



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Succession Cause 72 of 2000

IN THE MATTER OF THE ESTATE OF SHADRACK MUTAHI...(DECEASED)

MUTURI MUTAHI.....PETITIONER

Versus

WAMBUGU MUTAHI.....OBJECTOR

RULING

In the Notice of Motion before me dated 31st January 2005 filed by Wambugu Mutahi against his Co-Administrator, Muturi Mutahi, in these succession proceedings concerning the Estate of Shadrack Maina Muturi alias Maina Muturi, the Applicant prays for orders authorizing the Executive Officer of this court to execute all necessary documents concerning the Estate of the Deceased to effect a transmission of parcel of land No. OTHAYA/ITEMEINI/476 from the deceased to the two Co-Administrators in equal shares.

From the record, in the court case file, the Respondent was the Petitioner for a Grant of Letters of Administration in the said estate. He obtained a grant on 15th August 1983. But as a result of an objection filed by his brother Wambugu Mutahi, that grant was revoked by Hon. Justice J. V. O. Juma who, as a result, issued a new grant on 19th June 2001 to the two brothers as Co-Administrators in an effort to settle their dispute.

It appears to-date the two brothers do not see each other eye to eye on the issue of ownership of the suit parcel of land and therefore could not agree to file summons for confirmation of that new grant.

In the circumstances, Wambugu Mutahi filed that application alone but he could not move far because this court was insisting that Muturi Mutahi should participate in the application and that even if he is not one of the signatories, he should be present during the hearing of the application to let the court know his position concerning the application especially in relation to the distribution of the Deceased's estate. The deceased was an unmarried brother of both parties in this application.

Wambugu Mutahi kept on informing the court that Muturi Mutahi has refused to participate in the application and when asked to come to this court, even when he is served with summonses to come, he refuses to come. When I took over the conduct of this case I had to ensure that indeed what Wambugu Mutahi was saying about the refusal of Muturi Mutahi to come to court was true by getting this court's process server to effect the service and file affidavit of service before the hearing date. That was done and when Muturi Mutahi again failed to come on 5th November 2004, I heard Wambugu Mutahi's Summons for Confirmation of Grant and allowed it as prayed, the Applicant having proposed that the two of them share the suit parcel of land equally.

Now it is the execution of the relevant certificate of confirmation of the Land Registry to effect the transmission that is again giving Wambugu Mutahi a headache. While the Land Registrar requires the two

Co-Administrators to act together, Muturi Mutahi is refusing and when he, this time, came to court, he told me that he is refusing to sign the required documents because he does not agree with the distribution of the estate as made by Wambugu Mutahi.

The question is: for how long should Muturi Mutahi be saying this when he refuses to go before the court when the court is ready and able to hear him on that issue and resolve it? He failed to use the opportunity he had, at the confirmation of the grant, to raise that issue by way of an affidavit of protest and up to now he has not come up with any application challenging the court's decision dated 5th November 2004, neither has he appealed to the Court of Appeal.

I do not therefore accept what he is verbally saying now without having filed a replying affidavit – in this application.

I am aware that the Applicant Wambugu Mutahi has not complied with provisions of the Law of Succession Act particularly Rules 49 and 59 of the Probate and Administration Rules in bringing this application. Instead, he is referring to *Section 98* of the Civil Procedure Act, which is not applicable in Succession proceedings. No wonder therefore that he is talking in terms of this court's Executive Officer being authorized to sign those documents.

Under the Civil Procedure Act, that is done. But under the Law of Succession Act with its peculiarities, what the Applicant is asking for in his Notice of Motion cannot be lawfully done. Moreover Notices of motion are not known under the Law of Succession Act.

As Co-Administrators in the Estate of the Deceased herein, the Applicant and the Respondent were appointed under a peculiar procedure only known under provisions of the Law of Succession Act, which provisions exclude the application of any other law except the law which is permitted to apply by provisions of the Law of Succession itself. In that respect Rule 63 of the Probate and Administration Rules is the most cited provision.

There is no provision of the Law of Succession Act empowering the court to appoint an executive officer of the court or any other officer of the court or any person from outside the court to do what an administrator or an executor in the estate of a deceased person is supposed to do. Such an Administrator or executor is generally referred to as a personal representative and his or her appointment to that position is personal to him or her. He holds that position as the deceased person's heir or assignee within the meaning of all trusts and powers and that is why under the Law of Succession Act *Section 82* sets out the powers of a personal representative while *Section 83* sets out the duties of a personal representative. Any other person like the court's executive officer cannot lawfully fit into that position and it would therefore, in my view, be unlawful for a court to appoint or authorize such an executive officer to do what a personal representative is supposed to do.

That is the tight position in which the Applicant in this Notice of motion finds himself because of his disagreement with his brother and when I say this the Respondent may be smiling wherever he is with the feeling that he has properly fixed the Applicant.

I will however, revert to the court's power under Rule 73 of the Probate and Administration Rules and say that I do disregard undue technicalities and entertain the Applicant's Notice of Motion to decide the application on its merits – by saying the following:

The Applicant has not reached a dead end and the Respondent's smile may be short-lived. Firstly, this court may decide to revoke the grant issued to the parties herein as Co-administrators, dated 19th June 2001, under *Section 76(e)* of the Law of Succession Act and proceed to issue one in the name of the Applicant Wambugu Mutahi as the sole administrator or personal representative in the estate of the deceased. Secondly, after the revocation as stated above, this court may order further proceedings in this succession cause closed, so that the parties and any other persons, may start by filing a petition afresh in a new Succession cause. Thirdly the court may authorize the Applicant alone to sign the documents in question. All that can be done within provisions of the Law of Succession Act.

I will adopt the shorter and least troublesome, to the parties, of the three possibilities.

Accordingly, notwithstanding the generality of the powers conferred to a personal representative by *Section 82* and the duties imposed by *Section 83* of the Law of Succession Act, the Respondent in the Notice of Motion herein dated 31st January 2005, Muturi Mutahi, be and is hereby ordered to sign or thumb print, within a period of 30 days from the date of this ruling, together with the Applicant Wambugu Mutahi as Co-Administrators, all the documents necessary to effect, at the District Land registry Nyeri, the execution of the court order in the certificate of Confirmation of Grant issued to the two parties by this court on the 5th day of November 2004, to have parcel of land Reg. No. OTHAYA/ITEMBEINI/476 shared between the two parties and registered in accordance with the aforesaid certificate of Confirmation of Grant leading to sub-division or partition of that land if desired by either party.

In default by the Respondent, the Applicant, Wambugu Mutahi, be and is hereby empowered, authorized and ordered; just as the Land Registrar is also ordered to permit the said Wambugu Mutahi; to sign or thumb-print all the documents aforesaid on Wambugu Mutahi's own behalf and for and on behalf of the Respondent; Muturi Mutahi.

To encourage good relationship between the parties, each party to bear its own costs of this application.

Dated at Nyeri this 8th day of November 2005.

J. M. KHAMONI

JUDGE

Both Parties Present.