REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

SUCCESSION CAUSE NO.369 OF 2013

IN THE ESTATE OF THE LATE LUCY EDNA OUMA.....DECEASED

CORNEL ODIAGA OUMA.....OBJECTOR

VERSUS

ANDREW LUMUMBA KECHULA.....APPLICANT

R U L I N G

[1] The summons for confirmation of the grant filed herein on 9th July 2020 revolves around the grant of letters of administration intestate as amended issued on 18th June 2020 to Andrew Lumumba Kechula (**first petitioner/applicant**) and Cornel Odiaga Ouma (**second petitioner/protestor**) husband and father respectively, of the late Lucy Edna Ouma (**deceased**) who passed away at the age of forty eight (**48**) years on 27th August 2013, and was survived by her parents and siblings.

[2] The initial grant respecting the estate of the deceased was issued to her parents on 22nd July 2014 and confirmed on 4th December 2014. However, the first petitioner applied for revocation of the grant in an application dated 19th January 2015 and filed in court on 23rd January 2015. He alleged that the grant was obtained by concealment of material facts on the part of the then petitioners.

After a protracted hearing process, the application was allowed by the court on 25th February 2020 with orders that the applicant/first respondent herein and the second petitioner/protestor herein be appointed as joint administrators of the estate and that they do file a proposal for confirmation of the grant within thirty (**30**) days. Otherwise the grant be revoked automatically.

[3] Apparently, there was a delay in the issuance of the fresh grant such that it was issued on 18th June 2020, outside that period prescribed by the court in its ruling of the 25th February 2020. Nonetheless, the delay was excusable as the delay was clearly attributable to the court through its registry staff who execute their functions under the overall supervision of the deputy registrar of this court.

Be that as it may, no sooner had the fresh grant been issued the first petitioner took out the necessary fresh summons for confirmation of the grant filed herein on 9th May 2020. Subsequently, the second petitioner purported to file grounds of opposition dated 8th October 2020 but these were somehow overtaken by a replying affidavit dated 18th January 2021 deponed by the second petitioner opposing the first petitioner's application for confirmation of grant.

[4] In effect, the replying affidavit was actually an affidavit of protest to confirmation of the grant. It was heard by way of affidavit evidence and written submissions as directed by the court.

Both parties filed their respective submissions through **Ojienda & Co. Advocates,** and **Gabriel Fwaya & Co. Advocates** respectively.

This court, having given due consideration to the rival submissions along with the affidavit of protest formed the view that the basic issue for determination is whether the fresh grant ought to be confirmed on the basis of the mode of distribution proposed by the first petitioner in paragraph four (**4**) of the affidavit in support of the summons for confirmation of grant which ironically, is said to be an affidavit by both petitioners but not signed by the second petitioner.

A consent on the proposed distribution of the estate was also filed on 9th July 2020 but is not signed by the second petitioner.

[5] Even though the first and second petitioners are the joint administrators of the estate appointed by the court, the fact that they could not come up with a well considered and agreed mode of distribution and instead one of them went solo in an attempt to confirm the grant is a clear demonstration of their disregard of the obligations of an administrator and a serious fallout in relation to the distribution of the estate which in accordance with the summons for confirmation of grant consists of movable and immovable property in the form of bank accounts, sacco shares, burial benefits and death in gratuity. The only immovable asset is a parcel of land described as Bunyala/Bulemia/3525.

All the said property or assets allegedly belonged to the deceased and were all available for distribution as far as the first petitioner is concerned.

However, as far as the second petitioner is concerned the alleged shares and bank accounts are non-existent and any other movable or immovable property belonging to the deceased were solely owned by herself and were acquired by herself prior to her alleged marriage with the first petitioner. As such, none of the property was matrimonial property.

[6] The foregoing notwithstanding the first petitioner in his submissions was of the view that there is no protest to confirmation of grant as the replying affidavit by the second petitioner does not amount to a protest. And, even if the replying affidavit was a protest then the second petitioner did not provide a counter proposal on the mode of distribution.

These fear by the first petitioner are unfounded as a replying affidavit may amount to a protest to confirmation of grant if it does not agree with an applicant's supporting grounds and/or proposal on distribution of the estate. In any event, that uncertainty was settled herein by this court treating the replying affidavit as the affidavit of protest.

[7] As to the alleged failure of the second petitioner to make a counter proposal on the mode of distribution, the omission is not fatal as it is not mandatory. The fact that a protestor does not make a counter proposal or distribution would not render his/her protest invalid or null and void.

In any event, the two petitioners as joint administrators ought to have agreed on the mode of distribution before either of them could take out necessary summons for confirmation of grant. In the event that such agreement became elusive or too remote due to differences of opinion the remedy was to move the court to distribute the estate in accordance with the Law. In the process, the court could invite the parties to file their own respective proposals on the mode of distribution. Such proposal would act as the beacon for the distribution of the estate by the court. Otherwise, the **Law of Succession Act** (**Cap 160** (**LOK**), contains clear provisions on the distribution of property belonging to an intestate deceased person (see, **Ss 35** to **42** of the Act).

[8] For the right formula on distribution to be followed by the administrators or administrator, all the property available for distribution must be specified and proved to be such. Any property which is not available for distribution may not and cannot be available for distribution in an application for confirmation of grant. This explains why the second petitioner in his protest indicates that some of the items availed by the first petitioner for distribution are actually not available for distribution. In fact the second petitioner suggest that all the assets mentioned by the first petitioner are not available for distribution as none of them was matrimonial property and/or jointly owned by the deceased and the first petitioner.

[9] All the foregoing factors clearly indicate that the fresh grant is not ripe for confirmation. The administrators have to seriously engage and agree on which property is available for distribution and how it shall be distributed among themselves as beneficiaries (**if at all**). They should put their personal differences aside and deflate their respective egos if they are to agree on a mode of distribution acceptable to them. In that way, the deceased shall surely "**rest in peace**".

Otherwise, the application by the first petitioner for confirmation of grant is disallowed not only for being pre-mature but also unmerited.

The parties are herein directed to return to the drawing board, agree on the mode of distribution and jointly take out a fresh summons for confirmation of grant; in any event, within the next four (**4**) months from this date hereof. In default, the fresh grant issued on 18th June 2020 shall stand revoked forthwith.

Each party shall bear own costs of the application.

Ordered accordingly.

J.R. KARANJAH

J U D G E

[READ AND SIGNED THIS 16TH DAY OF JUNE 2021]