REPUBLIC OF KENYA

High Court at Kitale

Succession Cause 82 of 2011

WENSLAUS WATIBINI :: DECEASED.

VERSUS

PROTUS MASIBO WATIBINI

PATRICK WAFULA WATIBINI:: APPLICANTS.

R U L I N G.

Wenslaus Watibini (herein, the deceased), passed away on the 6th September, 2010 at the age of 76 years leaving behind one widow (Susan Watibini) and a total of ten (10) children including four (4) sons and six (6) daughters. Consequently, a petition for letters of administration with written Will was made by two sons (i.e. Protus Masibo Watibini and Patrick Wafula Watibini). These are the first and third sons of the deceased. The petition was granted and on 23rd June, 2011, grant of letters of administration with written will annexed was issued in favour of the said first and third sons of the deceased who thereafter took out summons for confirmation of the grant. The summons dated 20th February, 2012 and were initially scheduled for hearing on 1st March, 2012 but were re-scheduled to 26th April, 2012 on which date the parties sought the court's direction following the filing of an application dated 20th March, 2012 said to have been filed by the widow Susan Namaemba Watibini. This latest application was eventually fixed for hearing on 22nd November, 2012 by affidavit evidence. However, on the 22nd November, 2012, the application was compromised by the parties to the extent that a related succession cause No. 2581 of 2010 filed in Nairobi be consolidated with the present succession cause filed here in Kitale and that the proceeds from the safaricom booster be released to the applicant for medical care, daily subsistence and upkeep pending the hearing and determination of this cause. The parties also agreed that another application dated 21st November, 2012 be heard by affidavit evidence on 18th February, 2013. The said application is by the widow and the six (6) daughters of the deceased against the first and third sons of the deceased who are the petitioners in this matter.

The application was not heard as scheduled on 18th February, 2013 but was stood over to 26th march, 2013 on which date the parties agreed to have the application argued by way of written submissions. In that regard, written submissions were filed by the parties. This ruling is therefore in respect of that application dated 21st November, 2012.

The application seeks the following orders viz:-

(a) That, adequate provision for the applicants from the net estate of the deceased be made in such a way that the applicants and the other beneficiaries receive equal shares of the estate of the deceased.

(b) That, an order be made allowing the applicants access to reasonable acreage of land

from the estate of th deceased to enable them grow food crops for their subsistence and upkeep pending confirmation of the grant.

(c) That, the widow Susan Namaemba Watibini and the last daughter of the deceased, Jane Naliaka Watibini be included as joint administrators of the estate of the deceased and that the eldest son of the deceased, Protus Masibo, be removed as an administrator.

(d) That, the estate of the deceased be preserved pending the confirmation of the grant and

(e) That, the costs of this application be provided for.

The application is made essentially for orders under section 26 and 27 of the Law of Succession Act and Rule 73 of the Probate and Administration rules and is premised on the grounds contained in the appropriate chamber summons as supported by the averments contained in the supporting affidavit deponed by four of the applicants dated 21st November, 2012. There is a further supporting affidavit by the widow dated 19th February, 2013. the opposition to the application is based on the averments contained in a replying affidavit deponed by the first petitioner/respondent dated 13th February, 2013.

Section 26 of the Law of Succession Act provides that:-

"Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate."

Section 27 of the Law of Succession Act provides that:-

"In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant or to make such other provisions for him by way of periodical payments or a lump sum and to impose such conditions, as it thinks fit."

These provisions gives the court a wide discretion to provide for dependants outside the will. The applicants herein are daughters of the deceased and hence dependants. It is their belief that they were not

properly or adequately provided for by the deceased's will. They also believe that their elder brothers, the first and second respondents herein have failed to administer the estate diligently and are biased against them.

Under Rule 73 of the Probate & Administration Rules, the court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

In her supporting affidavit the first applicant challenges the veracity and validity of the will and implies that it was a document prepared on behalf of the deceased after being misled. It is also implied that the document is not a true reflection of the intention of the deceased who had wanted it re-written to make adequate provisions for all his dependants.

The first applicant indicates that a commercial building granted to her is not benefiting her as the second respondent and another son of hers called Francis Mbocha are collecting and depriving her of the rent. She has also indicated that the twelve (12) acres of land parcel Kiminini/Matunda/Block 7/166 being used by herself was leased out to third parties while she had been admitted in hospital. She says that her sons including the second respondent, Francis and Peter are responsible for leasing the land.

The seventh applicant alleges that the two respondents have failed to administer the estate diligently and are always biased. She was allocated by her late father one acre of land to cultivate but she realized that she had been allocated less than one acre. Her attempt to start planting on her entitlement was met with resistance from her brother Francis who went as far as assaulting her theory attracting a criminal court case against himself.

The second applicant alleges that the two respondents have been hostile to her to the extent of assaulting her for standing for her rights. She alleges that the respondents have started alienating and selling the estate without orders from the court or the consent of all beneficiaries. She alleges that the first respondent suffers from a mental disability arising from a head injury he sustained in the year 2007. he is therefore incapable of long concentration and making serious decisions.

The second applicant contends that the daughters of the deceased have largely been left without adequate provision in the alleged Will of the deceased. She sees no reason why she should have only one acre of land while her brothers should have thirty two (32) acres each. She further contends that the respondents are intermeddling with the estate by selling land and felling down trees despite the existence of a court order preventing the same.

As for the fifth applicant, she contends that this cause was filed without the knowledge of the applicants and that the respondents have acted contrary to the wishes of the deceased. She opposed the alleged will and contends that the mode of distribution is unfair to the applicants. She says that the first respondent being unwell should be removed from being an administrator of the estate. She desires that the distribution of the estate be done on the basis of equity to all the beneficiaries so that the purported will should be disregarded.

In their reply to the foregoing allegations by the applicants, the respondents aver that the deceased left behind a valid Will and Testament dated 11th June, 2008 which was drawn in accordance with the law and has not been contested to date and in which the deceased made provisions for all his children and the widow. The respondents contend that this application is intended to delay and frustrate the administration of the estate just when the grant is due for confirmation. That the applicants have all along been aware of the Will and even signed an agreement acknowledging the will. The respondents deny the allegation that they are alienating and selling estate property and instead say that it is the applicants who sold off parcels of land allocated to them contrary to the spirit of the Will. They (respondents) contend that they were appointed trustees and executors of the Will by the deceased and are surprised that the first applicant (widow) would turn around and purport to disown the Will.

The respondents contend that the deceased was not of unsound mind and that the first applicant was adequately provided for in the Will.

It is further the respondent's contention that their sisters who are all married women have made claims which are far-fetched and are colluding with their mother to frustrate due administration of the estate yet adequate provisions was made for them in the Will.

From all the foregoing averments by both sides it is clear that this application and indeed, any other application have proceeded on the basis that the deceased's written Will has not been contested. However, it is obvious from the applicants' averments that they are not happy with the wishes of their late father in as much as he did not adequately provide for them as daughters and widow and instead seemed to have favoured his sons. The applicants have also suggested that the deceased might have been misled in writing the Will the way it is currently and that he once attempted to alter it in order to provide for the widow and the daughters adequately but was somehow frustrated by a bank manager at Standard chartered Bank (ltd.) Kitale where the will had been kept in safe custody.

Be that as it may, section 26 and section 27 of the Law of Succession Act allows the applicants to move the court the way they have since they are apparently dissatisfied with mode of distribution of the estate property as prescribed in the deceased's written will.

The said will is annexed to the respondent's replying affidavit. It is dated 11th June, 2008 and it is for all practical purposes a valid will and remains uncontested in that regard.

A peruzal of the Will by this court reveals that the deceased was mindful of the welfare of his entire immediate family composed of his widow and ten (10) children. The deceased also intended that all his earthly possession and in particular immovable property be preserved for a period of time before being formally distributed amongst his dependants and/or being disposed off for their benefit. It is notable that this present dispute stems from the possession and usage of such immovable property whereas the will makes adequate provision for all.

Paragraph 4 (a) of the Will is the operating provision. It clearly sets out the deceased's intention with regard to his family and property. Accordingly, the deceased bequeathed and devised all his real and personal estate including money or other properties immovable or movables to be utilized jointly by his whole immediate family for their own benefit upon his death **on condition** that his said immediate family **shall not** jointly and severally dispose off any of the property or be registered as proprietors until after fifty (50) years from the date of his death.

In the remainder of the sub-paragraphs of the main paragraph 4, the deceased went on to specify how the entire estate shall be shared among the beneficiaries after the expiry of the fifty years period.

Given that the deceased died on 6th September, 2010, the fifty years period is far from the applicants and the respondent to share out the estate for purposes of ownership and/or disposal and if they are doing so, then they are acting contrary to the wishes of the deceased. They are at this stage required to share and use the estate equally and jointly for their own benefit. None of them is permitted to register any of the immovable property in their own name or even dispose off such property until after the expiry of fifty (50) years of the death of the deceased.

However, it is apparent from the averments herein by both sides that they have failed to honour and strictly adhere to the wishes of the deceased and hence the present dispute. They seem to be operating under the false assumption that they have the liberty to deal with the estate property anyhowly prior to the expiry of the fifty year period set by the deceased in his wisdom.

What the applicants and the respondents are required to urgently undertake, is to formulate a workable and agreeable modality for equal sharing and usage of the estate's immovable property for their own individual benefit without disposing off or attempting to dispose off any of the property.

In sum, there is no room for the applicants and the respondents to deal with the property as if it is their own individual property. They have to wait for the expiry of fifty years for them to be able to do so. Clearly, the intention of the deceased was to preserve the property for as long as possible for the

benefit of his immediate family.

However, there seems to be a disconnect between the applicants and the respondents with regard to the administration of the estate and in particular the mode of sharing and using the property. Consequently, and in order to allow transparency and fairness in the administration of the estate, the court hereby invokes Rule 73 of the Probate & Administration rules to order that the widow of the deceased (i.e the first applicant) and the eldest daughter of the deceased (presumably, the third applicant, Mary Nasimiyu) be co-opted in the administration of the estate prior to the confirmation of the grant.

In that regard, prayer (c) of the application is granted in the manner prescribed hereinabove. And so as to preserve the estate prior to the confirmation of the grant, prayer (d) is also granted.

It is without doubt that prayers (a) and (b) of the application will be factored in the overall administration of the estate. Those are the orders of this court. Each party will bear own costs of the application.

[Read & signed this 15th day of March, 2013.]

[In the presence of Mr. Barongo for Mr. Samba for the applicant and the respondents in person.]

J.R. KARANJA.

JUDGE.