



REPUBLIC OF KENYA

High Court at Kitale

Succession Cause 195 of 2004

JAMES WANYAMA MASOLO.....DECEASED.

AND

FREDRICK WAKHUNGU WANYAMA

STEPHEN WAFULA WANYAMA.....APPLICANTS.

R U L I N G.

Fredrick Wakhungu Wanyama and Stephen Wafula petitioned for letters of administration intestate in respect of the estate of their late father James Wanyama Masolo on the 26th October, 2004. The deceased died on 2nd March, 2003 leaving behind two widows and several children including the petitioners and the respondents in this application dated 3rd April, 2012.

the grant of letters of administration was issued in favour of the petitioners on the 18th January, 2005 and was confirmed on 6th October, 2005. Approximately seven years later, the respondents took out these summons for revocation or annulment of grant under section 76 of the Succession Act and rule 44 (1) of the Succession rules on the following grounds:-

- (1) *That, the remaining administrator Stephen Nafula Wanyama has failed and conceded to the court that his co-administrator died on 3rd May, 2008*
- (2) *That, the said lone administrator has failed to distribute the state of the deceased in accordance to the agreed mode by family members and has gone to the extent of selling some land belonging to some beneficiaries and converting the proceeds of sale to his own use without their consents and/or knowledge.*
- (3) *That, the proceedings to obtain the confirmation were defective in substance as not all beneficiaries gave consent in writing or otherwise to the distribution of the estate of the deceased.*
- (4) *That, the administrator in question has mismanaged the estate of the deceased to the extent that some of the beneficiaries to the estate are now landless.*
- (5) *That, the said administrator has failed after due notice and without reasonable cause to proceed diligently with the administration of the estate.*
- (6) *That, the said administrator has failed to produce to the court within the time prescribed by law such inventory and/or account of the administration as is required.*

These grounds are supported by the averments and annexures contained in the supporting

affidavits of the applicants. David Wekesa Wanyama, Beatrice Wanyama, Nancy Wanyama and rose Nakhumicha Wanyama.

However, the respondent opposes the application on the basis of the averments and annexures contained in his replying affidavit dated 2nd May, 2012 which was responded to by a further affidavit of David Wekesa Wanyama dated 8th May, 2012.

The application proceeded by way of affidavit evidence and in that regard, written submissions were exchanged by the parties and filed accordingly. The said submissions have been considered by this court in the light of the grounds in support of the application.

Revocation and/or annulment of a grant is provided for under section 76 of the Succession Act. The provisions contains guidelines for the revocation and/or annulment of a grant by the court acting on its own motion or an application by any interest party.

A grant may therefore be revoked and/or annulled if the proceedings to obtain the grant were defective in substance or the grant was obtained fraudulently by the making of a false statement or by concealment from the court of something material to the case. Grounds one and three of the present application would fall under such instances.

With regard to ground one, it is not contended by the applicants that material facts were concealed from the court priors to the grant of the letters of administration. It is however contended that the concealment was done after the issuance and confirmation of the grant in that one of the petitioners/administrators Fredrick Wakhungu Wanyama died on 3rd May, 2008 but his death was not brought to the attention of the court by the surviving administrators i.e. Stephen Wafula Wanyama (the respondent herein).

The respondent state that the estate was already crystallized such that there remains nothing for him or any other administrator to administer. Therefore, there arose no need to inform the court about the death of the co-administrator. It is however, the application's contention that the estate has not crystallized since title deeds have not been issued for the entire immovable property and in particular the Mbai farm. Further there are several minors for whom property is held in trust by the administrator.

It is the opinion of this court that in so far as the estate has not crystallized and such crystallization would not occur. If there are title deeds, yet to be issued and there are minors whose interest in the property have to be protected prior to their reaching the age of majority. The respondent duty to this court remains intact. Such duty would include providing any vital information regarding the administration of the estate. It would have been prudent for the respondent to inform the court of the demise of his co-administrator if the fact was expected to impact on the administration of the estate. However, the respondent was not under any mandatory obligation to provide the information if it did not affect the administration of the estate since an estate may be administered by one administrator or more than one administrator but not exceeding four.

In any event, if it was deemed necessary, any other beneficiary was not precluded from applying to be substituted in place of a deceased administrator.

For the foregoing reasons, ground one of the application is unsustainable.

With regard to ground three, the applicants contend that the proceedings to obtain the confirmation were defective in substance as not all beneficiaries gave consent in writing or otherwise to the distribution of the estate. The respondent replied that the grant was properly and lawfully confirmed by the court on 6th October, 2005 and that all the beneficiaries were given their respective shares.

It is this court's view that any defect arising from the application for confirmation of grant ought to have been raised at the time of the hearing of the same. It is therefore an afterthought on the part of the applicants to raise the issue at this juncture yet they all participated in the confirmation proceedings and those who were minors at the time were represented by the petitioners and/or other beneficiaries who

were to hold some property in trust for the minor children of the deceased.

Being satisfied with property and legality of the application for confirmation, the court granted the necessary order and a certificate of confirmation was issued on 6th October, 2005.

Consequently, ground three of the application is unsustainable for want of merit.

A grant may also be revoked and/or annulled if an administrator has failed to proceed diligently with the administration of the estate or to produce to the court within the time prescribed, any such inventory or account of administration as is required or has produced any such inventory or account which is false in any material particular. Grounds two, four, five and six of the application deal with such instances.

Herein, the applicants contend that after the death of the co-administrator, the respondent has engaged in the sale of the land allocated to the minor children of the deceased for his own benefit and without consulting other family members for their consent. The applicants allege that with regard to the Meru and Mbai Farms, the respondent has acted contrary to agreements reached and in the process interchanged beneficiaries titles such that some of the beneficiaries may be required to shift or be evicted from some property.

The applicants contend that due to the mismanagement of the estate by the respondent, several court cases have arisen involving family members such as **Kitale HCCC No. 53 of 2010** involving **Joseph Wanyama vs. Bernard Masolo Wanyama** in which orders were obtained against the defendant.

The applicants also contend that some of the beneficiaries such as Nancy Wanyama and Rose Nakhumicha Wanyama have since become adults but have not been allocated any land.

The applicants allege that the respondent has failed, neglected and/or refused to account to the family members disposal of property done without their consent.

In sum, it is the applicants contention that since the demise of the co-administrator, the estate has been mismanaged by the respondent.

The respondent's response to the foregoing allegations by the applicants, is a denial and a contention that transfer forms were duly completed and signed by both administrators for the transfer of portions of land to the respective beneficiaries who have each been granted their respective title deed. Some transfer forms and title deeds were exhibited herein (see, annexures "SWW1 a-c", "SWW3 a-d" and "SWW 4").

It is the respondent's contention that each beneficiary has taken possession of their respective shares and that it is only the Mbai Farm where title-deeds have not been issued since they do not exist in that area.

The respondent further contends that none of the beneficiaries has been rendered landless even though part of the land belonging to some beneficiaries including Rose Nakhumicha Wanyama were sold by the late co-administrator leading to the matter being taken to court for necessary punishment of the co-administrator.

The respondent contends that he ought not be faulted for the mistakes of the co-administrator and states that he has never at any one time been called upon to account for the administration of the estate.

From all the foregoing contentions and allegations by both the applicants and the respondent, it is apparent that the big issue is the distribution of the estate property and in particular portions of the estate land among the beneficiaries.

Prior to confirmation of the grant, a mode of distribution had been agreed upon by all the beneficiaries but it would appear that some beneficiaries later expressed their dissatisfaction in the manner that the

distribution was effected. The applicants in particular are discontented with the manner of distribution undertaken by the respondent after the demise of the co-administrator.

It is generally the applicants' contention that the respondent has mismanaged the estate such that it has become necessary to revoke and/or annul the grant in order to protect the estate and facilitate a proper distribution of the estate.

Mismanagement of the estate of a deceased person by an administrator or administrators is a serious matter which would swiftly attract drastic orders against the administrator including revocation and/or annulment of grant to pave way for a new grant with new or additional administrator.

However, such drastic measures would only be taken upon proof of the alleged incidences of mismanagement. Petty quarrels and disagreements between beneficiaries on the manner of distribution would not be viewed as providing sufficient evidence of proof of mismanagement. However, if distribution is undertaken in a manner which was not agreed by a majority of the beneficiaries or in a manner contrary to the interests of any of the beneficiaries, then, mismanagement may easily be construed. Any action by an administrator must be undertaken in the interest of all the beneficiaries so as to avoid a situation where the administrator deems the estate to be his personal property for him to deal with in the manner that he solely wishes. In this present case, the grant was duly confirmed by the court thereby granting the administrators the authority to deal with the estate property in the manner agreed by the beneficiaries or in any other manner which was in the interest of the beneficiaries. Therefore, any detrimental action by the administrator would amount to negligence and hence mismanagement.

By and large, the dispute herein is in relation to the estate's immovable property and in particular the portions of land known as Meru Farm and Mbai Farm. It is alleged that the respondent has interchanged these farms among the beneficiaries contrary to the agreement reached by family members. The applicant Beatrice Wanyama alleges that she was entitled to an acre of the Meru Farm but the same was exchanged with a portion at Mbai farm. The same position applies to the applicant Nancy Wanyama. The applicant, Rose Nakhumicha Wanyama, alleges that she is entitled to three acres of the Mbai Farm which has not been allocated to her. These allegations are met with a denial by the respondent. However, with regard to Rose Nakhumicha, the respondent says that part of her land was sold by the late co-administrator and that he had offered part of his share to her but she declined to accept.

The mode of distribution presented together with the summons for confirmation of grant indicated that Beatrice Wanyama and Nancy Wanyama were both entitled to an acre each of the Mbai Farm and not the Meru farm as alleged by themselves. Nancy was a minor at the time. Her share was held in trust for herself by the respondent.

Rose Nakhumicha Wanyama was entitled to three acres of the Mbai Farm being her late mother's share in the estate. Rose was a minor at the time. Her share was to be registered in the name of the respondent to hold in trust for her.

From the foregoing, it is apparent that Beatrice's and Nancy's shares in the estate were confirmed to the Mbai Farm rather than the Meru Farm. The allegation that the respondent interchanged their shares was not established by any evidence and was indeed an inaccurate representation of the facts.

However, with regard to Rose, there was an admission by the respondent that part of her three acres entitlement was sold by the late administrator. This was a clear indication that there was mismanagement of Rose's entitlement to the estate property. The respondent blames the late co-administrator for the error but he cannot escape responsibility for he was one of the two administrators. As the position stands, it would appear that the applicant Rose is yet to be handed over her entitlement now that she has attained adulthood. The entitlement was held in trust by the respondent for the benefit of Rose. His failure to release the actual shares to Rose amounts to negligence and mismanagement of the estate. For this reason alone, ground two of this application is sustainable and so is ground four regard being given to the fact that Rose is yet to receive her share of the Mbai farm and by extension ground five considering that if the respondent either by himself or jointly with the late co-administrator had proceeded (diligently) with the

administration of the estate, rose would not find herself in her current position of having not benefited from the estate.

Ground six would be unsustainable for the simple reason that there was no specific request or demand made by any of the beneficiaries or any order made by the court for the respondent to provide an inventory and/or account of his administration of the estate. However, a diligent administrator is required to account from time to time for his administration of the estate even without any specific request, demand or order from any person.

Even though the mismanagement of the share belonging to Rose would be sufficient reason to revoke and/or annul the grant, it would not be in the interest of the entire estate to do so as this would complicate the entire administration process and probably give rise to a multiplicity of suits by third parties who may have purchased part of the estate property. Besides, it would be appropriate to maintain continuity of the administration but with sufficient safeguards to avoid future mismanagement. In that regard, in addition to the respondent, the substantive, applicants herein i.e. David Wekesa Wanyama and Mary Nasimiyu Wanyama be and are hereby appointed joint administrators of the estate of the deceased in place of the deceased co-administrator. The respondent shall continue as a joint administrator on condition that he shall provide to the co-administrators David and Mary an inventory and/or account of all the transactions pertaining to the immovable property (i.e. land) of the estate as at this 22nd day of November, 2012 within the next three (3) months from this date hereof. A copy of the said inventory and/or account be filed in court within the said period. In default, the respondent shall forthwith be removed from the administration of the estate without prejudice to any legal action that may personally be brought against him as a result of his previous mismanagement of the estate.

Ordered accordingly.

**[Read and signed this 22nd day of November, 2012 in the presence of applicants and M/s. Munialo for respondent.]**

**J.R. KARANJA.**

**JUDGE.**