



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1220 OF 2005

IN THE MATTER OF THE ESTATE OF PATRICK PETERSON HIUHU (DECEASED)

JUDY WANGUI HIUHU.....APPLICANT

VERSUS

JANE MWIYERIA HIUHU.....EXECUTOR/RESPONDENT

RULING

1. The deceased Patrick Peterson Hiuhu died testate on 20th January 2005. He left a written Will which was executed on 14th December 2004. He appointed his second wife Jane Mwiyeria Hiuhu (the respondent) and one Kabiru Mugo as the executors of the Will. He left two houses, the respondent being the widow of the second house which has a son and three daughters. The first house has three sons and four daughters. The applicant Judy Wangui Hiuhu is one of the children of the first house.
2. The deceased left several properties which he indicated how they should devolve upon his death.
3. On 30th June 2005 the respondent petitioned this court for the grant of probate of written Will. The grant of probate was issued to her on 8th September 2005.
4. On the basis that the respondent had not sought the confirmation of the grant, or taken any other action to move the cause, a notice was issued to her to show cause why the cause should not be closed. On 28th May 2018 the cause was closed, there having been no response to the notice.
5. On 7th February 2019 the applicant filed the present application seeking to re-open the cause; to have the respondent provide a true and accurate inventory of the assets and liabilities of the estate and a full and accurate account of her dealings with the affairs of the estate; and to have the respondent removed and/or discharged as the administrator of the estate of the deceased, and, in her place, to have the applicant appointed as the administrator.
6. The application was based on grounds and supporting affidavit. The applicant's case was that the respondent had since the grant of probate failed to appraise the beneficiaries of the goings-on in the estate; had failed to have the grant confirmed; had let some of the properties in the estate to go to waste, and especially Mavoko Town Block 2/275 which had been invaded by strangers; and that she had generally failed to perform her duties as the executor of the Will, which had led to the applicant seeking to replace her.
7. The respondent filed a replying affidavit to oppose the application. She stated that she did not receive the notice to show cause. As to why she has not prosecuted the cause to completion, she blamed the applicant. She stated that the applicant has always been hostile to her and made it difficult for her to administer the estate. She averred that sometimes in 2008 the applicant went to her house in Ngong while quarrelling and demanded original documents of some of the properties. She handed over four of the documents. She annexed an acknowledgement by the applicant. The properties in question were the ones that the deceased had bequeathed to the first house. Subsequently, on 22nd March 2016 the applicant filed a caveat in the cause. These actions made it impossible for her to proceed in the matter. She stated that she was the duly appointed executor of the Will of the deceased and could not surrender the responsibility to the applicant. All that she sought was cooperation from the applicant.
8. In the further affidavit by the applicant, she stated that the respondent had not explained why for 9 years she had not confirmed the grant. She denied that she had been hostile or that she had caused the delay. She reiterated that the respondent had not accounted to her in so far as her dealings with the estate was concerned.

9. Mr. Ndurumo for the respondent and Mr. Njoroge for the applicant each filed written submissions on the application. I have considered what each had to say.

10. The issue whether or not the respondent was served with the notice to show cause why the matter should not be closed is now not important. This is because the parties agreed to reopen the cause. What is important is why, and this is the same question the applicant is asking, since the grant was issued on 8th September 2005 there was no action taken to confirm it. It is notable that the respondent was required under **section 71(1)** of the **Law of Succession Act (Cap 160)** to have the grant confirmed upon the expiry of six months following its issue. Indeed, the court was concerned about the delay in seeking confirmation when it issued a notice to the respondent to apply for confirmation. The notice was issued under **section 73** of the **Act**.

11. It does not appear disputed that the applicant on 26th May 2008 collected from the respondent four documents of title of the properties of the deceased. The respondent explained that she handed over these documents upon the hostile demand by the applicant. The applicant denied ever being hostile to the respondent. However, I note that the respondent, as the executor of the Will of the deceased and to whom a grant of probate had been issued, was the legal and legitimate custodian of all the documents of title of the properties of the deceased. There cannot be any reasonable explanation why the applicant went for these documents. I find that in getting the documents of title from the respondent, the applicant was interfering with the legal role of the respondent, and cannot be heard to complain that the respondent did not diligently execute her role.

12. Secondly, the respondent stated that on 22nd March 2016 the applicant placed a caution in the matter which meant she could not proceed with it. This was not denied by the applicant. I find that this was a further interference with the role of the respondent as the executor of the Will of the deceased to whom a grant had been issued.

13. I agree that the respondent was generally obligated under **sections 82** and **83** of the **Act** to account to the beneficiaries and to the court about her dealings with the estate of the deceased. However, no material has been placed before the court to demonstrate that the respondent had done anything to waste or otherwise unreasonably deal with the estate of the deceased.

14. As to whether the respondent should cease to administer the estate, and the role instead given to the applicant, I note that it was the deceased who, in the exercise of his right under **section 5(1)** of the **Act** to dispose of his property by means of a Will, appointed the respondent as the executor of the Will (**Elizabeth Kamene Ndolo –v- George Matata Ndolo [1006]eKLR**). The court cannot interfere with the deceased's right to appoint an executor unless it can be shown that the executor has refused to comply with the terms of the Will, he has mismanaged the estate, he has refused to cooperate with the beneficiaries, he has misappropriated funds of the estate, or he has so misconducted himself so that it would be untenable for him to continue to act as the executor. Cogent and strong evidence has to be led to lead to such a finding. I do not find that such evidence has been led by the applicant.

15. The result is that I dismiss the application with costs.

16. However, under **section 47** of the **Act** and **rule 73** of the **Probate and Administration Rules**, I ask the respondent, within 30 days from today, to file and serve to all beneficiaries an application to confirm the grant. Upon service, the applicant or any beneficiary shall be at liberty within 21 days to respond. The matter shall then be mentioned on 11th May 2021 for directions.

DATED AND DELIVERED NAIROBI THIS 9TH DAY OF MARCH 2021.

A.O. MUCHELULE

JUDGE