In re Estate of Natolio Nagwebonia Mbolu (Deceased) (Succession Cause 126 of 2008) [2024] KEHC 4018 (KLR) (19 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4018 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

SUCCESSION CAUSE 126 OF 2008

WM MUSYOKA, J

APRIL 19, 2024

IN THE MATTER OF THE ESTATE OF NATOLIO NAGWEBONIA MBOLU (DECEASED)

RULING

1. I am called upon to determine 2 applications, dated 26th April 2023 and 15th May 2023.

2. The application, dated 26th April 2023, is by the administrator of the estate herein, the Public Trustee. I shall refer to the Public Trustee, for the purposes of these confirmation proceedings, as the Public Trustee. It seeks confirmation of the grant made herein on 17th November 2021. The children of the deceased are identified as 8, being 2 sons and 6 daughters. 1 son and 4 daughters are identified as dead. The surviving children are John Maube Natolio, Elizabeth Akumu Mola, Susan Mudambo Orida and Mary Anyama Abuya. Those said to be deceased are James Ouma Natolio, Almeida Aloo Natolio, Josephina Achola Oriadi and Agnes Muoya Anyango. The assets distributed are Bunyala/Bulemia/133, 533 and 2242. The distribution proposed is to some children of the deceased, and to individuals whose relationship with the deceased is not indicated. There is an accompanying consent on distribution, dated 28th February 2023, no doubt in Form 37, purportedly executed by John Maube Natolio, Joseph Ouma Mbolu, Mirium Nabwire Mukabana, Willimina Anyango Nasonga, Charles Pamba Namahia, Susan Narima Orida, Elizabeth Akumu Mola and Sande Oriadi. There is also a consent to confirmation of grant, dated 24th April 2023, signed by John Maube Natolio, Elizabeth Akumu and Susan Mudambo Orida.

3. The filing of the summons for confirmation of grant provoked a reaction by John Maube Natolio, a son of the deceased, who filed a Motion, dated 15th May 2023. Since his Motion is a reaction to the confirmation application, as he is challenging the administratorship of the Public Trustee, I shall treat it as a protest to the confirmation application, and I shall treat him, John Maube Natolio, as the 1st protestor. He seeks review of the order that the court made herein on 17th November 2021, which revoked the grant that had been made herein on 3rd November 2008, and confirmed on 5th May 2009. He would like the grant herein made to himself, John Maube Natolio, jointly with Joseph Ouma Mbolu, as agreed by the beneficiaries. He explains that the initial grant was revoked, and the Public Trustee appointed as administrator of the estate, after the then administrators failed or were reluctant

to expedite the matter. He states that the stalemate had been caused by the inability of the parties to agree on administration and distribution of the estate. He avers that after the Public Trustee was appointed, all the beneficiaries agreed on both administration and distribution. They then approached the Public Trustee with the proposal to have confirmation done through the administrators proposed by the family, but the Public Trustee was reluctant. He has come to court, as the Public Trustee has declined to cede the administration to him, and is keen on having his grant confirmed.

4. The summons for confirmation of grant has attracted a protest from Geoffrey Ogaba Namadoa, vide an affidavit sworn on 17th May 2023. I shall refer to him hereafter as the 2nd protestor. He claims to hold a title deed to Bunyala/Bulemia/2678, which had been hived off Bunyala/Bulemia/2242, and fears that the distribution of Bunyala/Bulemia/2242 could disadvantage him. He avers that there is a pending appeal, arising from proceeding ignited by the subdivision of Bunyala/Bulemia/2242 to create Bunyala/Bulemia/2678. He identifies the appeal cause as Civil Appeal No. E108 of 2022. He avers that the Public Trustee had obtained a limited grant on 20th April 2023, and before the 6 months lapsed, he filed a summons for confirmation of grant, which was in breach of the law. He states that Bunyala/Bulemia/2242 was registered in the name of James Ouma Natolio, on 13th November 1991, vide ELC No. 70 of 2013, after which the land was registered in his name, that is Geoffrey Ogaba Namadoa. He avers that the family of the late James Ouma Natolio should not be claiming 6 acres which had already been transferred to him. He dismisses the application for confirmation of grant as fictitious, as the beneficiaries had not disclosed the correct information to the Public Trustee. He attaches a title deed for Bunyala/Bulemia/2678, as evidence that the property was registered in his name on 15th April 2015. He also attaches copies of orders, judgements and pleadings in Busia ELC No. 70 of 2013, Kisumu CACA No. E078 of 2022 and Kisumu CACA No. E108 of 2022, to demonstrate that there was, and still is, litigation, between him and others, over the subject property. He has also attached a copy of a green card for Bunyala/Bulemia/2678, evidencing the dealings with that property from 13th November 1991 to 2016.

5. The 2nd protestor also filed grounds of opposition, dated 14th August 2023. He avers that Bunyala/Bulemia/2678 does not form part of the estate of the deceased herein, and that the same is still subject to litigation in Kisumu CACA No. E078 of 2022, and, therefore, the property should be excluded from these proceedings..

6. The other response to the application is by way of grounds of opposition, dated 26th May 2023, filed herein by Fredrick Fidelis Omulo Gumo, with respect to Bunyala/Bulemia/3122, which he claims he obtained in 1991, the same does not form part of the estate, and should be excluded from the proceedings. I shall refer to him hereafter as the 3rd protestor.

7. There is yet another protest, filed by the Catholic Diocese of Bungoma, vide grounds of opposition, dated 14th August 2023, claiming that Bunyala/Bulemia/3516 was its property, it did not form part of the estate of the deceased, and should be excluded from the confirmation proceedings. I shall refer to the Catholic Diocese of Bungoma as the 4th protestor. A copy of a title deed is attached, depicting the 4th protestor as proprietor of that property since 22nd September 2016.

8. The 1st protestor then filed a supplementary affidavit, sworn on 17th September 2023, in response to the protests by the other protestors. He avers that all the other protestors were not contesting that the deceased had not parted with title to any of his assets that are the subject of these proceedings. He points out that the 3rd protestor purports to have had acquired Bunyala/Bulemia/3122 in 1991, at a time when the deceased was dead, and succession to his estate had not happened. He further avers that the 2nd protestor was claiming to have acquired Bunyala/Bulemia/2678 in 2015, long after the deceased had died, and at a time when administration of the estate had not been completed. He asserts that

the assets the subject of the protests, and the subdivisions from them, cannot be excluded from the succession process, for their transfer to third parties was not undertaken through a lawful process, and, therefore, it was illegal. He further states that none of the said protestors have sought to explain how they came to be registered as proprietors of the assets in question. He states that the court has power to cancel the titles illegally registered in the name of any person or entity.

9. The principal application herein is for confirmation of grant, and I note that the rest of the filings thereafter are mere responses to that application. From what I have read from those responses, the proposed distribution is very highly contested, and the most effective way to deal with all the issues raised would be by way of viva voce evidence. So, the said summons for confirmation of grant, and the 4 protests to it, shall be heard orally, through cross-examination of all the parties on the contents of their respective affidavits.

10. Although the 1st protestor reacted to the application, by filing a counter-application for removal of the Public Trustee, I have chosen to treat his response as a protest, and treat him as a protestor. Let me explain. The Public Trustee was appointed by way of a grant of representation. The order to appoint him was made on 26th November 2021, and a grant was duly issued to him on 20th April 2023. A grant-holder, or grantee, can only be removed from office through revocation of his appointment. That exercise can only be done in accordance with section 76 of the *Law of Succession Act*, Cap 160, Laws of Kenya, and not otherwise. The 1st protestor is asking me to review the orders which appointed the Public Trustee. He may argue that he does not seek revocation of the grant to the Public Trustee. An administrator is placed in charge of an estate through a grant of representation, and is removed from that office by way of revocation of that grant. The review of the orders that appointed the Public Trustee would have the effect of removing him from office, which would be irregular, for his removal cannot be done or achieved, unless his grant is revoked. In any case, why go in a roundabout way, to remove the administrator through review proceedings, when there is the direct way provided for by the law, revocation under section 76 of the *Law of Succession Act*. I shall not review the orders of 26th November 2021, for now, for the 1st protestor has not come to court properly with that plea.

11. Secondly, review of order is done on clear parameters. These are set out in Order 45 of the Civil Procedure Rules. Review of orders is one of the processes in the Civil Procedure Rules that have been adopted in the probate and administration process, through Rule 63 of the Probate and Administration Rules. Rule 63 talks of Order XLIV of the Civil Procedure Rules, which, following the re-organisation of the Civil Procedure Rules in 2010, has now become Order 45. The principle grounds for review are 2: error on the face of the record and discovery of new evidential material that was not available when the order sought to be reviewed was made. There is a third ground, which is omnibus and vague, any other sufficient reason. The 1st protestor has not alluded to any facts which would point to there being an error on the face of the order made on 26th November 2021, nor to discovery of any evidential material of such importance and significance as to require that those orders be revised. I do not see any other sufficient reason. He claims that the beneficiaries, or family members, are now agreed on administration and distribution. I have not seen evidence of that. He has not attached any document signed by all of them, indicating that they had agreed on his appointment as administrator, neither is there any showing how they have all agreed on how the assets are to be distributed. There is nothing to establish that the circumstances, that led up to the court making the said orders on 26th November 2021, have changed, so much as to require those orders being revisited. The deceased died in 1991, and the family members did not see it necessary to initiate succession proceedings until 2008, some 17 years later. Even then, upon representation being granted, the administrators were unable to complete administration for 13 years, until the court was convinced that they were incapable and incompetent, and chose to replace them with the Public Trustee, the administrator of last resort. According to the

law of succession, administration ought to be completed within 1 calendar year. Any administrator who is unable to complete administration within a year, would, generally, be considered a failure. The protestor was 1 of the administrators appointed in 2008. He failed to complete administration of this estate within the 1 year required by law, and for 12 years he was still holding himself out as administrator, without completing administration, until the court got tired of his failures, and revoked the grant and replaced him. If he feels that, for that period that he has been out of office, he has developed a better perspective of things, and his administration skills have improved, let him prove that at the oral hearing of the confirmation application.

12. My last statement, foregoing, should dovetail with what I am going to say hereafter. At the hearing of a confirmation application, one of the issues that the court addresses is confirmation of the administrators. It considers 3 things, according to section 71(2)(a) of the *Law of Succession Act*.

13. The first thing is whether the administrator, who is seeking confirmation of his grant, and distribution of the estate, was properly appointed. Just how was he appointed, or how did he come into the office? Was the process of his appointment defective? Was it attended by fraud, misrepresentation or concealment of important matter from the court? These are the factors, under section 76(a)(b)(c) of the *Law of Succession Act*, upon which a grant may be revoked. So, at confirmation, there should be a reading of sections 71(2)(a) and 76(a)(b)(c), together, for the purpose of assessing whether the administrator validly came into office. So, at the confirmation hearing of the application, the 1st protestor will be at liberty to make a case that the Public Trustee is not properly in office.

14. For avoidance of doubt, sections 71(2)(a) and 76(a)(b)(c) of the *Law of Succession Act*, say as follows:

> " The court to which application is made, or to which any dispute in respect thereof is referred, may –
>
> a. if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer the estate according to law, confirm the grant..."
>
> "A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion –
>
> a. that the proceedings to obtain the grant were defective in substance;
>
> b. that the grant was obtained fraudulently by the making of a false statement or the concealment from the court of something material to the case;
>
> c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently..."

15. If the court finds that the administrator was properly appointed, the next consideration will be whether upon his appointment he went about administering the estate in accordance with the law. That would be about properly exercising the powers that are conferred on administrators by section 82 of the *Law of Succession Act*, and properly discharging the duties of administrators as set out in section 83 of the Act. See In re Estate of GNC (Deceased) [2017] eKLR (Muigai, J). The powers relate to enforcing causes

of action that survive the deceased or arise from his death, with respect to the assets of the estate. It is about selling estate assets were need arises. It is about assenting to vesting property and appropriation of the same. The court will consider whether the administrator exercised these powers at all for the benefit of and in the best interests of the estate, and where the administrator did exercise the same, evaluate whether he did so properly. The duties are about providing for a decent burial of the remains of the deceased from the resources of the estate, collecting and getting in the assets of the estate, meeting all the administration expenses of the estate, ascertaining and paying the debts and liabilities of the estate, rendering accounts, applying for confirmation of the grant in order to distribute the estate, and finally distributing the estate. See Loise Wambui Njoroge vs. Albert Thuo Cege & 5 others [2017] eKLR (Muchelule, J) and In re Estate of James Waiganjo (Deceased) [2020] eKLR (Onyiego, J). The court has to evaluate whether those duties were properly discharged by the administrator. Where there would be monumental failure to exercise those powers and to discharge the duties, and thereby putting the estate in jeopardy, the court would be reluctant to confirm the administrators. See In re Estate of Festo Lugadiru Abukira (Deceased) [2019] eKLR (Musyoka, J). That is what administering the estate in accordance with the law is about. Under section 76(d) of the *Law of Succession Act*, failure to do duty as an administrator is a ground for revoking a grant. Again, section 71(2)(a) should be read together with section 76(d). Section 76(d) is about failure to apply for confirmation of grant within the time allocated by the relevant legislation, failure to proceed diligently with the administration of the estate, and failure to render accounts of the administration of the estate. The 1st protestor is at liberty, at the oral hearing of the confirmation application, to raise issues around these matters, if he would like me to consider removing the Public Trustee from office.

16. The third and last consideration would kick in after the administrator has passed the first 2 tests, would he, upon being confirmed, continue to administer the estate in accordance with the law? Are there factors that would militate against confirming the administrator? If he has performed his administration duties dismally, by failing to collect assets, ascertain beneficiaries, settle debts and liabilities, meet the administration expenses of the estate, and render accounts, for example, the court should not trust him to complete administration of the estate, after confirmation. See In re Estate of Festo Lugadiru Abukira (Deceased) [2019] eKLR (Musyoka, J). It could also be the case that the administrator has since aged to a point of senility, or has become physically infirm, or is in critical ill-health, or has been adjudged bankrupt, or there is evidence that he is unable to manage his own affairs so much as to suggest that he cannot be trusted to manage the affairs of others. There is liberty, at the oral hearing, for the 1st protestor to demonstrate that there exist circumstances, that would militate against confirming the Public Trustee as administrator, to allow him to go on to execute the certificate of confirmation of grant, should his proposed distribution be confirmed.

17. So, what happens where the court is not satisfied, in terms of section 71(2)(a)? Section 71(2)(b) would apply. The court may well go on to confirm the grant in terms of the distribution, but not confirm the administrator. Instead of confirming the administrator, the court would remove him, and replace him with another, and then confer upon the new administrator the duty of completing the administration, in terms of the distribution confirmed. Section 71(2)(b) says:

> " if it is not satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 inclusive, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered..."

18. In view of what I have discussed above, I can only consider the application by the 1st protestor, after I have taken oral evidence, in the confirmation proceedings, and then proceed to deal with it in terms of section 71(2)(a)(b) of the *Law of Succession Act*.

19. These are succession proceedings, which are governed exclusively by the *Law of Succession Act* and the rules made under that Act, the Probate and Administration Rules. The proceedings contemplated under the *Law of Succession Act* are special or specialised to probate and administration litigation. The same are saved under section 3 of the *Civil Procedure Act*, Cap 21, Laws of Kenya. The effect of that saving is that those processes are then not subject to the *Civil Procedure Act* and the rules made under that Act, the Civil Procedure Rules. See Welcome Properties Ltd vs. Jackson Kamau Karuga & 2 others [2001] eKLR (Ringera, J). The *Civil Procedure Act* and its Rules would only apply to probate and administration litigation to such extent as permitted by the *Law of Succession Act* and its Probate and Administration Rules. See Shah vs. Shah (number 2) [2002] 2 KLR 607 (Onyancha, J).

20. Why do I raise these matters? I note that the 3rd and 4th protestors have filed grounds of opposition to the confirmation application. The practice of filing grounds of opposition is provided for under the Civil Procedure Rules, specifically under Order 51 rule 14(1)(c). There is no equivalent provision under the Probate and Administration Rules. In any event, grounds of opposition are only suitable where they advance points of law, they cannot be used to plead facts. The grounds of opposition failed in this case adduce facts, regarding ownership of specified parcels of land, and, in one case a document has even been attached to the grounds. Surely, that is improper. Grounds of opposition only state grounds or arguments, they are not meant to state facts. They are not meant to carry evidence. Facts are disclosed in affidavits, and any documentary material is placed on record through annexures to the affidavit, not to grounds of opposition. Grounds of opposition are wholly unsuitable in cases where facts have to be adduced in such highly contested matters as the present one. The 3rd and 4th protestors ought to have filed affidavits, to carry the facts that are stated in their grounds of opposition, supported by relevant documentation.

21. Fundamentally, the procedure with relation to confirmation applications is stated in the Probate and Administration Rules. The relevant provisions are in Rule 40. Rule 40(6) of the Probate and Administration Rules states the procedure for replying or objecting to a confirmation application. One is required to file an affidavit of protest. That provision does not talk about grounds of opposition. An affidavit of protest is what all those parties who have reacted to the summons for confirmation of grant herein should have filed. That is critical, for Rule 41(1) provides for the oral hearings of confirmation applications where objections have been raised. Of course, Article 159 of *the Constitution* and Rule 73 of the Probate and Administration Rules, on substantive justice and the inherent powers of the court, may allow for some flexibility, but in very highly contested or fought matters, such as this, where oral evidence has to be taken, it is critical that parties who are objecting, or raising issues of one kind or other, must file evidence, in the form of affidavits, to disclose their cases, and to provide basis upon which they can then be cross-examined by the other parties. There can be no walking away from the filing of affidavits when it comes to confirmation applications.

22. Rules 40(6) and 41(1) of the Probate and Administration Rules provide:

> " Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 ageusia such confirmation stating the grounds of his objection."
>
> > "At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant and each protestor and any other person interested, whether such persons appear personally or by advocate or by a representative."

23. These protestors invite me to exclude the assets they claim, from the estate and the confirmation proceedings, on the basis that they hold titles to them, or on the basis that those assets are subject to litigation elsewhere. It is clear, from the stance taken by the 1st protestor, that some of the survivors of the deceased consider these assets to be part of the estate, and expect these protestors to account for how they acquired those assets from the estate. The decision, as to whether some asset or other belongs or does not belong to the estate, can only be made after evidence has been taken on those assets. Of course, the probate court may not be the proper court to determine ownership, for probate proceedings are not designed to determine such issues. See In re Estate of Kimani Kinuthia [2008] eKLR (Ibrahim, J), Gichohi Mwangi vs. Simon Irungu Joshua [2016] eKLR (Waweru, J) and In re Estate of Alice Mumbua Mutua [2017] eKLR (Musyoka, J). Currently, by dint of Article 162(2) and 165(5) of *the Constitution*, the High Court does not even have that jurisdiction. Again, the probate court can only distribute assets that are free, and where ownership is contested, the property would not be free, and would not be available for distribution, before the issue of ownership is determined in separate proceedings. The probate court must be made aware of all the assets that are claimed by the estate, whether or not registered in the name of the deceased, and particularly where it is alleged that assets were irregularly transferred from the estate after the demise of the deceased. That should also apply to property which is under litigation, so long as the probate court does not make any determinations on ownership. Such disclosure, of contested assets, is part of the accountability processes that must be undertaken by administrators, as they have a duty to trace and recover assets of the estate that may have irregularly changed hands. As such the probate court cannot be prevented from getting information on assets that are alleged to have been irregularly taken away from the estate.

24. Rule 41(3) enables the court to appropriate and set apart such contested assets, so that the issue of ownership can be determined elsewhere in separate proceedings. See In Re The Estate of Kipyego Chepsiror Kolil [2007] eKLR (Ibrahim, J), In re Estate of Kimani Kinuthia [2008] eKLR (Ibrahim, J), Jidraph Kamero Njuguna & 3 others vs. Hilda Njeri Kamero [2012] eKLR (L. Njagi, J), Everline Atiang' Wanyama vs. William Osayo Siroko & another [2014] eKLR (F Tuiyott, J), Gichohi Mwangi vs. Simon Irungu Joshua [2016] eKLR (Waweru, J), In re Estate of Alice Mumbua Mutua [2017] eKLR (Musyoka, J), In re Estate of Mwangi Gikonyo (Deceased) [2017] eKLR (Waweru, J), In re Estate of Njagi Njeru (Deceased) [2018] eKLR (Muchemi, J), In re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR (Gikonyo, J), In re Estate of James Muiruri Kamau (Deceased) [2018] eKLR (Ndung'u, J), In re Estate of Samuel Kathieri (Deceased)[2019] eKLR (Sitati, J) and In re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR (Musyoka, J). That setting aside happens only after the assets have been disclosed, and the claimants have explained to the court how they acquired them, so that should the estate wish to pursue the ownership angle, the probate can direct them appropriately, in accordance with Rule 41(3). See Everline Atiang' Wanyama vs. William Osayo Siroko & another [2014] eKLR (F Tuiyott, J), Ruth Munyutha Kimonongi & another vs. Grace Waithera Mutitu [2015] eKLR (Ngaah, J), In Re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR (Musyoka, J), In re Estate of Julius Ndubi Javan (Deceased) [2018] eKLR (Gikonyo, J), In re Estate of M'Guatu M'Itania (Deceased) [2020 eKLR (Gikonyo, J) and In re Estate of Joseph Atang'o Akida alias Otango Achita (Deceased) [2022] eKLR (Musyoka, J).

25. Articles 162(2) and 165(5) of *the Constitution*, and Rule 41(3) of the Probate and Administration Rules, provide as follows:

> "162(2)Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –
>
> (a) ...

(b) the environment and the use and occupation of, and title to, land."

"165(5)The High Court shall not have jurisdiction in respect of matters-

(a) ...

(b) falling within the jurisdiction of the courts contemplated in Article 162(2)."

"41. Hearing of application for confirmation

(1) ...

(2) ...

(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.

(4) ..."

26. I have noted, from the confirmation application, that the Public Trustee has not properly ascertained some of the beneficiaries of the estate, and, therefore, the proviso to section 71(2) of the *Law of Succession Act* and Rule 40(4) of the Probate and Administration Rules have not been fully complied with. He has ascertained that some of the children of the deceased are themselves dead, but he has not ascertained whether those children were survived by children of their own, who would be entitled, under section 41 of the *Law of Succession Act*, to what ought to devolve to their dead parents. See In re

Estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR (Musyoka, J), In re the Estate of Joseph Gichuki Riunge (Deceased) [2016] eKLR (Musyoka, J) and Martin Munguti Mwonga vs. Damaris Katumbi Mutuku [2016] eKLR (Thande, J). He should have listed the children of each dead son and daughter of the deceased, under the names of their dead parents. He should bring his application into compliance with the proviso to section 71(2) of the *Law of Succession Act* and Rule 40(4) of the Probate and Administration Rules in that regard.

27. The proviso to section 71(2) of the *Law of Succession Act* and Rule 40(4) of the Probate and Administration Rules provide as follows:

> "Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares."
>
> "Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all the persons beneficially entitled to the estate have been ascertained and determined."

28. Secondly, I have noted that the Public Trustee has not attached documents on the assets that he proposes to distribute, that is to say Bunyala/Bulemia/133, 533 and 2242. The fact that these assets have land reference numbers suggests that they are registered with the State. The registration is to evidence that these assets exist, and to establish ownership or proprietorship. With documentation attached, I would not know whether these assets exist, and I would not know whether they were owned by the deceased, and I would not tell, as at the time I am called upon to give orders on their distribution, whether they, if ever they were in the name of the deceased, they still are held under his name. The court should not act blindly at confirmation, by ordering distribution of property without evidence that the property exists, and is, in fact, still registered in the name of the deceased. Title deeds, green cards and certificates of official searches ought to have been attached. I would emphasise on green cards and certificates of official searches, as they state the current state of the assets, and give a history of the dealings on the titles. Without these documents, the court risks disposing of assets that do not exist, or which do not belong to the estate.

29. So, I shall not make any final determinations on any of the 2 applications, instead I shall give the following directions:

    a. That the summons for confirmation of grant, dated 26th April 2023, and the protests to it, shall be disposed of by way of viva voce evidence, based on the affidavits filed by the parties, and cross-examination;

    b. That the 3rd and 4th protestors shall file, within 14 days of the days of this ruling, proper affidavits of protest, in accordance with Rule 40(6) of the Probate and Administration Rules;

    c. That the Public Trustee shall file and serve, within 14 days, a supplementary affidavit, disclosing the names of the children of the dead children of the deceased, both sons and daughters, listing such children under the names of their departed parents;

    d. That the Public Trustee, shall, in that supplementary affidavit, the subject of (c), above, attach documentation on the existence and the current status of the assets that he proposes for distribution; and

e. That I shall allocate a date for the viva voce hearing of the said summons for confirmation of grant, at the delivery of this ruling.

30. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 19TH DAY OF APRIL 2024

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Kiprono, instructed by the Public Trustee.

Mr. Okanda, instructed by Otieno Okanda & Company, Advocates for the 1st protestor.

Ms. Ngire, instructed by Ngire Aduol & Associates, Advocates for the 2nd and 4th protestors.

Mr. Ashioya, instructed by Ashioya & Company, Advocates for the 3rd protestor.