



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 2569 of 2011

IN THE MATTER OF THE ESTATE OF M. C. W. (DECEASED)

A. M. W.APPLICANT

VERSUS

Y. N. W. RESPONDENT

RULING

This ruling relates to the application dated 30.04.2012 made by A. M. W. The application seeks the following orders:

2. *that this Honourable Court do allow the payments from the estate for purposes of school, university fees and maintenance in respect of W. S. W. and W. W. (Junior)*
3. *that the petitioner namely LADY Y. N. W. be forthwith compelled to account for Ksh.36,578,179.50/= the estate received as the deceased's gratuity*
4. *that the petitioner LADY Y. N. W. be forthwith compelled to account for the Ksh.3,400,000/= that was found in the deceased's briefcase at the time of his death and deposited with the firm of Khaminwa & Khaminwa Advocates.*
5. *that the petitioner herein LADY Y. N. W. be forthwith compelled to account for the monies she received from the deceased's pension gratuity on behalf of W. W. and W. W. junior who were then minors.*
6. *that the petitioner herein LADY Y. N. W. and her lawyer M/s Khaminwa & Khaminwa Advocates be ordered to render account of all monies secured and paid and all assets and liabilities comprising the estate of the deceased from his death to date.*
7. *That the co-petitioner A. M. W. and W. W. be allowed to petition for letters of administration of the estate of the deceased.*
8. *that this honourable court be pleased to issue any further orders that it may deem fit and just in the interest of justice.*
9. *that the petitioner Y. N. W. be compelled to pay the costs of this application.*

This cause relates to the estate of the late M. C. W., [information withheld]. It is not in dispute that he was

survived by the following beneficiaries.

1. widow – Lady Y. N. W.
2. son – J. J. R. W. *an adult*
3. daughter – A. M. W. *an adult*
4. son – W. S. W. *an adult*
5. son – W. W. *an adult*
6. daughter – M. W. *a minor*

However, in her replying affidavit sworn on 19.06.2012 Y. N. W. indicates that D. O., an adult, and Mama E. N., the deceased's mother, are also beneficiaries. She indicates that the debts owed by the Estate were in excess of Shs.10 million.

The deceased left an estate comprising real property, shares, motor vehicles and cash, including gratuity. It is alleged that at the time of his death, the deceased had 300 acres under maize crop which yielded Shs.12 million after harvest.

There is in existence a **limited grant of Letters of Administration *ad colligenda bona*** issued on 18.02.2005 in favour of Lady Y. N. W. and A. M. W. following rectification of the initial limited grant dated 12.09.2003 made to Lady Y. N. W. alone. The gratuity amounting to Shs. 36,578,179.50 was transmitted to the two administrators by cheque No.018335 dated 09.03.2005 by the Public Trustee. Ostensibly, the funds were banked in the Estate account at Commercial Bank of Africa.

By her own admission in her supporting affidavit sworn on 30.0.2012, the applicant, A. M. W., states that the funds received on behalf of the Estate of the deceased were divided among the beneficiaries as shown in paragraphs 16, 17, 19 and 21. Needless to emphasize, this was in violation of the provisions of the Law of Succession Act, Cap 160. The limited grant issued by the court was for the purpose only of collecting and getting in and receiving the estate and doing such things as may be necessary for the preservation of the estate until a full grant was made by the court.

Y. N. W. admits in her replying affidavit that monies belonging to the Estate were paid out in the manner stated in paragraph 17 of the affidavit of the applicant but I observe that whereas the applicant states that Shs.2 million was paid to E. N. who has since died, Y. N. W. indicates that only Shs.200,000/= was paid and further that D. O. was paid a sum of 2 million. There is no dispute that the signatories to the Estate account at Commercial Bank of Africa are the applicant and Y. N. W. The latter admits that she has used other Estate funds such as money received from maize harvest from 300 acres to purchase apartments and to pay for mortgages, travel expenses for J. J. R. W., tuition fees for W. S. W. and for medication for Mama E. N. including payments for purchase for furniture, purchase of plot No.31 at Kitale Municipality, living expenses for the administrators etc.

When the application came up for hearing before me, Miss M., learned counsel for the applicant, told the court that the applicant was paid Shs.3 million from the estate funds while Y. N. W. received Shs.7 million on behalf of M. W. (a minor) and the deceased's mother while she herself received Shs.5 million. The applicant does not know how the funds in the hands of Y. N. W. were expended. She calls upon her to account. She also complains that Shs.10 million remitted to Khaminwa & Khaminwa Advocates to pay for debts owed by the deceased has not been accounted for. Ms M. contended that it was improper for Y. N. W. to buy apartments and to take mortgages using funds from the Estate while at the same time not disclosing receipts of monies due to the Estate. Her prayer to the court is for orders requiring Y. N. W. to account.

Mr. A. K. made submissions on behalf of Y. N. W. He relied mainly on the latter's replying

affidavit. It was his submission that Y. N. W. was being put in bad light in spite of the fact that the mode of distribution was agreed on. But clearly the time for distribution of the estate has hardly come. He admitted that apartments had been purchased by his client with funds from the Estate but was quick to add that such apartments were for dependants of the Estate and further that they were now generating income. However, he did not elucidate the quantum of the income and whether it was being banked in the estate account and the person in whose name or names the titles to the apartments were registered. He pointed out that his client had explained the expenditure in her affidavit and taken care of the welfare of the beneficiaries. In the circumstances, it was his submission that his client had done her duty and preserved the Estate.

In reply, Ms M. pointed out that the court had not given leave to the widow to buy apartments using funds from the estate. Her client, she said, had not been brought on board as a co-administrator when the apartments were being purchased or funds of the Estate were being expended.

The deceased died intestate. The materials placed before the court show that he was a Christian when he died. Succession to and administration of his estate is governed by the provisions of the Law of Succession Act, Cap 160. Full grant has not been made. The existing limited grant of Letters of Administration *ad colligenda bona* does not entitle the administrators to whom it is made to distribute the estate. The actions taken by the widow clearly show that the provisions of the Law of Succession Act have been violated. The duty of the court is to ensure that the properties that constitute the Estate of the deceased are collected and put together and that the debts owing by the Estate are paid out and the net Estate established from which the legitimate beneficiaries of the Estate do receive their legacies in accordance with the law. From the averments contained in her replying affidavit, the widow of the deceased has dealt with the Estate as one would with one's personal property. In effect, knowingly or unknowingly, she has breached the provisions of the Law of Succession Act. She has distributed cash to herself and to other beneficiaries and has taken the lion's share of such cash. She has purchased apartments from funds belonging to the Estate and taken mortgages. She has received monies belonging to the Estate without accounting for it but has paid out living expenses and tuition fees for the beneficiaries from estate funds. The limited grant does not authorize her actions.

It is desirable that the entire estate of the deceased is put together and all legitimate debts paid out and the net estate established because this is what will be distributed among the heirs. The applicant has focused merely on the sum of shillings 36,578,179/50 which was received in respect of gratuity. The deceased also seems to have had actual cash from his briefcase amounting to Shs.3.4 million. The provisions of Section 55(1) of the Law of Succession Act state-

“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property unless and until the grant has been confirmed as provided by Section 71.”

In this cause, the court has not made a full grant. The manner in which provision has been made to the dependants of the estate leaves a lot to be desired. There is no question that those of the children of the deceased who were in school or are otherwise still dependent on and require support from the estate must be provided for. But the manner in which this is done must be transpar

ent and above board. The properties that make up the estate of the deceased belong to his children as legacy. The limited grant was made in September 2003 and subsequently rectified on 24.01.2005 owing to special circumstances which gave rise to urgency. It was expected that an application for a full grant would follow. Rule 36(1) of the probate and administration rules provides that where, owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration *ad colligenda bona defuncti* of the estate of the deceased. Since the limited grant was made in the year 2003, no application for a full grant has been made!

It is my finding in this application that the provisions of Section 55(1) of the Laws of Succession Act

have been violated. It is also my finding that the administrators holding the limited grant have failed to move with speed to obtain a full grant. It is admitted in the affidavits of both parties that the estate is being distributed and the widow has dealt with the estate in a manner inconsistent with the requirement of the law.

Under Section 47 of the Law of Succession Act, this court has jurisdiction to entertain any application and determine any dispute under the act and to pronounce such decrees and make such orders as may be expedient. Under Rule 73 of the Probate and Administration Rules this 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.

As the deceased died intestate in the year 2003 succession to and administration of his estate is governed by the provisions of the Law of Succession Act and the rules made thereunder by dint of Section 2(1) of the Act. Kenyans must be encouraged to write Wills during their lifetime to obviate intestacy.

To facilitate compliance with the law, and in determination of the Application by summons dated 30th April 2012 the Court makes the following orders:-

1. Within 45 days from the date of this order, Y. N. W., the widow of the late M. C. W., shall
 - (a) file in this court a statement giving a full account of monies received by her on the account of the estate of her late husband including the sum of Ksh.36,578,179/50 paid out as gratuity and also the cash amounting to Shs.3.4 million and in addition money received by her on behalf of W. S. W. and W. W. Junior as gratuity and the proceeds of sale of the maize harvest on the 300 hundred acres
 - (b) file in this court a full statement of account of all the monies received by her belonging to the estate of the late M. C. W. and an inventory of all the payments made by her from such money and evidence of such payments and the balance thereof.
 - (c) file in court a list of all the properties acquired through funds from the estate of M. C. W. as well a list of all the properties constituting the estate of M. C. W.
 - (d) file a statement of account showing how the sum of Ksh.10 million remitted to Messrs Khaminwa & Khaminwa Advocates to pay the debts of the estate of the Late M. C. W. has been utilized.
2. Y. N. W. and A. M. W. and or any of the other beneficiaries of the estate shall within 60 days from the date of this ruling petition for a full grant in this cause failing which the Public Trustee shall be required to administer the Estate.

G. B. M. KARIUKI, SC

JUDGE

Dated and delivered at Milimani Law Courts, Nairobi, on this 25TH day of April 2013 by the Honourable Justice W. Musyoka on behalf of Justice G.B.M. Kariuki.

W. MUSYOKA

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JUDGE