



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
SUCCESSION CAUSE NO. 450 OF 2012
IN THE MATTER OF THE ESTATE OF ELIJAH DOLFUS NYASEME
(DECEASED)

RULING

Joel Elijah Dolfas Nyaseme died on 4th February 2012 in Nairobi. A dispute erupted shortly thereafter regarding the disposal of his remains. This culminated in the filing of a suit at the civil side of the High Court in Civil Suit No. 61 of 2012.

On 6th March 2012 Rose Caroline Abiero Nyaseme and Frankilin Eric Odhiambo Nyaseme, being widow and son, respectively, of the deceased, petitioned the court in this cause for grant of representation. According to the petition, the deceased was survived by a widow, a son and two daughters. The survivors are named as Rose Caroline Abiero Nyaseme, Frankline Eric Odhiambo Nyaseme, Jacqueline Constance Atieno Nyaseme and Barbara Herine Ochieng Nyaseme. He is said to have died possessed of 27 assets valued in total at Kshs.150,000,000.00.

Contemporaneously with the petition for full grant, the petitioners filed on the same day a petition for letters of administration *ad colligenda bona* under **Section 67** of the Law of Succession Act. The said petition for limited grant was filed simultaneously with a Motion dated 29th February 2012, seeking the making of a limited grant of letters of administration to enable the petitioners access the deceased's business accounts to facilitate payment of salaries to the deceased's employees and for family upkeep.

The Motion was placed before Njagi J. on 7th March 2012. The explanation given to justify the grant was that the deceased's business had on going contracts which require finances and for the running of the architectural office. Njagi J. asked the petitioner to place before him evidence of the pending payments and outgoings. Mwilu J. eventually on 5th April 2003 issued two limited grants: one to enable the two applicants to file and defend suits in respect of the estate and the other limited to collection and preservation of the estate.

The making of the limited grants to the respondents provoked an application dated 23rd April 2012 brought by way of a Motion premised on **Section 76** of the Law of Succession Act, among other provisions. The application seeks the varying, setting aside or annulment of the grants made by the court to the respondents. It also prays that a certain architect be appointed to manage the pending matters relating to the firm of Messrs. Joel E.D. Nyaseme & Associates pending the orders made by the court. He also prays for the appointment of himself, Rose Caroline Abiero Nyaseme and

Samuel Ndeda to jointly manage all financial matters of the said firm.

The reasons adduced to support the application are that the grant and the orders in question were obtained fraudulently on the making of false statements and concealment of material from the court. The various alleged false statements and concealed material are itemized on the face of the application. These reasons are further elaborated in the affidavit in support of the application. They range from the fact there HCCC No. 61 of 2012 is not against the estate, wilful failure to disclose that applicant is a child of the deceased, failure to disclose that the court in HCCC No. 61 of 2012 had held that the applicant was a child of the deceased, failure to disclose that the 1st respondent had other sources of income, failure to disclose to court about the existence of the probate proceedings, wilful exaggeration of financial requirement, failure to disclose that the 2nd respondents reside in the United Kingdom and failure to disclose that Jacqueline Constance Atieno Nyaseme and Barbara Herine Ochieng Nyaseme reside abroad and that it was not possible for the two beneficiaries to have signed the consents filed with the application.

Another Motion was filed on 25th July 2012 by the applicant herein under **Section 76** of the Law of Succession Act and **Sections 3** and **3A** of the Civil Procedure Act. The application also seeks revocation of the said grant and other orders. The applicant in the Motion moved the court as a son of the deceased. He argues that the grant of letters of administration *ad colligenda bona* was obtained fraudulently. He complains that the grant holders have since taken over the running of the affairs of Joel E.D. Nyaseme & Associates, an architecture firm that the deceased was running, and which the applicant alleges to be the most valuable asset. He complains that the grant holders have opened a bank account where they have directed that all the fees due to the firm ought to be paid.

The application was served on the grant holders who are named as respondents. There is a reply filed by the grant holders vide an affidavit filed on 24th September 2012 sworn by Franklin Eric Odhiambo Nyaseme, the 2nd respondent, on 24th September 2012. He denies that the grant made to him and the 1st respondent, his mother, had not been obtained fraudulently. He explains that the grant made to him was limited to the collection, preservation and maintenance of the estate pending final distribution and the determination of the objection proceedings. He denies that the applicant is a child of the deceased. He also explains that Joel E.D. Nyaseme & Associates was a sole proprietorship business, which automatically wound up on his death and therefore the same does not exist legally. The assets of the sole proprietorship ought to be collected and the liabilities accounted for by the administrators of the estate.

To the issues raised in the reply by the 2nd respondent, the applicant answered through his supplementary affidavit sworn and filed on 21st November 2012. He says in the affidavit that the respondents have been intermeddling with the estate and caused a letter to be written complaining about the matter. He alleges that the respondents attempted to dispose of estate property, namely Kisumu Municipality/Block 11/132. He asserts that he is indeed a child of the deceased.

What is sought to be revoked is a limited grant. Limited grants are interim by their nature. The grant *ad colligenda bona* in particular is made pending the making of a full grant. It is limited in the sense it only allows the interim administrators to collect and preserve the estate. It was held in *Morjaria vs. Abdulla* (1984) KLR 490, that it would be made where the assets are in a precarious state. It is needed where urgent action needs to be taken to preserve the estate. In this case it would appear that it was obtained primarily for the purpose of meeting the obligations of the deceased's business ran through his firm, Joel E.D. Nyaseme & Associates.

The applicant complains that the interim administrators are disposing of assets, changing particulars relating to control of Joel E.D. Nyaseme & Associates and opening new accounts for the business.

Regarding the affairs of Joel E.D. Nyaseme & Associates, it would appear to me that the said business was a sole proprietorship. Such an arrangement does not enjoy perpetual succession. It dies with the proprietor. The business that a deceased person was running can be carried on by the administrators, as held in *Rohit C Nawaz vs. Nawaz Transport Company* (1982-88) 1 KAR 75, but

in that respect the administrators would be personally liable for the debts incurred by the business since the said debts would not be debts of the estate. There is no property in a business name and therefore for the persons taking over to legally use it they must change the particulars at the registry of business names. This would explain the actions by the interim administrators. The steps taken by the interim administrators in this matter are not sinister.

The proceeds in the bank accounts in the name of Joel E.D. Nyaseme & Associates were the property of the deceased and form part of the estate. Administrators holding a grant limited *ad colligenda bona* cannot possibly access such accounts as their mandate is limited and they can only deal with them after the grant has been confirmed. However, a grant *ad colligenda bona* cannot be confirmed, as only the full grant is available for confirmation to pave way for distribution of the estate. A grant *ad colligenda bona* does not confer a power to distribute the estate; there would therefore be no basis for confirming such a grant. To be able run the deceased's business the interim administrators holding a grant *ad colligenda bona* must change the particulars of the business firm and open new bank accounts for the business where they can put the funds generated by the business. There is therefore nothing improper about what the interim administrators have done with respect to the business. In any event, once the full grant is made the interim administrators shall have to account for to their activities.

On the allegation that they have attempted to transfer certain properties to their names, no evidence was placed before me to support the assertion. It is important for beneficiaries to understand that under **Section 79** of the Law of Succession Act a grant vests in the hold all the assets of the estate. There would be nothing improper for the administrators to make enquiries about the assets. Since the assets vest in them as personal representatives, there is nothing wrong with them causing the assets to be registered in their names in their capacities as administrators. Otherwise how would they discharge their mandate as the custodians of the assets unless the assets vest in them as administrators? **Section 79** applies to all grants, be they be full or limited.

I note that the applicant has filed several applications in this matter. These multiple applications do not augur well for the administration of the estate. In the end they will drain the estate. I say so because this high octane litigation is being engaged in even before administration has started in the earnest. I note that the applicant has even filed a notice of objection to the making of the grant, yet the petition has not even been gazetted. Under the rules objections to the making of the grant should be filed only after the gazetting of the petition. As it is the said notice of objection is premature. The concerns that the applicant is raising now belong to the objection stage. All these applications only serve to delay gazetting. They are pointless. The applicant should spare his objections till then.

The provisions of **Section 76** of the Law of Succession Act envisage that the process of obtaining the grant is attended by defects and lies. The applicants have not disclosed any defects and lies in the process of the making of the grant *ad colligenda bona*. Besides the Probate and Administration Rules envisage a Summons for Revocation and not a Notice of Motion, although nothing really turns on that.

In the end I will make the following orders: -

1. That the applications dated 23rd April 2012 and 5th July 2012 are hereby dismissed.
2. That the Deputy Registrar is hereby directed to cause the petition for full grant, dated 29th February 2012, to be gazetted forthwith.
3. That once the petition is gazetted the applicant shall be at liberty to file his objection and answer and cross-application in accordance with the Probate and Administration Rules.
4. That the Notice of Objection dated 14th January 2013 is a nullity and is hereby struck out.
5. That the matter shall be mentioned within seven days after the delivery of this ruling to confirm compliance.

DATED, SIGNED and DELIVERED at NAIROBI this 30TH DAY OF AUGUST 2013.

W. M. MUSYOKA

JUDGE