven – motor vehicle KZS 899 has been under the control of the first widow who should pay for its maintenance. Eight – the first widow has been meeting the expenses of the domestic servants based at the deceased's rural home. Nine – motor vehicle KAK 443M's registration book is held at the Nairobi hospital as security for a debt at the hospital. Curiously, the said motor vehicle is not mentioned in the proposed distribution.
6. The second widow and co-administrator then swore a further affidavit on 24th February 2014 in

response to the first widow's replying affidavit. She complains that the first widow failed to cooperate with her as co-administrator, hence her sole effort to have the grant confirmed. She insists that the assets she has identified for disposal to meet the liabilities are sufficient for the purpose. She has sought to explain why she allotted the Kiambu property to herself and why she took motor vehicle KZS 899. She also says that the domestic servants referred to in the affidavit being responded to do not serve her.

7. The first widow replied to the second widow's affidavit of 24th February 2014 by swearing a supplementary affidavit on 2nd April 2014. She denies the allegations that she failed to cooperate with her co-administrator. She asserts that the values attached to the assets are exaggerated and that although valuation was proposed, the second widow frustrated efforts to appoint a valuer. She avers that the liabilities of the estate have not been fully identified and agreed upon. On motor vehicle KZS 899, the first widow argues that since her co-wife has custody of it she should meet the costs of its repair and maintenance. She supports the proposal by the second widow on distribution subject to four variations – LR No. 15428 be sold to settle liabilities with the surplus being shared equally between the two households, motor vehicle KZS 899 be given to the second widow absolutely and Plot No. 68 Holo Market be given to the first widow while the second widow takes Plot No. 3940 Paw Akuche.

8. The second widow filed a further affidavit on 15th May 2014 reacting to the first widow's affidavit of 2nd April 2014.

9. It is plain from the material before me that the parties are not at consensus *ad idem* on issues touching on the estate. They have not agreed on the liabilities valuations and distribution. From the facts these appear to be family straightforward matters that the administrators ought to agree on. It is unfortunate that they have failed to discharge their duties as administrators. They ought to understand that the fact of them having married the same man threw them together and they have no option but to work together for the benefit of their children. They have no option. The alternative is that if they fail totally to agree to work together, the grant may be revoked and the administration of the estate be committed to some other person or persons.

10. It would appear to me that the matter is not ripe for confirmation of the grant and distribution of the estate. In the first place, it would appear that the liabilities of the estate have not been properly identified for the two administrators appear to be squabbling on what these liabilities actually are. Some of the titles have not been perfected; for example, the purchase of Plot No. 31 Kisumu Town is yet to be completed. There is mention of motor vehicle KAK 443M whose status is not clear. These issues ought to have been resolved before the step to have the grant confirmed was taken.

11. There is also the question of valuation. This is critical in this case as the parties are not able to agree on how the property is to be distributed. They cannot also agree on which assets ought to be sold to settle liabilities. Quite clearly without scientific values attached to the assets that I am being asked to distribute, I am unable to move forward.

12. The first widow has raised the issue of the distribution being in favour of the widows and silent on the interests of the children, and especially the minor. This is a legitimate concern. Under the intestacy provisions in Part V of the Law of Succession Act, a widow is entitled only to a life interest in the net intestate estate, and upon determination thereof the estate reverts to the children in equal shares. This is so according to Section 35 of the Act. Where the deceased died a polygamist, such as in the present case, the estate falls for distribution in accordance with Section 40 of the Law of Succession Act. These provisions have not been complied with, and the applicant has made no effort to explain the non-compliance. I concede that there can be departure from these provisions in instances where all the survivors are in agreement, but that is not the case here.

13. **Section 71 (2) (d)** of the Law of Succession Act grants me the discretion to postpone confirmation of grant as may be necessary in the circumstances. I am persuaded that this is a case where I should not allow the application dated 1st November 2013. I shall postpone it and direct as follows:-

- (a) That the administrators shall, within the next thirty (30) days of this order, agree on all the assets and liabilities of the estate;
- (b) That all the assets agreed upon in terms of (a) above shall be valued within thirty (30) of having been agreed upon, by a qualified valuer to be agreed upon by the administrators, failing which agreement the Chairman of the Institute of Valuers of Kenya shall appoint a valuer for the purpose of these proceedings;
- (c) That the valuer appointed under (b) above shall be remunerated for his services out of the estate;
- (d) That the administrators shall, within thirty (30) days of this order, agree on the asset or assets to be sold and the proceeds of sale utilized to settle debts and liabilities, and in default of agreement the court shall decide on the said asset or assets;
- (e) That the matter shall be mentioned on 22nd January 2015 for compliance.

DATED, SIGNED and DELIVERED at NAIROBI this 21st DAY OF November 2014.

W. MUSYOKA

JUDGE

In the presence of Mr. Khasian advocate for the applicant and Miss. Ingonga for Mr. Aboge for the respondent.