



In re Estate of Bardsley Zephania Msagha (Deceased) (Succession Cause 50 of 2011) [2024] KEHC 16729 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEHC 16729 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 50 OF 2011**

**G MUTAI, J
JULY 25, 2024**

IN THE MATTER OF THE ESTATE OF BARDSLEY ZEPHANIA MSAGHA (DECEASED)

BETWEEN

MARTIN MSAFARI MSAGHA BENEFICIARY

AND

DOROTHY MKAWANA MSAGHA RESPONDENT

AND

INTEGRATED UTILITIES SERVICES LIMITED PROPOSED INTERESTED PARTY

RULING

1. Before this court is Summons dated 15th February 2024 seeking the following orders:-
 - a. That leave be granted to the Applicant to join these proceedings Integrated Utilities Services Limited as an Interested Party;
 - b. That the certificate of confirmation dated 20th October 2021 be rectified to conform to the orders made on 23rd September 2019 and 22nd October 2021;
 - c. That the property registered as Title No. CR.29911 (Plot No.4103/11/MN) and the mode of distribution be included in the fresh certificate of confirmation of grant;
 - d. That a fresh certificate of confirmation of grant conforming to the orders of this honourable court be issued;
 - e. That the honourable court be pleased to order the cancellation of the titles below registered in the name of DOROTHY MKAWANA B MSAGHA:



- i. Plot No. Kwale/Chuini/145
 - ii. Plot No. Kwale/Chuini/390
 - iii. Plot No.957 Mikindani Site and Service Scheme
 - iv. Plot No. Kilifi/Roka/1357.
- f. That the honourable court be pleased to order the titles below to be transferred back to the estate of Bardsley Zephania Msagha following the cancellation of the interests in favour of Dorothy Mkawana Msagha:
- i. Plot No. Kwale/Chuini/145;
 - ii. Plot No. Kwale/Chuini/390;
 - iii. Plot No.957 Mikindani Site and Service Scheme;
 - iv. Plot No. Kilifi/Roka/1357.
- g. That Integrated Utilities Services Limited be ordered to provide to the beneficiary/applicant their audited financial statements from the year 2010 to date;
- h. That integrated utilities services limited be ordered to provide proof of availability of the dividends in respect of the shares of the estate of Bardsley Zephania Msagha from the year 2010 to date;
- i. That Integrated Utilities Service Limited be ordered to release to Javan Msagha, Zablon Msagha and Martin Msagha the dividends in respect of the shares of the estate of Bardsley Zephania Msagha from the year 2010 to date.
- j. That the honourable court be pleased to order the executrix to provide a full and accurate inventory of the of the assets and liabilities of the deceased and a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account; and
- k. That the costs of the application be in the cause.
2. The application is premised on the grounds therein stated and the supporting affidavit of the Applicant sworn on 15th February 2024.
3. He stated that this honourable court issued orders on 22nd October 2021, distributing the four assets of the estate. As he was following up on the conclusion of the matter, he discovered information that necessitated the application herein.
4. He stated that the certificate of confirmation includes properties that do not form part of the estate. On the other hand, it excludes others that form part of the estate. It excludes Title No. CR.29911 (Plot No.4103/11/MN), which forms part of the estate.
5. He averred that he discovered that certain properties are in the name of the executrix being Plot No. Kwale/Chuini/145, Plot No. Kwale /Chuini/390, Plot No.957 Mikindani Site and Service Scheme and Plot No. Kilifi /Roka/1357. The same were irregularly transferred to the name of the executrix before the confirmation of the grant, which makes it impossible to transmit them to the beneficiaries.
6. Further, he discovered that the executrix has been collecting dividend payments from the Intended Interested Party since the demise of the deceased without confirmation of the grant. He averred that



- shares in the Intended Interested Party were distributed equally to Javan Msagha, Zablon Msagha and himself. His attempts to find out about the availability of the dividends had been rebuffed by the Intended Interested Party. He then urged the court to allow the application.
7. In response, the Intended Interested Party, through their director, Dan Gicheru, filed a replying affidavit sworn on 12th March 2024. He opposed the joinder of Integrated Utilities Services Limited as an interested party in the proceedings. He deposed that this is a succession matter and thus, the company was not a necessary party. Further, they deal with the executrix as per the will of the deceased herein, which appointed her as executrix and trustee. He urged the court to dismiss with costs the prayer for the joinder of the company as an interested party in the proceedings.
 8. The Applicant filed a further affidavit sworn on 15th April 2024. He reiterated his position in his supporting affidavit and stated that the certificate of confirmation of grant dated 12th March 2012, relied on by the Respondent, was set aside on 23rd September 2019. Still, she never disclosed that substantial assets had been transferred to her and never took steps to undo the same. The Respondent produced the statement of accounts on 10th December 2018, which did not include the interested party company, amongst other omissions. He urged the court to allow the application.
 9. The summons was canvassed by way of written submissions. Subsequently, the Applicant, through his advocates Gachiri Kariuki & Company Advocates, filed written submissions dated 29th April 2024. Counsel submitted on six issues for determination, namely:-
 - a. Whether the certificate for confirmation dated 20th October 2021 should be rectified as prayed;
 - b. Whether the titles in the name of the Respondent should be cancelled and reverted to the estate;
 - c. Whether the Proposed Interested Party should be joined to these proceedings;
 - d. Whether the Proposed Interested Party should be ordered to produce proof of availability of the estate's dividends and the financial statements from the year 2010 to date;
 - e. Whether the Proposed Interested Party should be ordered to release to Javan Msagha, Zablon Msagha and Martin Msagha the dividends in respect of the estate's shares from the year 2010 to date; and
 - f. Whether the Respondent should produce a statement of inventory and accounts for the estate.
 10. On the first issue, counsel submitted that prayers 2,3 and 4 of the Notice of Motion have not been objected to and, therefore, they can be allowed as prayed.
 11. On the 2nd issue, counsel submitted that transmission of property to the beneficiaries is through LRA Form 42. If the property is in the name of a person other than the deceased or executor/administrator in their capacity as such, then transmission becomes an issue. If the suit properties are transferred directly from the executrix, then it will not be transmission, and it will therefore attract tax obligations that are exempt in respect of transmissions. Counsel urged the court to allow prayers 5 and 6 of the application.
 12. On the third, fourth and fifth issues, counsel submitted that the participation of the Proposed Interested Party in this matter is necessary so as to answer the questions on payment of dividends and their dealings with the Applicant.
 13. On the sixth issue, counsel submitted that the accounts produced by the Respondent on 10th December 2018 did not include the shares in the Proposed Interested Party. It was urged that the Respondent has an obligation under Section 83(h) of the Law of Succession Act to produce a full and accurate account of the estate and dealings therewith. Counsel urged the court to allow prayer 10 of the application.



14. In conclusion counsel urged the court to allow the application as prayed.
15. The Respondent, through her advocates Mwakireti & Asige Advocates, filed written submissions dated 9th May 2024. Counsel submitted on four issues, namely:-
 - a. Joinder of Integrated Utilities Service Limited as an interested party;
 - b. Rectification of the certificate of confirmation of grant relating to the shares of the deceased in Integrated Utilities Service Limited;
 - c. Whether titles in the name of the executrix should be cancelled and reverted back to the estate; and
 - d. Executrix to provide a full and accurate inventory of assets and liabilities and all dealings.
16. On the 1st issue, counsel submitted that the interested party is not a necessary party to these proceedings, and its joinder has no impact in this matter. Counsel relied on Order 1 Rule 10 of the Civil Procedure Rules 2010 and various decided cases to buttress his position and submitted that the Proposed Interested Party has no stake in this matter and that the rectification of the certificate of confirmation of grant will solve the issues raised.
17. On the second issue counsel submitted that the rectification of the certificate of confirmation of grant will solve the issues raised regarding shares of the estate of the deceased.
18. Regarding the Third issue, counsel submitted that there was no need to cancel the titles as it would prolong the matter. They will have to be transmitted to the executrix first before they can be transferred to the beneficiaries of the deceased. That rectification of the certificate of confirmation of grant will be more effective and sufficient to meet the expectations of the Applicant.
19. On the fourth issue counsel submitted that the respondent had already availed records of accounts to the court pursuant to the order of 2018. The Applicant had been collecting rent from Plot No.1488 Magongo and 2840/1/MN/Shanzu against the order of 23rd September 2019. Thus, he should account for the same.
20. In conclusion counsel urged the court to dismiss the summons.
21. The Proposed Interested Party/2nd Respondent, through its advocates Ombati Otieno Opondo & Awino Advocates, filed its written submissions dated 25th April 2024. Counsel submitted that the interested party has never been notified of any change in the administration of the estate and, hence, could not deal with any other party other than the Executrix. It was urged that the company is a stranger to the allegations made by the Applicant regarding the alleged misuse of the estate by the Executrix. Such misconduct could not be blamed on the Proposed Interested Party/Respondent.
22. It was urged that the company has no control over the administration of the estate. The company is ready and willing to transfer the shares of the estate of the deceased to the rightful beneficiaries upon rectification of the certificate of confirmation of the grant. Counsel urged the court to dismiss the application.
23. I have read the application and the responses thereto. I have also considered the submissions of the parties. It falls on this Court to decide the matter in accordance with the facts and the law.
24. Rule 63 of the Probate and Administration Rules, 1980 does not list Order 1 of the Civil Procedure Rules as among the provisions of the latter Rules that may be applied in Probate and Administration proceedings. That being the case, a Probate and Administration Court has the discretion under Rule



73 of the Probate & Administration Rules to choose whether to apply Order 1 in the interests of justice as there is no equivalent provision. To determine if there should be a joinder in this matter, this Court, in the exercise of its discretion, will consider Order 1 Rule 10(2) of the said Rules as providing persuasive authority. The said provision states that:-

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

25. In my view, it isn't necessary to join Integrated Utilities Services Ltd as an interested party in these proceedings. The said company has no real stake in the succession proceedings, nor will it be affected by the decision of this court, when made, in either way. In the circumstances, I decline to issue Order No.1 of the Summons dated 15th February 2024. I am guided by the case of Gladys Nduku Nthuki vs Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff) [2022] KEHC 2227 (KLR) where it was stated that:-

The relevant tests for determination of whether or not to join a party in proceedings were restated by Nambuye, J (as she then was) in the case of Kingori vs Chege & 3 Others [2002] 2 KLR 243 where the learned Judge stated that the guiding principles when an intending party is to be joined are as follows:

1. He must be a necessary party. Page 9 of 15
 2. He must be a proper party.
 3. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff.
 4. The ultimate order or decree cannot be enforced without his presence in the matter.
 5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.
26. Applying the test in Kingori vs Chege & 3 Others [2002] 2 KLR 243 it is evident that joining the Intended Interested Party into these proceedings is not necessary. The Court can at any time direct them to produce accounts without the need for them to be added. Their addition will merely add costs and might needlessly prolong the trial.
27. From the submissions of the parties it is clear that there is a meeting of the minds among them that prayers 2, 3 and 4 of the Summons dated 15th February 2024 may issue. I thus allow prayers No. 2, 3 and 4 of the Summons.
28. In her replying affidavit, the Executrix did not deny that the parcels of land listed in prayer No. 5 of the summons belong to the estate of the deceased and that she registered them in her name unlawfully. Under those circumstances, I allow prayers 5 and 6 of the summons and order that the titles in the name of the executrix be revoked and that the said parcels of land be transferred back to the estate of



the deceased. I am guided by the case of *In re Estate of Paul M'Maria (Deceased)* [2017] KEHC 985 (KLR), where it was stated that:-

“Therefore, the argument that there was a suit by the 1st Respondent or a decree therefrom does not change this reality of the law or fetter the jurisdiction of a probate court to preserve estate property for purposes of succession. As long as the transaction is void, it is also futile to argue that subsequent transfer thereof was done by the 1st Respondent who was the administrator of the estate of the deceased. Such was not an act of relation back; and the 1st Respondent cannot purport to validate that which is illegal, null and void. What Lord Denning stated in the case of *MCFOY vs. UNITED AFRICA CO. LTD* (1961) 3 All ER 1169- is true of this case, that:

“... If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay here. It will collapse.

29. Although I have not allowed prayer 1 of the summons, I am of the opinion that the beneficiaries are entitled to get the full dividend due to the estate. I thus allow prayers Nos. 7 & 8 of the summons.
30. I order that any unpaid dividends due and payable to Javan, Zablou and Martin Msagha be paid to them forthwith. I order that any beneficiary who has unjustly drawn dividends due to Javan, Zablou and Martin Msagha refund the three said persons.
31. The Executrix has a duty to provide a statement of account under section 83 of the *Law of Succession Act*. The said section provides at paragraphs (b) and (i) that:-

“Personal representatives shall have the following duties:-

...

- (h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
- (i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.”

32. *In re Estate of Julius Mimano (Deceased)* [2019] KEHC 10103 (KLR)

“Section 83 of the Act imposes duties on personal representatives to pay for the expense of the disposal of the remains of the deceased, to get in or gather or collect the assets of the estate, to pay for the expenses of the administration of the estate, to ascertain and pay out all debts and liabilities, and eventually to distribute the assets amongst the persons beneficially entitled. The discharge of these duties would naturally attract an account, in terms of the personal representative stating whether they discharged the said duties and disclosing the expenses that they incurred in the process of discharge. In addition, section 83 of the Act has imposed



a positive duty on personal representatives to specifically render accounts at two stages. The first instance is in the first six months of the administration. It is at this stage that they ought to account as to whether they spent any funds from the estate for the purpose of disposing the remains of the deceased and, if so, how much. State whether they got in or gathered or collected or brought together all the assets that make up the estate. The getting in of the estate is critical, it should precede settlement of debts and liabilities and distribution of the assets. Indeed, these duties can only be discharged if there are assets sufficient to settle debts leaving a surplus for distribution. It would also be from the assets collected that the estate would have a pool of resources for administration expenses. Section 83(e) commands the personal representatives to produce in court a full and accurate inventory of the assets and liabilities, no doubt generated from the exercise of getting in the assets and ascertaining the debts of the estate. There is also an obligation to render an account of all their dealings with the assets and liabilities up to the point of the account. The second occasion for rendering accounts is at the completion of administration. The duty is stated in section 83(g) of the Act. The object of the second and final account is to give opportunity to the personal representative to demonstrate that they have complied with the duty in section 83(f) of distribution of the estate to the beneficiaries. The duty to account on those two occasions is imposed by statute. It envisages an account to the court, not even to the beneficiaries. The powers exercised by the personal representative's flow from a court instrument, the court is entitled to know whether those powers have been properly exercised, and whether the duties imposed have been properly discharged. Being a statutory duty to account to the court, the personal representative does not have to wait for a court order directing them to render account, they must render the accounts as a matter of course. The matter of the duty to render accounts is so critical that default to do so is listed in section 76(d)(iii) of the Act as one of the grounds upon which the court may consider revoking a grant."

33. From the foregoing, it is clear that the Executrix has a duty to account. Grant of prayer No. 10 will, therefore, be in furtherance of a statutory imperative.
34. The upshot of the foregoing is that the application filed by the Applicant succeeds in respect of all prayers save for Prayer 1, which has been denied.
35. As this is a family matter I make no orders as to costs.
36. Orders accordingly.

DATED AND SIGNED IN MOMBASA THIS 25TH DAY OF JULY 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

Gregory Mutai

JUDGE

In the presence of:-

Mr Awino, for the Proposed Interested Party/Respondent;

Mr Mwakireti, for the Executrix/Respondent;

No appearance for the Applicant; and

Arthur – Court Assistant.

