



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 65 OF 1974

IN THE MATTER OF THE ESTATE OF STEPHEN BUTHIA (DECEASED)

RULING

(ON APPLICATION BY WAY OF CHAMBER SUMMONS DATED

23RD JUNE 2004)

By a consent order made on 8th December 2003, the parties herein agreed inter alia, that a fresh grant of Letter of Administration be issued jointly to Rose Wambui Mbuthi and Charles Kimacia Mbuthi and that the joint Administrators shall within 45 days of the said order file an application for confirmation of the grant so made.

On 24th March 2004 the co-administrator Charles Kamachia Mbuthi filed the Summons for confirmation which came up for hearing on 26th May 2004. The co-administrator and Charles Kimachia (junior) who is represented by the firm of Flavia Rodrigues & Co. Advocates was served but did not appear in court. The grant was duly confirmed as the court was satisfied that the following steps had been taken

- 1) Service of the Summons was effected and an affidavit of service was duly filed
- 2) There was no pending application or affidavit of protest that was on record.
- 3) The proposed mode of distribution of the deceased estate that allocated equal shares to the four beneficiaries was deemed to be fair and equitable. The court therefore proceeded to confirm the grant.

Rose Wambui Mbuthi, the co-administrator who is not satisfied with the confirmed grant has now moved this court by way of a Chamber Summons brought under order IXA Rule 10 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and Section 74 of the Law of Succession Act seeking for orders to set aside the order of 26th May 2004 and the co-administrator applicant be granted leave to oppose the application for confirmation.

The application is premised on the ground that the grant was issued on 8th December 2003 and not 11th December 2003. That the grant was confirmed before the expiration of the statutory period of six (6) months. That the distribution of the estate is unfair to the applicants as would be demonstrated by way of evidence and that the absence of the applicant on 26th May 2004 was inadvertent and unintentional.

This application was supported by the affidavit of David Mutinda, Advocate who avers that the application was received in their office by their pupil, Mr. Solomon Masitsa who filed it away and the same was not entered into their diary.

Further the dispute on the rightful beneficiaries and their shares has been pending since 1974 and has not been determined, he therefore pleaded with this court not to visit his own mistake upon his innocent client.

This application was vehemently opposed by the respondents/co-administrators who submitted that this is yet another attempt by the co-administrator to procrastinate and prolong the finalization of this matter which has been pending now for 30 years.

As to the issue of beneficiaries and the rightful shares, this was determined in April 1978 in H.C.C. No. 1289/1974 by Harris J. where he ruled as follows:

(1) “The furniture and household effects in the deceased’s house at the time of his death will go to his widow, the first defendant

(2) The remainder of the movable property will go equally between the two houses that is to say, onehalf to the persons now constituting Joyce’s house and the one-half to those comprised in the widow’s house”

Counsel for the respondent submitted that the parties were ordered to bring the application within 45 days due to the age of the matter and the application was duly served upon the advocates who acknowledged receipt and since the applicants have failed to show any plausible explanation for their failure to file an affidavit of protest, the respondent’s urged the court to dismiss the application which in any event is bad in law and an abuse of the court process. I have carefully considered this application, firstly I agree with the counsel for the respondent that the Law of Succession is a complete Act of Parliament with its own regulations and save for where there is specific provision for the invocation of the Civil Procedure Rule as in Rule 63 of the Probate and Administration Rule, the rules of Civil Procedure in particular Order 9, Rule 10 upon which the application is based is not applicable. Hence there is no provision in the Law of Succession for setting aside of judgment as envisaged by the applicants in this application in this respect therefore the application should fail. Apart from form, I find the application wanting in many other aspects.

1) There is no plausible reason why the applicants failed to attend court. The consent order specifically provide that the parties were supposed to file an application for confirmation within 45 days. The court having specifically granted the leave the applicants cannot be heard to challenge the application for confirmation which was brought before 6 months.

2) This is an old matter, the mode of distribution that was approved of to the effect that the deceased estate be divided equally among the surviving beneficiaries. This is in accordance with an earlier judgment of Justice Harris in H.C.C.C. No. 1289 of 1974 (O.S) This suit involved the deceased estate and the determination of shares of each household. Since no appeal was lodged, I am satisfied that the issue of distribution was duly brought to rest in that judgment and should not be revisited.

3) It would appear that there was a typographical error on the application for confirmation that read 11th December 2003 instead of 8th December 2003. I am not satisfied that the applicants suffered any prejudice as a result of the said typographical error. The applicants advocate aver under paragraph 5 of the supporting affidavit that the application was served upon their firm and was received by “our pupil Mr. Solomon Masitsa who filed it away and the same was not entered into the diary.”

In view of the above explanation, which is not at all supported by the affidavit of the said pupil, I am satisfied that there was no prejudice suffered by the applicants

4) This is an old matter that goes back to three decades since the deceased herein passed away. It is in the interest of justice that matters of probate should be finalized without undue delay. It is obvious that the delay in this matter has caused tremendous suffering to some

beneficiaries while others have probably been benefiting from the delay in this regard. This court has a duty to promote the rights of all the parties for ends of justice and to protect the abuse of the process.

In the result, it is my humble view that this litigation should be brought to an end and I therefore decline to allow the application dated 23rd June 2004 which I hereby dismiss with costs to the respondents.

It is so ordered.

Ruling read and signed on 22nd October 2004.

MARTHA KOOME

JUDGE