



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: Hon. D. K. Kemei - J

SUCCESSION CAUSE NO. 677 OF 2012

IN THE MATTER OF THE ESTATE OF PHILIP ITUMO KIVINDYO (DECEASED)

AND

IN THE MATTER OF

ROSEMARY NDINDI MBONGE.....ADMINISTRATOR/APPLICANT

PRIESTLY MUTUKU ITUMO.....ADMINISTRATOR/RESPONDENT

JOHNSON MUTINDA KIVINDYO.....ADMINISTRATOR/RESPONDENT

GEORGE KIOKO KIVINDYO.....ADMINISTRATOR/APPLICANT

RULING

1. By Summons dated 5th November, 2019 Rosemary Ndindi Mbonge and George Kioko Kivindyo, the 1st and 4th Administrators/Applicants herein moved this court for the following orders:-

a. THAT, an order be and is hereby issued for the Deputy Registrar to sign all relevant documents including but not limited to mutation and transfer documents on behalf of 2nd and 3rd Administrators for purposes of effecting full and final transfers to the beneficiaries of the Estate in respect of their respective shares of the Estate as per the ruling of the Court delivered on the 2nd July, 2019.

b. THAT, an order be and is hereby issued for the County Surveyor Machakos County to effect subdivisions and distribution of the Estate as per the ruling of the court dated 2nd July, 2019.

c. THAT, an order be and is hereby issued for the County Commander, Machakos County to provide security during the distribution process.

d. THAT, an order be and is hereby issued that the costs of this application and the costs of the full administration of the estate including surveyor's fees and costs, transfer costs and any other incidental costs/or expenses be borne and catered by the estate.

2. The Applicants in seeking the above reliefs invoked the provisions of Section 47 of the Law of Succession Act and listed the following grounds as basis for her application:

a. THAT, the Petitioner/Applicants petitioned for letter of administration for the estate of the deceased herein vide a petition filed in court on the 4th July, 2012.

b. THAT, objection and/or protest proceedings ensued.

c. THAT, parties were heard and a ruling was delivered on 2nd July, 2019.

d. THAT, as per the ruling the estate was to be distributed as per the 2nd Objector's schedule of distribution.

e. THAT, it has proved difficult to administer the estate jointly with the other two administrators as per the ruling of the court

because they have declined to engage a joint surveyor and sign all necessary documents including transfers and mutations.

f. THAT, it is in the interests of justice that the Deputy Registrar does execute the transfer documents and any other relevant document to ensure that the estate of the deceased is distributed to have its beneficiaries get their rightful shares.

g. THAT, the actions by the administrators have made it impossible for the administration of the deceased's estate.

3. The Applicants supported the above grounds through their affidavit sworn on **5th November, 2019** wherein they have reiterated the above grounds which I will not reproduce them here but will only touch on the additional important and relevant facts deposed in the said affidavit in support of this application. The Applicants deposed that, the said Administrators have also declined to have a sitting to decide on where to get funds for the costs of the administration including the surveyor's costs. They further deposed that the administration of the estate has stalled because of willful failure of the other Administrators to cooperate, as such, the beneficiaries of the estate cannot have their rightful shares transmitted to them.

4. The application is opposed by the **2nd** Administrator/Respondent who filed a replying affidavit sworn on **6th March, 2020**. The **2nd** Respondent has denied the allegations made that it has been difficult to administer the estate of the deceased as the **1st** and **4th** Applicants have become adamant in doing things secretly without involving the other beneficiaries. The **2nd** Respondent maintains that the **1st** and **4th** Applicants have not been honest since the last sitting they had as a family and that as per the meeting held on **9th August, 2019** all the beneficiaries who were present agreed that Plot No. **MAVOKO TOWN BLOCK 3/320** be disposed to cater for the expenses of the estate which they never objected. The **2nd** Respondent further maintains that the **1st** and **4th** Applicants are the cause of the delay for sidelining the other beneficiaries and administrators hence their refusal to sign the documents.

5. In response to the application, **Richard Wambua Itumo**, the **2nd** Objector in this matter filed his replying affidavit sworn on **14th June, 2021** who averred that the **1st** Administrator/Applicant's proposed mode of distribution was not adopted by the court and that the meeting held to discuss the way forward on the issue of distribution scuttled once a majority of the beneficiaries insist on following the express directions of the court. He further proposed that the plots of lands to be disposed of to cater for the process of subdivision to be plot No. **MAVOKO TOWN BLOCK 3/973 or MAVOKO TOWN BLOCK 3/320**; that the proceeds of the sale be deposited in a joint interest earning account in the names of the Advocates for the Petitioners and Objectors to meet the cost of survey and administration and that any balance thereof be divided equally among all the beneficiaries. He finally deposed that the **1st** and **4th** Administrators/Applicants have failed to exhibit any efforts to administer the estate and that this application must fail with costs to the Objectors.

6. In response to the application, **Esther Nzula Itumo**, the **2nd** wife to the deceased in this matter filed her affidavit dated **11th June, 2021** wherein she deposed that prior to the death of her husband, he had verbally distributed his estate to his children and four (4) wives in her presence and that of the other two (2) wives. She proposed that each beneficiary who has occupied and developed their portions of land given to them a long time ago should be allowed to remain thereon. She further deposed that all the Administrators were also given their shares which they now occupy and that several meetings held to finalize this matter have failed to yield any positive result.

7. I have also considered the application as well as responses made by the **2nd** Respondent, **2nd** Objector and the deceased's second wife. This court from outset observes that this application was not really necessary if the administrators co-existed peacefully with mutual respect for each other. In my view, the apparent bad blood between the Applicants, Respondents and the Objectors though not unexpected given the circumstances has had undesired effect of protracting this cause and causing unnecessary delays. Having stated so, then what is before this court is in an application with a number of prayers but the main one being subdivision and distribution of the estate as per the ruling of this court dated **2nd July, 2019**. I find no basis for going back to what this court has already dealt with and issued orders accordingly.

8. It is obvious from this application and the responses made that the main bone of contention in the squabbles between the administrators herein is that the disposal of the chosen plot No. **MAVOKO TOWN BLOCK 3/320** from the deceased's estate to facilitate the expenses of the estate. This is owing to the fact that it is necessary for the beneficiaries to sub-divide and transfer the estate to the respective beneficiaries. I find that the need for financial and moral support raised by the Applicants in this application cannot be used as a basis to invoke the powers and authority of this court.

9. It is true that court orders must be obeyed by everyone for the dignity and authority of the court to be maintained and respected. The Applicants have accused the Respondents of acts of disobedience but the right remedy in my view does not lie in this application. The Applicants needed to have filed contempt proceedings against the Respondents if it is true that they disobeyed any court orders. The standard of proof applicable in such proceedings is different from the standard of proof applicable to proceedings such as this. I find that the Applicants allegations in regard to disobedience particularly in respect to failing to engage a joint surveyor and sign all necessary documents including transfers and mutations have not been established. This court finds that it is difficult in this application to make any finding because it is the Applicants word against the Respondents. For purposes of clarity and for the interest of justice, this court directs that a joint-interest earning account be opened in the names of the Advocates for the Petitioners and Objectors in this matter to facilitate the deposit of all proceeds realized from the sale of Plot No. **MAVOKO TOWN BLOCK 3/320**, as suggested by the beneficiaries. If any of the parties is reluctant to execute the requisite documents, including but not limited to mutation and transfer documents to facilitate the sale and subdivision of the deceased's estate, I direct the Deputy Registrar of this court to sign all the necessary forms. The **1st** and **4th** Administrators/Applicants appear not to have any problem with the distribution being carried out in line with the ruling of this court dated **2/7/2019**. If this is the position then I do not see why the objectors are reluctant to participate as their proposed schedule of distribution was accepted by this court. Further, the objectors have not shown evidence that on their part they have signed the requisite documents so as to fast track the process of distribution. It is clear therefore that none of the administrators have signed the documents and hence the need for this court to put its foot down and compel the parties to participate failing which the Deputy Registrar will execute the documents so as not to further inconvenience the beneficiaries who are patiently waiting for their shares. The parties herein must be whipped into line as the court cannot tolerate their ping pong games any longer. Suffice to add that none of the parties have appealed against the ruling dated **2/7/2019** and hence the same has to be complied with. As the parties have held meetings and resolved to dispose one of the properties and use the proceeds to carry out the subdivision and meet other administration expenses with the balance thereof being shared equally between the

beneficiaries, the application ought to be allowed as prayed.

10. In the result, it is my finding that the application dated 5/11/2019 has merit. The same is allowed as prayed. The court hereby further orders that **L.R NO. MAVOKO TOWN BLOCK 3/320** be sold and the proceeds deposited into an interest earning account in the joint names of the Advocates for the Administrators and Objectors and that the proceeds be used to meet the costs of subdivision and administration/legal costs and the balance thereof be shared equally between the beneficiaries.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 15TH DAY OF JULY, 2021.

D. K. KEMEI

JUDGE