



**REPUBLIC OF KENYA**

**High Court at Bungoma**

**Probate & Administration 196 of 2007**

**PETER WASIKE SIBOKO .....DECEASED**

**AND**

**FELIX SAKINI WASKIE .....PETITIONER**

**RULING**

**INTRODUCTION**

**The Application**

[1] I have before me an application by way of Notice of Motion dated 2<sup>nd</sup> April 2012 and filed in court on 4<sup>th</sup> of April 2012. The application is brought under section 1A and 1B of the Civil Procedure Act, and Order 40 rules 1, 2, 3 and 6 of the Civil Procedure Rules. It is supported by the Affidavit of George Wanjala Masete Wasike sworn on 3<sup>rd</sup> April 2012, and also on the grounds on the face of the application. The Applicants are seeking among others, orders THAT;

- 1) The Respondent to be compelled to come to court and sign form R.L.16 and/or the same be registered without his signature.
- 2) Costs be provided for.

**THE APPLICANTS' CASE**

[2] From the application, affidavit in support and oral submissions by the Applicant, the main grounds of the application are that:

- a) The Respondent, who is the administrator of the estate, has refused to sign form R.L16 which is drawn in accordance with the grant.
- b) The Respondent has intentions of blocking the other beneficiaries from carrying out any transaction on their rightful shares.
- c) The Respondent seems to be tired of them and is treating the other family members as enemies. The applicant suggests that he should be relieved of the duties as the administrator and have another person step into his shoes and complete the work that is remaining.
- d) The major source of the problem here is the inclusion in the confirmation of the grant of Justus Peter Wasike as having a share of 25 by 100 ft in Land Parcel No. KIMILILI/KIMILILI/2564 when in fact, he sold the said share to Wycliffe Wafula Lusweti.

- e) The Certificate of Confirmation indicates that Justus Peter Wasike and Wycliffe Wafula Lusweti each has a plot measuring 25ftx100ft in LR NO.KIMILILI/KIMILILI/2564 which is a duplication.
- f) Form R.L.16 annexed to the affidavit of the Applicant is drawn in accordance with the grant herein.

[3] The Applicant however, at the end of his submissions suggested that a fresh Form R.L. 16 could be drawn in accordance with the grant as rectified by the court, in order to remove Justus Peter Wasike from LR KIMILILI/KIMILILI/2564, and also finalize the administration of the estate.

### **THE RESPONDENT'S CASE**

[4] The Respondent through his lawyer Mr. Situma told the court that Form R.L.16 that has been exhibited by the Applicant is inconsistent with the Certificate of Confirmation of grant in material respects. He has referred the court to paragraphs 4, 5 and 6 of the Replying Affidavit by Felix Sakini Wasike sworn on 4<sup>th</sup> October 2012.

The named paragraphs aver that:

**4. That I have compared the certificate of confirmation and Form RL.16 and they are different as per the shares of beneficiaries 12 on land parcel No. KIMILILI/KIMILILI/2564 one JUSTUS PETER WASIKE is supposed to get Plot measuring 25ft x 100ft while on Form No.16 he has been given Nil as beneficiary No.12.**

**5. That Fredrick Wafula Wasike is supposed to get 0.53 Acres from Land parcel NO. KIMILILI/KIMILILI/2564 but he has been given 0.16 Acres as per RL.16.**

**6. That Kizito Masete Wasike and Elizabeth Nasambu Masete have jointly been given 0.78 Acres while on Form No2564 the name Elizabeth has been deleted**

[5] According to Mr. Situma, because of these inconsistencies between the Certificate of Confirmation of Grant and Form R.L.16, the administrator cannot sign the said form.

[6] Lastly, Mr. Situma exhorts that the approach used by the Applicant to come to court is defective. He reminds that he is aware of Article 159 of the Constitution on technicalities, and also Rule 63 of the law of Succession Rules where provisions of the Civil Procedure Rules can apply in P & A matters. But despite those provisions of the Constitution and the law, Order 40 Rule 1 – 3 of the CPR and section 1A and 1B of the Civil Procedure Act are not some of the provisions of the CPR which can be imported to P & A cause. He urges further that, Rule 73 of the P & A Rules does not also allow that kind of transportation of rules. According to Situma, if the applicant wants to rectify the grant he needed to apply under section 74 of Law of Succession Act. He is also of the view that the court cannot rectify a grant on its own. He therefore implores the court to reject the application for it lacks merit.

### **ISSUES FOR DETERMINATION**

[7] What appear to be the real issues in dispute which the court must resolve are:

**a) Whether Form R.L.16 exhibited by the Applicant in his application is in conformity with the grant as confirmed by the court. Depending on the answer to this question, should the Petitioner/Respondent sign the said Form R.L.16? Or what orders are appropriate in the circumstances of this case?**

**b) Whether under Rules 63 and 73 of the Law of Succession Act, sections 1A and 1B of the Civil Procedure Act and Rules 1-3 of Order 40 of the Civil Procedure Rules can be transported into a succession case. What is the proper constitutional control on this kind of transportation of rules of procedure?**

### **ISSUES IN DISPUTE ARE DISPOSED OF IN THE MANNER BELOW**

## The Applicable Law

[8] This matter is largely governed by the Law of Succession Act, although there are some aspects in the arguments by Situma that will require the court to speak to Articles 159(2) (d) of the Constitution as well as the provisions of the Civil Procedure Act and Rules that he has quoted.

### About procedural technicalities

[9] I am glad Mr. Situma is aware of Article 159 of the Constitution as he must be, and I believe he is referring to Article 159(2) (d) that deals with technicalities. The question of Article 159(2) (d) of the Constitution is one which courts have re-stated time and again, and we will not tire repeating until the wealth of that provision is properly understood in the dispensation of justice. The court observed in the case of **BGM HC MISC APP. NO.1107 OF 2010 – MATUNGU LAND DISPUTES TRIBUNAL, Ex Parte ELECTINA WANG’ONA** that;

***Whereas adherence to procedural requirements should be observed, it should not be unduly used to defeat substantial justice of the case. Applying technicalities with an almost peremptory command will only lead to an absurdity and disparage of the very Constitution to which all law must conform.***

[10] The court, in the above case, also succinctly set out the proper constitutional control on technicalities; which followed after the decision of the Supreme Court in **SAMWEL KAMAU MACHARIA AND ANOTHER V KCB LTD AND TWO OTHERS APPLICATION NO 2 OF 2011** thus:

***In its forthright characteristic in ascertaining the law, the Supreme Court appears to suggest that the circumstances of each case will determine whether a procedural requirement is one that affects the rights of the parties or...is a procedural technicality the likes of which are depreciated by Article 159(2) (d) of the Constitution.***

[11] I should nevertheless emphasize that we need to develop a new and real consciousness of the elegant provisions of Article 159(2) (d) of the Constitution, and I am sure if we did that, parties will resist the temptation of raising objections unless they ***relate to a technicality of a nature that is the Centre piece of administration of justice.*** [See case No 107 of 2010 quoted above].

[12] My rejoinder to the objections raised by Mr. Situma is that; I do not understand how sections 1A and 1B of the Civil Procedure Act could be a basis for an objection when overriding objective is now a cardinal principle of the Constitution and all law in Kenya. Our courts are bound by the overriding objective in the manner tabulated under sections 1A and 1B of the Civil Procedure Act, which is the exemplar of adjudication of cases by civilized system of courts. The requirement for courts to facilitate a just, expeditious, proportionate and affordable resolution of disputes is quite in consonance with and has been embodied in Article 159 of the Constitution.

I should be quick to say also that, looking at the nature of the prayers sought in the application, there is little difficult in noting that the quoting of Order 40 rules 1, 2, 3 and 6 of the CPR as the enabling provision, is just a misplaced tag.

[13] Before I close on this aspect, I wish to say one more thing. The court, under the Law of Succession Act, and in particular Rules 63 and 73 of the Probate and Administration Rules, has wide powers, and where necessary, may resort to its inherent powers in dealing with any situation that might arise in relation to the estate of the deceased in order to do justice to the parties, ensure due administration of the estate and prevent prejudice to the rights of the dependants. The manner of approaching the court in probate and administration cases for intermediate relief, will therefore involve court's unfettered discretion inclined to doing substantial justice rather than paying homage to strict procedural technicalities particularly those similar to the ones being raised here. Without doubt, the objections by Mr. Situma are of the nature ... ***the likes of which are depreciated by Article 159(2) (d) of the Constitution.*** His argument therefore turns up nothing and is rejected. The instant application is properly

before the court, and I will thus proceed to determine the real issues in dispute.

### **IS FORM R.L.16 HERETO IN CONFORMITY WITH THE GRANT?**

[14] My very earlier view is that Form R.L.16 hereto does not conform to the Grant of Letters of Administration that was confirmed through the Certificate of Confirmation of Grant issued by the court on 25<sup>th</sup> March 2012.

[15] There is material variance in respect of the share of Kizito Masete Wasike and Elizabeth Nasambu Masete in Land Parcel No. KIMILILI/KIMILILI/2564. According to the Certificate of Confirmation of Grant, the two beneficiaries jointly own 0.78 Acres in that parcel of land whereas Form R.L.16 "has vested" the entire portion in Kizito Masete Wasike alone. That may look like a simple thing; a mere entry in some "Form". But it is a grave matter that completely disinherits Elizabeth Nasambu Masete of her entitlement in the estate; contrary to the Constitution as well as the Law of Succession Act. The court will never allow such an injustice to take place and this finding largely cuts the direction the decision of the court will take in this matter.

[16] There is another variance with regard to the share of Justus Peter Wasike of a plot measuring 25ft by 100ft in LR KIMILILI/KIMILILI/2564, but that aspect was cured following the rectification of the Certificate of Confirmation of Grant herein that was done by the court on the application by Justus Peter Wasike on 23.10.2012. According to the Affidavit sworn by the said Justus Peter Wasike on 15<sup>th</sup> October 2012, he had sold his said share to Wycliffe Wafula Lusweti, and he confirmed this to the court on 23.10.2012. Therefore, the inclusion of both Wycliffe Wafula's share and his is erroneous. That error was however corrected and I will not say much about it.

[17] But, the averment by the Respondent in paragraph 5 of his affidavit is not entirely correct as Form R.L.16 clearly indicates at item No 2 that Fredrick Wafula Wasike gets 0.53 Acres in KIMILILI/KIMILILI/2564. What that form has done is that it has again in item no 11 indicated that Fredrick Wafula Wasike gets 0.16 acres, which is also not in line with the grant as that portion is to be owned jointly with David Wamalwa Wasike and Stephen Sikuku Masete.

[18] On the overall, Form R.L. 16 is inconsistent with the Grant of Letters of Administration and is certainly a negation of lawful administration of the estate of the deceased as required by the Law of Succession Act. The administrator therefore is right to have declined to sign the said Form R.L. 16. As such, the application by way of Notice of Motion dated 2<sup>nd</sup> April 2012 and filed in court on 4th of April 2012, to the extent that it seeks the administrator to sign Form R.L. 16 annexed to the application, fails.

[19] However, the application has brought to the fore the fact that administration of the estate is not completed and so I make the following orders that:

***1) The administrator, within 30 days, to complete administration of the estate in accordance with the law, and take such necessary steps, including but not limited to signing and lodging for registration all legal conveyance instruments that will effectively distribute the estate to the respective beneficiaries. In particular, if it is the appropriate procedure, he should fill in a proper Form R.L. 16 and accordingly lodge it for registration.***

***2) Further, on completion of administration in accordance with order (1) above, the administrator shall produce in court a full and accurate account of the completed administration on 21st January 2013.***

[20] I make no order as to costs.

**Dated, signed and delivered in open court this 22nd day of November 2012**

**F. GIKONYO**  
**JUDGE**

**22.11.2012**

**In the presence of**

Mercy Alusa-court clerk  
Applicants present  
Situma for Petitioner

Situma: The thirty days period should start to run after the rectified certificate of confirmation is issued to us.

Court: The thirty days period to complete the administration of the estate to start to run once the certificate of confirmation of grant is issued to the Petitioner. Matter to be mentioned on 26/11/2012 to confirm the rectified certificate of grant has been issued to the Petitioner.

**F. GIKONYO**

**JUDGE**

**22.11.2012**