



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 450 OF 2012

IN THE MATTER OF THE ESTATE OF JOEL ELIJAH DOLFUS NYASEME (DECEASED)

NICHOLAS STEPHEN OTIENO NYASEME.....APPLICANT

VERSUS

ROSE CAROLINE ABIERO NYASEME.....1ST RESPONDENT

FRANCKLINE ERICK ODHIAMBO NYASEME.....2ND RESPONDENT

RULING

1. The deceased Joel Elijah Dolfus Nyaseme died intestate on 4th February 2012 at Karen in Nairobi. It is now not in dispute that the applicant Nicholas Stephen Otieno Nyaseme was his first child by one Margaret Omoga Owuor. The deceased left a widow Rose Caroline Abiero Nyaseme (1st respondent) and children Frankline Erick Odhiambo Nyaseme (2nd respondent), Jacqueline Constance Atieno Nyaseme and Barbara Herine Ochieng Nyaseme. On 19th May 2017 the applicant and the respondents were issued with a joint grant. The grant was confirmed on 5th February 2020, and rectified on 8th June 2020. The confirmation followed a Mediation Settlement Agreement dated 29th November 2019 which was adopted on 29th January 2020, and the rectification followed a consent filed on 28th May 2020.

2. Both the confirmation and rectification are the subject of the present application dated 24th February 2021 wherein the applicant seeks that the certificate of confirmation of grant issued on 5th February 2020 and rectified on 8th June 2020 be revoked and annulled. The grounds are that the proceedings leading to the confirmation and rectification were commenced and finalized without reference to him, and yet he was a co-administrator of the estate of the deceased, and that the contents of the certificate of confirmation issued on 5th February 2020 and rectified on 8th February 2020 were not a true reflection of the legal status of the assets of the deceased. Lastly, that there were outstanding legal disputes in the cause that had to be determined before the joint grant issued to them was confirmed. The application was opposed by the respondents.

3. When the petition was filed, the estate of the deceased was stated to comprise the following assets:-

- a. Account No. 11XXXXXXXX KCB Moi Avenue;
- b. Account No. 01XXXXXXXXXX KCB;
- c. Account No. 11XXXXXXXX (Dollar Account) KCB;
- d. Account No. 01XXXXXXXXXXXX Coop Bank;
- e. Account No. 01XXXXXXXXXXXX Coop Bank;
- f. Account No. 02XXXXXXXXXXXX (Dollar Account) Coop Bank;
- g. Coop Card Account No. 4401-XXXX-XXXX-XXXX;

- h. Account No. 0152-XXXXXXXXXX Standard Chartered bank;
- i. Title No. Kisumu Municipality/Block 11/132;
- j. LR No. Nairobi Pepercorn 36684/30;
- k. LR No. East Gem/Nyamnia/833;
- l. LR No. East Gem/Ramula/306;
- m. LR No. Kanyamkago/Kawere/1203;
- n. LR No. Kisumu/Fort Ternan/538;
- o. LR No. Kisumu/Fort Ternan/581;
- p. LR No. Kisumu/Fort Ternan/583;
- q. LR No. Kisumu/Fort Ternan/584;
- r. LR No. Kisumu/Fort Ternan/585;
- s. LR No. Kisumu/Fort Ternan/586;
- t. Title No. Kisumu/Kogony/1936;
- u. Title No. Kisumu/Kigony 2254;
- v. LR No. Kisumu/Pandpieri/242
- w. LR No. South Gem/Ndori/306;
- x. LR No. South Gem/Ndori/1022;
- y. L.R. No. Kisumu Municipality/17477;
- z. LR No. Nairobi/12882/30

The other properties were LR No. Kibos 654/15; LR No. 654/16 and LR No. 654/17 at Kibos.

4. This cause was screened and referred to Court Annexed Mediation. On 29th November 2019 the parties signed a Mediation Settlement Agreement in which it was agreed that:-

- “1. L.R. No. Kisumu Municipality/17477 (7 acres) to be handed to the plaintiff Nicholas Stephen Otieno;**
- 2. LR No. Kusumu/Fort Ternan/538 (30 acres) to be handed over to Nicholas Stephen Otieno;**
- 3. LR Kibos 654 which is 50 acres to be subdivided and the plaintiff Nicholas Stephen Otieno to take possession of 24 acres;**
- 4. LR No. Kisumu/Pandpieri/ 242 (1/8 of an acre) to be handed to the plaintiff Nicholas Stephen Otieno. The parties to begin the process of effecting the content of this agreement immediately.”**

5. What was the dispute between the parties in this cause? When the respondents filed this petition their case was that the deceased had left only one widow (the 1st respondent) and three children: the 2nd respondent, Jacqueline Constance Atieno Nyaseme and Barbara Herine Ochieng Nyaseme. Their case was these were the only beneficiaries of the estate of the deceased who were entitled to the properties in the petition. The applicant objected to grant, saying he was a son to the deceased who had not been indicated in the petition and who was entitled to inherit the deceased. It was after the objection was heard that he was recognized by the court as the deceased's son. He was therefore going to benefit from the estate. The joint grant was issued to him and the respondents. What was left to be determined was how much he was going to benefit from the estate of the deceased. It is in light of this that the Mediation Settlement Agreement signed on 29th November 2019 should be understood. The Agreement was filed in court on 2nd December 2019. On 24th January 2020 it was adopted as the order of the court.

6. On 28th May 2020 a consent letter dated 26th May 2020 was received by the Deputy Registrar from Mckay Advocates who represent the respondents. It had been signed by the respondents (on their own behalf and on behalf of the Jacqueline Constance Atieno Nyaseme and

Barbara Herine Ochieng Nyaseme) distributing the rest of the estate among themselves, and saying that the Mediation Settlement Agreement had provided for the applicant. On 8th June 2020 the consent letter was adopted as order of the court. This led to the issuance of the certificate of confirmation now sought to be revoked.

7. It is evident that the consent letter dated 26th May 2020 was not signed by the applicant. The applicant was a co-administrator of the estate of the deceased and had an obligation under **sections 82 and 83 of the Law of Succession Act (Cap. 160)** to, among other things, manage the estate of the deceased and to eventually distribute it to the respective beneficiaries. A distribution of the estate, or part of it, to the beneficiaries, or any of them, without his involvement was illegal. It was therefore an error and a mistake on the part of the court to adopt as order of the court the consent dated 26th May 2020 which the applicant had not appended his hand on. The applicant was a party to the proceedings, an administrator, who was entitled to be served with the consent, and to be heard on it, before the adoption. Because of this clear and manifest error and mistake, under **section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules**, I review and set aside the order of 8th June 2020 adopting the consent dated 26th May 2020 and filed on 28th May 2020.

8. The consequence is that, the certificate of confirmation issued on 5th February 2020 and rectified on 8th June 2020 are recalled by the court, reviewed and set aside. This is because the certificate of confirmation and the rectification were grounded on the erroneous order of 8th June 2020.

9. The applicant's complaint about the adoption on 28th May 2020 of the Mediation Settlement Agreement dated 29th November 2019 is without basis. The Agreement was signed by him to settle the dispute between him and the house of the 1st respondent over the estate of the deceased. His signature created a contractual obligation from which he cannot resile. He subjected himself to mediation, and mediation is a known mechanism, under **Article 159(2)(c)** of the Constitution and **section 59B of the Civil Procedure Act**, through which parties can resolve their civil disputes.

10. So that this matter is progressed, I direct the 1st and 2nd respondents to, within 21 days, file and serve an application for the confirmation of the grant issued on 19th May 2017. They should propose how the estate of the deceased should be shared. Upon service to the applicant, he will within 21 days respond and propose his mode of distribution. The respondents shall have 14 days to file any further affidavit and written submissions to which the applicant shall respond by written submissions within 14 days.

11. The matter shall on **19th September 2021** be heard to provide counsel with opportunity to highlight their written submissions.

12. Each side shall bear own costs as this is a family dispute.

DATED and DELIVERED at NAIROBI this 9TH JUNE 2021.

A.O. MUCHELULE

JUDGE