



REPUBLIC OF KENYA

High Court at Eldoret

Succession Cause 293 of 2000

IN THE MATTER OF THE ESTATE OF MICHAEL CHELIMO BUNDOTICH (DECEASED)

RAPHAEL K. CHELIMO.....PETITIONER

VERSUS

GILBERT K. BUNDOTICH.....OBJECTOR

JUDGMENT

The dispute touches on the estate of the late Michael Chelimo Bundotich, who died on the 23rd April, 2000.

1. It is important to note at earliest that this matter was referred back to the court for writing of a Judgment, as the Judge, who had previously handled the matter, Hon. Justice Mary Ang'awa wrote a ruling instead of a Judgment. The said Judge left the station before she delivered her verdict. She later sent a ruling dated 30th September, 2010 which was delivered by Hon. Justice F. Azangalala.
2. A perusal of the court proceedings shows that the ruling was delivered on 29th November, 2010. Since that date, the matter has severally been mentioned, particularly with a view of exploring ways of sending back the file to the Judge who wrote the ruling to, instead write a Judgment. It follows that, had the file been sent back to the said Judge, she would have only changed the heading of the verdict from Ruling to Judgment.
3. The Counsel for the respective parties namely Mr. Limo for the Objector and Mr. Cheptarus for the Petitioner, found a mid way of settling the hurdle so as to have the matter concluded faster. They recorded a consent before me in the following terms:-

“By consent the order of 10/12/12 be and is hereby set aside and be substituted with an order that the court writes a Judgment. That the ruling dated 30/9/2010 be and is hereby set aside.”

4. The Order of 10/12/12 was to the effect that the file be sent to Hon. Justice Mary Ang'awa to write the Judgment instead of the Ruling.
5. It will be noted hereafter in this Judgment that this file has been moved from the hand of one Judge to the other. That even the witnesses were heard by different Judges. Hon. Justice Ang'awa was only directed to write Judgment/Ruling that were pending before Judges who had left this station, one of which was this file.

6. May I recognize the good work of Hon. Justice Ang'awa in her ruling that parties consented to set aside. I would not do a better job than she did and so a replica is the better portion of this judgment. After all, parties are already exposed to its contents, which I do wholly agree with.
7. In this family law matter, touching on the estate of the late Michael Chelimo Bundotich, who died on the 23rd April, 2000 at Iten District Hospital, intestate, a considerable delay had been occasioned that requires explanation in this ruling.
8. On the 7th December, 2000 one Raphael Kipkemboi Chelimo of P.O. Box 2, Tambach, a son to the deceased filed for grant of letters of administration intestate alone. A notice in the Kenya Gazette was issued being No.132 of 12th January, 2000. This may perhaps have read the year 2001.
9. When one of the survivors to the estate was notified of the said Petition, namely Constantina Sote Chelimo, she disclosed that she was a widow to the deceased and step mother to the Petitioner. That she objected to the grant being made to the Petitioner alone as there are two houses.
10. Objection proceedings per se under Rule 17 Probate and Administration rules were not taken. Parties agreed in court (Nambuye J.) (14th June 2001) that Raphael Kipkemboi the Petitioner and Constantina Sote Chelimo the widow in the second house be joint administrator/administratrix to the estate. The widow to the first house, Teresia Bundotich had since passed away.
11. The administration of the estate was acrimonious. Four months later on the 19th September, 2001 the first Petitioner/Administrator filed for Revocation or Annulment of Grant. The grounds being that the Co-administratrix failed to administer the estate according to law.
12. The reasons given fall under Section 76 (d) (ii) of the Law of Succession Act Cap 160. Unfortunately, the procedure for revocation of grant was never followed. Namely, once an application is filed supported by an affidavit (Form 70, Form 14) the Deputy Registrar would at once issue Form P&A. 70 to the applicant to attend to the Judge, ex parte as to whom should be served with the said application. (This would normally be all those who would be affected by the revocation of the grant if granted).
13. Those served would file an affidavit supporting or rejecting (and the reasons given) for the revocation of the grant. The Hon. Judge would then determine the matter without going into a trial.
14. In this matter, when it came before the court on 23rd May, 2002, the Hon. Judge, Omondi Tunya J. gave directions that parties were to hear the issues as to "the distribution of the estate" and to do so in a trial by way of viva voce evidence.
15. The matter was thereafter fixed for hearing on 18th July, 2002 (adjourned) (Omondi Tunya). Unfortunately, on the 31st October, 2002, when the matter was next to come for hearing, the court was informed that the petitioner/administratrix had passed away.
16. Where this occurs, the procedure would be for an application **De Bonis non** to be filed by the applicant co-administrator. Forms P&A. 86 and P&A. 19 (application and affidavit respectively).
17. The Hon. Judge made orders that the grant Form P&A. 41 be amended to read Gilbert Bundotich in place of Constantina (now deceased (administratrix)).
18. The file moved on to a third Hon. Judge four months later. Direction was given on the 3rd July, 2003 that "the dispute" be heard by oral evidence. On 10th July, 2003, the Hon. Judge (J.V.O. Juma, J.) correctly ordered parties to file a list of assets, a list of liabilities and a list of proposed beneficiaries. From the perusal of this file, these orders were never implemented by the parties. All the court had before it was the original form of the 1st petitioner as to the deceased assets, liabilities and survivors. The said was completely different from those put forward by the advocates to the parties in their written submissions to be mentioned later on below.

19. Thereafter, an application dated 23rd March, 2003 was filed. The application was not on the court file nor was it ever mentioned by the advocates. It was set down for hearing on 23rd September, 2003, later changed to 25th September, 2003, 16th October, 2003, 19th February, 2004 in the registry. On 19th July, 2004, it was stood over to the 23rd June, 2004 and adjourned (Gacheche, J.). On the 18th October, 2004, this matter proceeded to hearing before Gacheche J.

20. The Hon. Judge heard six witnesses and one respondent. Thereafter the Hon. Judge was transferred out of the station. Directions were given on 14th May 2007 that proceedings begin from where they had reached (Ibrahim J.). Orders for the file to be typed was made and on 16th June, 2007, it was to be mentioned to confirm this (Bauni J.). The matter was set down for hearing on 15th October, 2007 but was not reached for hearing (Ibrahim J.). The matter was set down for hearing on 17th December, 2007 but was not reached and adjourned to 10th March, 2008 (Ibrahim J.). On 10th March, 2008, one respondent's witness evidence was taken down (Bauni J.). The Hon. Judge passed away. The file came for directions on 16th February, 2002 (Ibrahim J.) and it was ordered that the hearing proceed from where it had reached.

21. The file came before Osiemo J. on 15th December, 2009 who adjourned the matter to 16th December, 2010. The evidence of two more respondents (DW3 and DW4) witnesses were taken. The case was closed. Orders were made that parties were to then file written submissions and that this matter be mentioned on 18th January, 2010. When it was confirmed that compliance has been done then further orders were made that "Judgment" would be delivered on 8th February, 2010 (Osiemo J.).

22. Unfortunately, Osiemo J. was not available, having been transferred out of the station. The file was pending for a decision to be made. The Hon. The Chief Justice through the Principal Judge directed that I complete all the Judgments and ruling of the Hon. Judges. The proceedings were ordered typed in July 2010.

23. The delay in finalizing this matter on behalf of the Judiciary is regretted.

24. I have perused this file and I am aware that what is before the court is the application dated 19th September, 2001, seeking the Revocation of Grant of Letters intestate issued in the joint names of the applicant and one Constatine Bundotich (the deceased widow/now also deceased) whom the applicant was complaining about.

25. There was an amendment of the letter of grant (Omondi Tunya J.) in which a new administrator was brought in. As mentioned earlier above, this should have been by way of De Bonis non application (P&A Form 86 and P&A Form 19).

26. The parties then came to court for a trial. It is unclear why they did so as there was nothing left after the application of 19th September, 2001 was overtaken by events. What I noted, in closely looking at the records, that the issues, according to Omondi Tunya J, was the distribution of the estate.

27. I wish to outline the procedure that should thereafter have been followed. J.V.O. Juma J. was correct in making orders that the list of assets, survivors and liabilities be disclosed. This should have been done when the new administrators were brought in after an application De Bonus non. The reasons being, that the first Form was signed by only the one administrator and does not bind the original 2nd administratrix.

28. Therefore, the two administrators are to file the:

(i) Petition P&A 80

(ii) Affidavit in support of the petition for letters of administration intestate in which all the survivors, the assets and liabilities are to be listed in file P&A 5.

(iii) Affidavit of justification of proposed sureties P&A 11.

(iv) Affidavit of justification of proposed administrators P&A 12.

(v) Guarantee by personal securities duly signed and sealed and registered at the Lands department
..... P&A 57

(vi) Consent by survivors to administration of making grant P&A 38

29. The grant of letters of administration intestate is thereafter issued. (Form P&A 41). The task of the administrator is to collect the assets and identify the survivors if not yet so done. After a period of six months, the two administrators must file an application for confirmation of grant. (Form P&A 108, Form P&A. 9).

30. Where a disagreement arises as to the apportionment of the assets, then the proceedings under Rule 41 of the Act would be followed. If a disagreement arises as to the dependants, then the proceedings under Section 26 of the Act on dependency arises.

31. In this matter, the issue on the assets as provided under Rule 41 was required to be followed, namely after filing an application for confirmation of grant (Form 108 & Form 9) which must contain the following information under Rule 40 (3) (a):

“The names, ages, address of the children of the deceased which he was survived (whether or not they were being maintained by him immediately prior to his death) and of such as his parents, step parents, grant parents, grand children whom he had taken into his family as his own, brothers, sisters, half brothers and half sisters as were living at his death and were being maintained by him immediately prior thereto with full details of the manner and extent and for what period they were being or had been so maintained.

(b) In case of a male deceased, his wife or wives or former wife or wives living at his death and in case of a female deceased, her surviving husband if he was being maintained by her immediately prior to her death with full details of the manner and extent and for what period he was being or had been so maintained.”

32. It is imperative, at the stage of confirmation of grant that all the shares of all persons beneficially entitled to the estate would have been ascertained and determined (Rule 40 (4)).

33. Before the confirmation of a grant is applied for, any party may file a caveat under Rule 15 at the Principal Registry. The registrar would wait until an application for confirmation of grant is filed. Once it has been filed, the registrar would at once send a notice in form III to the caveator (the person who filed the caveat) to warn the caveator of the application of the confirmation of grant. The caveator would proceed to the registry and read the application for confirmation of grant. If he/she is satisfied, the application for confirmation of grant would be heard before the Hon. Judge. If the caveator is not satisfied he/she would file a protest in form P&A 10 objecting to the confirmation of the grant and the grounds for so doing.

34. The protest copy would be forwarded by the registrar to the application who would then await a date in which directions would be given (Rule 40 (8)). If the matter is in the Magistrate's Court, orders for directions must be made in the High Court (Rule 40 (9)).

35. On the day for hearing the application for confirmation of grant, the application for confirmation of grant would be read. The affidavits and any written protest would be read. The applicant and each protestants would be heard (Rule 41 (1)). The court would either confirm the grant or refer the grant back for further consideration.

36. How then should this matter proceed? Evidence of six to seven witnesses had been taken down by the first Judge in October, 2004. The evidence of one respondent witness was heard in March, 2008 by the second Hon. Judge who is now demised. The third Hon. Judge heard three respondents and asked for

closing written submissions.

37. There is therefore nothing left out of the application of 19th September, 2001 seeking orders for revocation of grant as the grounds given was the **non performance of duty by the administratrix**", who has since passed away as mentioned earlier. That administratrix passed away and the application overtaken by events.

38. The parties therefore require to file for an application for confirmation of grant. From the evidence before court and the written submissions by both advocates, the assets are different from the original P&A 5 Form. The ages of the survivors and their relationship to the deceased is not disclosed.

39. Juma J. ordered that the assets, liabilities and survivors be listed.

40. I would hereby order that the parties do comply with a list of liabilities, assets and beneficiary/survivors. From the submission, I would attempt to constitute that list but would identify the survivors upon the demise of the deceased as:-

HOUSE NO. 1

(i) *Widow not named, deceased, possibly called Teresia*

(ii) *Raphael Chelimo, age and relationship*

(iii) *Vincent Bundotich, age and relationship*

(iv) *Joseph Chelimo, age and relationship*

(v) *Daughters not named, but later found to exist*

a. *Anastasia Bundotich*

b. *Lucy Rono*

c. *Meleniah Kedemi*

d. *Clara Tallam*

e. *Elizabeth Bundotich*

f. *Mary Chepkoech Bundotich*

HOUSE NO. 2

(i) *widow, Constantina Bundotich (now deceased)*

(ii) *Salina Jemutai Bundotich (daughter not named)*

(iii) *Gilbert Kipchumba Bundotich, age and relationship*

(iv) *Bernard Kipyego, age and relationship*

(v) *Phillip Bundotich, age and relationship*

(vi) *Luka Bundotich, unknown (was never enclosed in any formal document).*

41. The court requires each to file a consent in Form P&A 38 to the making of the grant to the two

administrators.

42. The assets must be disclosed in full in Form P&A 5. A separate paper may be included. P&A 5 is an affidavit and unless the assets list has been deponed to it means that the list on record is not conclusive and any decision as to the apportionment of assets normally done under Section 40 of the Law of Succession Act becomes meaningless and of no legal effect.

43. To this end, the court would await for compliance as ordered by J. V. Juma J. on 10th July, 2003. Once this has been complied with on oath, the parties are to apply through the two administrators for confirmation of grant. Protest would be entertained for the assets not agreed on and the mode of apportionment.

44. For ease of reference, all assets belonging to the deceased at the time of his demise, including bank account funds and income be accordingly disclosed.

My final order is that, once the parties have complied, should take a date in the registry to confirm compliance and thereafter proceed with applying for confirmation of grant.

Each party to bear their own costs.

DATED and **DELIVERED** at **ELDORET** this 18th day of March, 2013.

G. W. NGENYE – MACHARIA
JUDGE

In the presence of:

Mr. Cheptarus Advocate for Petitioner

No appearance for Mr. Limo Advocate for Objector