In re Estate of Leo Oduor Rajula (Deceased) (Succession Cause 12A of 2012) [2023] KEHC 3720 (KLR) (4 May 2023) (Ruling)

Neutral citation: [2023] KEHC 3720 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

SUCCESSION CAUSE 12A OF 2012

WM MUSYOKA, J

MAY 4, 2023

IN THE MATTER OF THE ESTATE OF LEO ODUOR RAJULA (DECEASED

RULING

1. The application that I am called upon to determine is dated March 2, 2022. It principally seeks the setting aside of orders made in the matter on June 3, 2020, and annulment of certificate of confirmation of grant issued on June 3, 2020 and dated March 24, 2020, and, upon the setting aside of the said orders grant leave to the administratrices to file a fresh summons for confirmation of grant.

2. The application is at the instance of Rosemary Akinyi Wanjiri, who swore an affidavit in support, on March 2, 2020. I shall refer to her, for the purpose of the instant application, as the applicant. She avers to be one of the administratrices appointed on May 23, 2016, following revocation of a grant made to the previous administrator, by consent. 2 of the administratrices brought a summons for confirmation of grant, dated October 18, 2016, to which she swore an affidavit of protest on February 7, 2017. The protest was overruled in a ruling delivered on 3rd June 2020, when the confirmation application was allowed. Her case is that the petitioner had not attached copies of national identity cards of individuals that she was saying were not biological children of the deceased. She avers that she did not have access to that information prior to filing her protest, and that she only got to lay her hands on it after the ruling. She alludes to an earlier review application, which had been dismissed. She complains that the confirmation orders of 3rd June 2020 were made without first subjecting the confirmation application to a hearing. She further complains that the confirmation orders were made despite the accompanying consent not being signed by 3 individuals, including herself. She argues that the 4 individuals, erroneously listed as survivors of the deceased, benefited from the estate of their own biological father.

3. Several documents are attached to the affidavit of the applicant. There are copies of 4 letters, dated May 27, 2020, showing that Geoffrey Oduor Wanjiri, David Oduor Wanjiri, Patrick Oduor Wanjiri and Evans Wanjiri Rajula were all children of Alfred Wanjiri Rajula and Consolata Aketch Oduor. There is a copy of a ruling delivered on November 4, 2021, which dismissed an earlier review application. There is a typed copy of these proceedings from inception to date. There is also a copy of the confirmation

application dated 2nd August 2016, together with the supporting affidavit, the consent on distribution and the resultant certificate of confirmation of grant.

4. The application elicited a response from one of the other administratrices, Margaret Nyangweso Oduor, sworn on May 6, 2022. I shall refer to her as the respondent. She accuses the applicant of filing multiple applications since the filing of the confirmation application of August 2, 2016, most of which were dismissed. She avers that the issues raised in the instant application had all been settled in the previous applications. She argues that upon a grant being confirmed, the remedies available to an aggrieved party would be either appeal or an application for revocation of grant. She asserts that all the beneficiaries named in the certificate of confirmation of grant were survivors and beneficiaries of the deceased. She avers that the court would be sitting on appeal on issues that the court has already determined. She has attached to her affidavit copies of the affidavit of protest sworn by the applicant on February 7, 2017; the chamber summons filed by the applicant, dated February 7, 2017, the Motion filed by the applicant, dated June 19, 2020; and a number of replying affidavits.

5. The applicant swore a further affidavit, on October 6, 2022. She argues that the issues raised in the instant application are different from those raised in her previous applications. She points out that the exclusion of her name from the certificate of confirmation of grant and the consent to administration not being executed by all the survivors were new issues. She further argues that the issues raised are not fit for determination in a summons for revocation of grant.

6. The application was canvassed by way of detailed written submissions, supported by appropriate caselaw. I have read through the said written submissions, and I have noted the arguments made.

7. I understand the application before me to be largely for review of the orders made on June 3, 2020, confirming the grant. Although there are prayers for setting aside, I have not found any averments or annexures geared towards establishing a case for setting aside. Setting aside is essentially sought where the proceedings were conducted in a manner that disadvantaged one of the parties. For example, where the proceedings were conducted ex parte, yet there was a justification for the absence of the complaining party, either on account of non-service, or illness, or wrong entry in diary, or non-listing of the matter in the cause list, or other plausible reason. Setting aside does not go to the merits of the matter, but the process, yet what is being raised are matters that go into merit as opposed to procedure.

8. I shall, therefore, determine the matter before me largely on the basis that it is a review application. Review is permissible in probate and administration, by dint of Rule 63 of the *Probate and Administration Rules*, which imports that process from the *Civil Procedure Rules*. Under the *Civil Procedure Rules*, review is on 2 principal grounds, error on the face of the record and discovery of new evidential material of great importance, which the party could not place before the court at the time the order in question was made. There is also room for review for other sufficient reason.

9. I understand the applicant to be moving the court under discovery of important evidence which she could not avail at the time the order was made, for she does not raise any issue of a mistake or error on the face of the record. She argues that some 4 individuals, listed in the certificate of confirmation of grant, were not survivors of the deceased, and, therefore, they should not have been given a share in the estate. She says that that information was not at hand when the grant was being confirmed, and that she only got it after the ruling. The use of new evidential material to upset an order or decree is dependent on whether that evidence could not be procured before the ruling was made. From what I can see, it was material that was relevant, for it would have helped the court determine the persons beneficially entitled to a share in the estate. The question is whether this was information that the applicant could not procure before she filed affidavit of protest, or before the ruling was delivered. The applicant has not explained why she did not obtain that information before she filed the

protest. The information was with the National Registration Bureau, Department of Immigration and Registration of Persons, in the Ministry of Interior and Coordination of National Government. The information is held by public bodies, and should be available to the public at request, and I believe that is how she obtained the same. What prevented her from getting the same on time? It is not evidence that can be claimed to be new evidence. The evidence was sitting with the National Registration Bureau all the time, waiting to be harvested by whoever needed it. It could have been gotten without any difficulty before the confirmation application was determined. There is nothing like discovery of new evidence of importance, to warrant review of the orders of July 3, 2020. In any case, the point sought to be established, through that evidence, could still be proved through other means, such as deoxyribonucleic acid (DNA) test, if the applicant had cared to ask for it.

10. The order that the applicant seeks to have reviewed or set aside are confirmation orders, made on the basis of the confirmation application, dated August 2, 2016, and the affidavit of protest, sworn on February 7, 2017. Contrary to the claim by the applicant, that the ruling was delivered without the benefit of a hearing, there was a hearing, based on written submissions, rather than oral evidence. The record reflects that when the application for confirmation of grant came up for hearing on 3rd February 2020, it was the Advocate for the applicant who proposed disposal of the matter by way of written submissions, rather than oral evidence. The applicant cannot now turnaround and claim, or even accuse the court, of not conducting a hearing, before ruling on 3rd June 2020, for it was her Advocate who opted for the written submissions mode of hearing the matter, rather than the more ideal viva voce hearing for this sort of dispute. Proceedings by way of written submissions is a mode of hearing. Parties who opt to canvass a matter by way of written submissions should not be heard to complain later, that they were not heard, for the written submissions would be the mode of hearing that they would have elected for disposal of the matter.

11. For avoidance of doubt, the proceedings of February 3, 2020, were recorded as follows:

> " 3/2/2020
>
> Before Hon. Kiarie W. Kiarie (J)
>
> C/Ass – Akinyi
>
> Inter – Eng/Kisw
>
> Mr. Bogonko for protestor
>
> Mr. Fwaya for petitioner
>
> Mr. Bogonko: We have agreed by consent that the protest be disposed of by way of written submissions. Each party to be given 14 days.
>
> Ct – The protestor to file and serve submissions within 14 days and the petitioner to file within 14 days of service. Mention 11/3/2020."

12. The issues that the applicant raises in the instant application ought to have been raised at the confirmation hearing. She has pointed out matters raised in her application which she says are all new, like the consent omitting the names of some survivors and some beneficiaries being not biological children of the deceased. All these are issues for the confirmation hearing. The confirmation application is founded on section 71 of the *Law of Succession Act*, Cap 160, Laws of Kenya, and Rules 40 and 41 of the *Law of Succession Act*. The confirmation hearing is about confirming the administrators, whether they were properly appointed, whether they have administered the estate in accordance with the law, and whether they would continue to administer the estate in accordance with the law, should they be confirmed. Secondly, it is about distribution of the estate. For the purpose of distribution, the

persons beneficially entitled to a share in the estate have to be identified or ascertained, the assets of the estate have to be ascertained, and the shares due to the persons beneficially entitled have to be identified or ascertained too.

13. The law on confirmation of administrators is stated in section 71(2) of the *Law of Succession Act*. Section 71(2)(a) just says that at confirmation, the court will seek to confirm whether the grant was properly made; and if it was, whether the administrator administered the estate in accordance with the law; and whether he would continue to administer the estate in accordance with the law if confirmed. Section 71(2)(b)(c) provides for what the court ought to do where it finds that the grant was not properly made or the administrator, upon being properly appointed, had not administered the estate in accordance with the law. The court may still confirm the grant, but revoke the appointment of the administrator, and replace him with someone else.

14. Section 71(2)(a)b)(c) of the *Law of Succession Act* provides as follows:

> "71. Confirmation of grants
>
> (1) ...
>
> (2) 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; or
>
> (b) if it is not so 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; or
>
> (c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other all assets of the estate then in his hands or under his control; or
>
> (d) ...
>
> (3) ...
>
> (4) ..."

15. What section 71(2)(a) requires the court to do at confirmation is what section 76 of the *Law of Succession Act* also covers. That would mean, it is unnecessary to file an application for revocation of grant where there is a pending application for confirmation of grant. Where there is no pending application for confirmation, but directions have been given for filing of one, rather than the administrators filing to have the grant revoked to remove one of them, they would be better of killing 2 birds with 1 stone, by filing for confirmation of their grant, where they raise the issues that they would propose to make in a revocation of grant. I address this because the respondent has argued that revocation of grant is a remedy to dissatisfaction with confirmation orders, and the applicant ought to have filed an application for revocation, rather than seek review of the confirmation orders. Revocation is not a remedy for dissatisfaction with confirmation orders. The reasons are here below.

16. Where an application for revocation of grant pends alongside another for confirmation of grant, the ideal thing should be to have both disposed of simultaneously, since the revocation application can be subsumed in the confirmation application. A party need not wait until a confirmation application is

disposed of to file his revocation application. The ideal position should be that the applicant, in the revocation application, ought to file an affidavit of protest, and raise his issues there, rather than wait to mount a revocation application thereafter. A court, faced with a revocation application, mounted shortly after determination of a confirmation application, by a party who participated in hearing of the confirmation application, or who should have so participated, should not entertain such a revocation application.

17. The discretion given to a court, under section 76 has nothing to do with confirmation of grant. A grant may be revoked only on the basis of the 5 grounds set out in that section. The fact that one is disaffected or dissatisfied with the orders made at confirmation is not among the grounds or reasons for which a grant may be revoked. Indeed, the only connection between confirmation and revocation is in section 76(d)(i), that the failure to apply for confirmation of a grant is a ground for its revocation. So, where a confirmation is applied for, but the orders given are not satisfactory, there would be no justification, under section 76, to invite the court to revoke the grant.

18. The proviso to section 71(2) of the *Law of Succession Act* and Rule 40(4) of the *Probate and Administration Rules* are critical here. They are the ones that require the administrator who has applied for confirmation to satisfy the court that he has properly ascertained the persons beneficially entitled to a share in the estate, and has allocated shares to those persons. That would be a person who feels that the administrator applicant has not complied with the proviso to section 71(2) and Rule 40(4) ought to file a protest raising those issues. The issues are to be addressed in the context of the confirmation hearing, and not after. The litigation that the applicant is now engaging in, with respect to the 4 individuals, that she says are not biological children of the deceased, is reverse litigation. She should have raised those issues in her protest affidavit for the court to address, and if she did, then she should have asked the court to conduct an oral hearing, where she would have voiced her concerns. She did not do so. She opted for the shortcut, written submissions. She is a victim of her own choices. She cannot complain at this late stage. She had her chance. She did not take it. She passed it up.

19. For avoidance of doubt, the proviso to section 71(2) and rule 40(4) 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 persons beneficially entitled to the estate have been ascertained and determined."

20. The applicant raises the issue of the consent. Again this is an issue for the confirmation hearing, and not later. It is provided for in Rule 40(8) of the *Probate and Administration Rules*. That consent is not mandatory, and it is for filing only where no affidavit of protest has been filed. In this case, a protest was filed by the applicant, so, technically there was no need for the consent, referred to in Rule 40(8), in Form 37, to be filed. The applicants name should not have been in the consent form, as she was not consenting to anything, for she had filed a protest. The consent is by those who support the proposals in the confirmation application, she did not support those proposals. It would make no sense, and would serve no purpose, therefore, to list persons in the consent, who are not consenting.

21. Rule 40(8) says:

> "Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit."

22. The other relevant provisions are Rules 40(6) and 41(1) of the *Probate and Administration Rules*. Rule 40(6) is the provision on the filing of protests. There is no reference to affidavits of protest in the Act itself. Where an affidavit of protest has been filed, then a formal hearing should be conducted under Rule 41(1), under which the court should orally hear the applicant, the protestor and any other persons wishing to be heard on the confirmation application. Where no protest affidavit has been file, then Rule 40(8) kicks in, where the court may dispose of the confirmation application, without hearing the parties, and rely instead on the consent in Form 37, provided for in that Rule. The applicant modified the rule in Rule 41(1), which gave her an opportunity to be heard orally, by opting to be heard by way of written submissions instead.

23. From what I have discussed above, it should be clear that the issues that the applicant is raising in her application are not new issues. They are matters that she ought to have canvassed at the confirmation hearing. She opted to have the confirmation application and her protest canvassed by way of written submissions, rather than through an oral hearing. The written submissions were filed. The ruling of the court followed thereafter. The ruling makes no reference to the written submissions, but that is not to say that the written submissions were not considered. The applicant is no doubt seeking to have a second bite at the cherry. She should have appealed, for she is aggrieved about the merit outcome in the impugned ruling.

24. I find no merit in the application, dated March 2, 2023. I hereby dismiss it. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON THIS 4TH DAY OF MAY 2023

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Ashioya, instructed by Nchogu Omwanza & Nyasimi, Advocates for the applicant.

Mr. Were, instructed by Gabriel Fwaya, Advocate for the respondents.