REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

P&A CAUSE NO. 1 OF 2014

IN THE MATTER OF THE ESTATE OF NGARUHIA KAMAU (DECEASED)

IN THE MATTER OF AN APPLICATION FOR ACCOUNTS

BETWEEN

JANE WANJIRU NGARUIYA.....PETITIONER

AND

SAMUEL KAROKI NGARUIYA.....APPLICANT

RULING

[1] Before the Court for determination is the Summons dated **4 February 2021**. The said application was filed by **Samuel Karoki Ngaruiya,** the applicant herein, pursuant to **Sections 47 and 83** of the **Law of Succession Act, Sections 1A, 1B and 3A** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya.** He asked for the following orders:

> [a] Spent;
>
> [b] That the petitioner be ordered to produce to the Court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of the dealings therewith up to the date of the account;
>
> [c] That the administrator of the estate of the deceased, **Jane Wanjiru Ngaruiya**, who is now of very advanced age, be substituted by any other competent beneficiary.
>
> [d] That the costs of the application be provided for.

[2] The application was premised on the grounds that, since the Grant was confirmed on **23 June 2015**, the administrator has not rendered account in respect of the estate; and has instead assumed that the estate property is hers to deal with as she pleases. The applicant further complained that the administrator has treated the beneficiaries with partiality and favoured some to the detriment of others. The applicant also complained that the administrator is advanced in years; and therefore is unable to effectively discharge her duty as an administrator.

[3] The application was supported by the applicant's affidavit, sworn on **4 February 2021** wherein he deposed that one of the estate properties, namely, **Eldoret Municipality Block 15/Huruma/28** fetches a rental income of about **Kshs. 100,000/=** while property **No. Thika Municipality/Block 28/29** yields **Kshs. 30,000/=** per month; but that at no time has the administrator shared such income with him. The applicant further deposed that the administrator has never disclosed to him the account balances in the deceased's bank accounts. He accordingly prayed that the administrator be required to account for all the accruals of the estate and how the same was utilized. He also prayed that, since the administrator is of such advanced age, she be substituted by a competent person who will effectively proceed with the administration to conclusion.

[4] The application was resisted by the petitioner. In her Replying Affidavit, sworn on **25 March 2021**, she averred that the application is malicious, vexatious and an abuse of the court process; and therefore ought to be dismissed forthwith, for having been filed by an unknown agent. She averred that there is no notice of appointment filed by the firm of **C.D. Nyamweya & Company Advocates** prior to the filing of the said application. The petitioner further deposed that, prior to the confirmation of grant on **23 June 2018**, all the beneficiaries consented in writing that the estate assets be transferred to her solely; and therefore that the applicant cannot seek a share of the rental income since no such sharing was captured in the Summons for Confirmation of Grant.

[5] The application was canvassed by way of written submissions, pursuant to the directions of the Court, given on **15 March 2021**. **Mr. Nyamweya** for the petitioner filed his written submissions herein on **11 May 2021**. He asserted that a Notice of Appointment of Advocate was filed along with the application dated **4 February 2021**; and that if the same was not on the Court record then the fault is not the applicant's. Although he indicated at paragraph 3 of his submissions that a duly stamped copy of the notice was annexed to his written submissions, there is no such document.

[6] **Mr. Nyamweya** further submitted that, under **Section 83 (f)** of the **Law of Succession Act**, the petitioner was obligated to distribute the net estate to the beneficiaries, failing which she would be presumed to retain the same in trust for them. Thus, according to **Mr. Nyamweya**, either the petitioner does not fully appreciate the import of her responsibilities as an administrator or has deliberately chosen to ignore the applicable law; in particular **Section 83(h)** of the **Law of Succession Act**. Counsel relied on **Kiambu High Court Succession Cause No. 53 of 2016: Re Estate of Cecilia Wanjiku Kibicho; Mombasa High Court Succession Cause No. 367 of 2006: Re Estate of Salim Islam Saadan Abdulhakim;** and **Kisumu High Court Succession Cause No. 393 of 2006: Re Estate of Joseph Oginga Oluoch**.

[7] **Mr. Mathai** for the petitioner relied on **Order 9 Rule 1** of the **Civil Procedure Rules** and the cases of **Joshua Nyamache T. Omasire vs. Charles Kinanga Maena** [2008] eKLR and **Techno Service Limited vs. Nokia International OY-Kenya & 3 Others** [2020] eKLR to buttress his argument that the firm of **C.D. Nyamweya & Company Advocates** is a stranger to this cause, since no Notice of Appointment was ever filed by the said firm as is by law required. Counsel further took the view that, since no evidence was availed by the applicant to prove the alleged rental income from **Eldoret Municipality Block 15/Huruma (28)** or **Thika Municipality/Block 28/29** or the allegations of discrimination made by him, the same should be disregarded by the court.

[8] In respect of the applicant's application for substitution on the ground that the petitioner is advanced in age, **Mr. Mathai** submitted that applicant was driven by malice in so far as he failed to demonstrate how the petitioner's age has affected the discharge of her responsibilities as an administrator. Counsel reiterated the petitioner's stance that since the beneficiaries consented to the estate properties being vested in her, the application for accounts has no basis.

[9] A technical point to address *in limine* is the question whether the application is incompetent for having been filed by a **"stranger". Mr. Mathai** cited **Order 9 Rule 1** of the **Civil Procedure Rules** to support his argument that the firm of **C.D. Nyamweya & Co. Advocates** did not properly place itself on record prior to the filing of the instant application. **Order 9 Rule 1, Civil Procedure Rules**, provides that:

> **"Any application to or appearance or act in any Court required or authorized by the law to be made or done by a party in such Court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent or by an Advocate duly appointed to act on his behalf."**

[10] Counsel relied on **Joshua Nyamache T. Omasire vs. Charles Kinanga Maena** (supra) and **Techno Service Limited vs. Nokia International OY-Kenya & 3 Others** (supra) for the proposition that the firm of **C.D. Nyamweya & Co. Advocates** ought to have filed either a Notice of Appointment or a Notice of Change of Advocates in this matter, prior to the filing of the instant application. Thus, in the latter case, **Hon. Kasango, J.** followed the **Joshua Nyamache case** and held that:

> **"The only way an Advocate can prove he/she is an authorized agent of a party is by filing a Notice of Appointment. Having failed to file that Notice the firm of Iseme Kamau & Maema had no legal basis to file the Notice of Motion Application under consideration to borrow the words of Justice D. Musinga, that firm of Advocates were and are strangers in this suit."**

[11] A perusal of the record confirms that no Notice of Appointment of Advocate was filed by the firm of **C.D. Nyamweya & Company Advocates** evincing his appointment to act herein on behalf of the applicant. It is significant however that, **Order 9 Rule 1** is not one of the provisions imported by dint of **Rule 63(1)** of the **Probate and Administration Rules,** which provides that:

> **"Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules."**

[12] Needless to say that, Parliament did not intend that proceedings under the **Law of Succession Act** be attended with undue regard for procedural technicalities, particularly the detailed procedural rules provided for in the **Civil Procedure Act** and the Rules thereunder. Hence, in **Josephine Wambui vs. Margaret Wanjiru Kamau & Another** [2013] eKLR the Court of Appeal held that:

> **"We hasten to add that the Law of Succession Act is a self-sufficient Act of Parliament with its own substantive law and Rules of procedure. In the few instances where the need to supplement the same has been identified some specific rules have been directly imported to the Act through Rule 63(1)."**

[13] Likewise, in **Josiah Mwangi Mutero & Another vs. Rachael Wagithi Mutero** [2016] eKLR, **Hon. Mativo, J.** had the following to say, which I entirely agree with:

> **"On the issue whether Sections 1A, 1B of the Civil Procedure Act[9] do apply in succession proceedings, guidance can be obtained in the book *Law of Succession* by W. M. Musyoka[10]where the author observes that *"the Law of Succession Act[11] inclusive of its support subsidiary legislation, is a comprehensive code of substantive and procedural law.[12]* Nyamu J in *Francis Kamau Mbugua & Another vs James Kinyanjui Mbugua*[13] observed that the Law of Succession Act [14] is a complete code except as regards third party rights or strangers, who should have recourse to provisions outside the Act. In succession causes, the probate court exercises its jurisdiction under the Law of Succession Act[15] and its subsidiary legislation.[16] The provisions of the Civil Procedure Act[17] and the Civil Procedure Rules apply, and the probate court**

exercises jurisdiction under them, only to such extent as may be allowed by the Law of Succession Act[18] and the Probate and Administration Rules.[19]

Onyancha J was more explicit in *Shah vs Shah*[20] where he stated that where any proceedings are governed by special legislation, the provisions of the Civil Procedure Act[21] and rules do not apply unless expressly provided by such special legislation, and the position remains the same even if the special legislation is silent about it and does not exclude the Civil Procedure Act[22] and Rules.

Rule 63 (1) of the Probate and Administration Rules provides that:-

> ***"Save as in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, X1, XV, XV111, XXV, XL1V, and XL1X, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules."***

From the above, it is clear that the only provisions of the Civil Procedure Rules imported to the Law of Succession Act[23] are Orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attendance of witnesses, affidavits, review and computation of time.[24]

The High Court has in numerous pronouncements severally stated that the other provisions of the Civil Procedure Act[25] and Civil Procedure Rules, that is those not mentioned in rule 63 cited above are of no application at all in proceedings under the Law of Succession Act.[26] For example, Khamoni J *in the matter of the estate of Joseph Mwinga Mwagana-deceased*[27]said in an application brought under Order XL1 Rule 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act,[28] that the said provisions did not apply as probate proceedings are governed by their own rules of procedure and added that the Civil Procedure Act[29] and Rules only apply where allowed by rule 63 of the Probate and Administration Rules…" (emphasis added)

[14] It is in the light of the foregoing that I find excusable, the failure by **Mr. Nyamweya** to file a Notice of Appointment herein. Moreover, it could very well be that he did file a Notice of Appointment; and that the same is yet to be placed on the file by the Court's own e-registry team. Turning now to the merits of the application, a perusal of the court record shows that the deceased, **Ngaruhia Kamau**, died intestate on **30 September 2013** at the age of 73 years. He was survived by his widow, **Jane Wanjiru Ngaruiya** and 8 sons and daughters. The record further shows that the widow filed this petition on **6 January 2014,** seeking to be issued with Grant of Letters of Administration Intestate in respect of the deceased's estate. The petitioner duly furnished the particulars of the deceased's assets in her Affidavit in Support of Petition, Form P&A.5, thus:

[a] Eldoret Municipality/Block 15(Huruma)/28

[b] Kapseret/Kapseret/Block 1(Yamumbi)/227, and

[c] Thika Municipality/Block 28/29

[15] The petition was duly processed and a Grant of Letters of Administration Intestate issued on **17 March 2014** to the petitioner. The petitioner thereafter filed Summons for Confirmation of Grant dated **27 January 2015** which was heard and determined on **15 June 2015.** The Grant was accordingly confirmed and distribution of the deceased's estate approved as proposed by the beneficiaries per paragraph 8 of the petitioner's affidavit in support of the confirmation application.

[16] Thus, having given careful consideration to the application dated **4 February 2021**, the averments set out in the Supporting Affidavit and the written submissions filed by counsel herein, the issues that arise for determination are:

[a] Whether the petitioner is under obligation to produce to the Court a full inventory of the assets and liabilities of the deceased; and to account for the income earned therefrom to date;

[b] Whether sufficient cause has been shown for the substitution of the administrator; and if so, by whom.

[17] There is no gainsaying that an administrator is under obligation to act truthfully and to account for all dealings in relation to the estate that he/she has been charged with the responsibility of administering. Hence, in **Section 83(e)** of the **Law of Succession Act**, it is recognized that one of the duties of an administrator, after settling the liabilities owing from the estate, is to render an accurate account of the estate. It states that:

"Personal representatives shall have the following duties—

…

within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;"

[18] This is a function to be discharged within 6 months of the issuance of the Grant. It was, therefore, incumbent on the applicant and any other interested beneficiary to move the Court accordingly before confirmation of Grant. The Grant herein having been confirmed, it is

presumed that the Inventory of Assets furnished by the petitioner at paragraph 6 of **Form P&A.5** was an accurate depiction of the deceased's assets. Indeed, when the matter came up for confirmation on **15 June 2015,** neither the applicant nor the other beneficiaries raised any issue about the inventory of assets.

[19] The foregoing notwithstanding, the **Law of Succession Act** places an obligation on an administrator to also account upon completion of the administration. To this end, **Section 83(i)** is explicit that an administrator has the duty to:

> **"…complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration."**

[20] It was therefore a misconception for the petitioner to depose, as she did in paragraph 7 of her Replying Affidavit, that accounts can only be called for in the event of misappropriation of funds by an administrator. Indeed, she was required, within six months from the date of confirmation of the grant, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration. The record shows that she is yet to do that, more than 6 years from the date of confirmation. I am therefore satisfied that the applicant is justified in seeking accounts, notwithstanding that he consented to all the titles to the estate properties being vested in the petitioner.

[21] As to whether the applicant is entitled to a share of the rental income, the court record does support the petitioner's assertion that all the beneficiaries were in agreement that all the assets be transferred to her name. This is clearly set out at paragraph 8 of the Affidavit in Support of the Summons for Confirmation of Grant sworn on **27 January 2015**. One of the documents annexed to that affidavit was a Consent to signed by the beneficiaries who were readily available; the petitioner having indicated that some of the beneficiaries were outside the jurisdiction of the Court. It is notable that the applicant was one of the signatories to the consent and thereby joined his siblings in consenting that:

> **"We the undersigned do hereby give our irrevocable consents confirming our acceptance of the mode of distribution stated in the affidavit in support of the summons for confirmation of the grant herein sworn by JANE WANJIRU NGARUIYA and hereby willingly append our respective signatures and bind ourselves jointly and severally on our own behalf…"**

[22] There being no indication, either in the Consent or the Certificate of Confirmation that the petitioner was to hold the property in trust for the other beneficiaries, the applicant's complaint that he has been left out of the proceeds of the estate, and in particular the rental income, is without basis. It is not for nothing that, in the proviso to **Section 71(2)** of the Law of **Succession Act**, it is stipulated that

> **"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 such grant shall specify all such persons and their respective shares."**

[23] Where, as in this case, the beneficiaries were all in agreement that the petitioner be the sole recipient of the estate assets, it is to be presumed that the beneficiaries endorsed the right of the petitioner to a life interest over the net assets of the deceased pursuant to **Section 35** of the **Law of Succession Act.** Under that provision, the petitioner is at liberty to make gifts from the estate property to any of the beneficiaries as she deems appropriate. Accordingly, I find no merit in the applicant's complaint that he has been excluded from the income accruing to the estate.

[24] On the substitution of the administrator, and whether sufficient cause for it has been shown, counsel for the applicant made no reference to any specific provision of the **Law of Succession Act** or the rules thereunder to underpin this prayer. Moreover, the applicant adduced no evidence at all to prove that the administrator is unable to discharge her duties; and even were this to be the case, what the law envisages in such a situation is for the interested party to move the Court for revocation of grant under **Section 76** of the **Law of Succession Act**, on the grounds that the petitioner has failed, after due notice and without reasonable cause, either:

> [a] to proceed diligently with the administration of the estate; or
>
> [b] to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of **Section 83** of the **Law of Succession Act.**

[25] The rationale for this is that a grant is issued *in personam* and is therefore not transferrable. In **Re Estate of Mwangi Mugwe alias Elieza Ngware (deceased) [2003] eKLR**, for instance, **Hon. Khamoni, J.** held thus, albeit in respect of a deceased administrator:

> **"…the operative word is "substitution". The Law of Succession Act has no provisions talking about substitution of a deceased single administrator…In the circumstances therefore, it is my considered view that the proper provisions of the law to apply is section 76(e) of the Law of Succession Act and Rule 44 of the Probate and Administration Rules whereby the Applicant would apply for revocation or annulment of a grant on the ground "that the grant has become useless and inoperative through subsequent circumstances." The Applicant would proceed to put a prayer in the same application that a new grant be made to him and could as well add a further prayer, if need be, for confirmation of the new grant. The application, should, of course, be supported by consent from adult beneficiaries in the estate of the first deceased person, the second deceased person being the deceased administrator."**

[26] That same point of view was taken by **Hon. Musyoka J.** in **Re Estate of George Ragui Karanja (Deceased)** [2016] eKLR, in which the learned Judge held that:

> **"The Law of Succession Act does not expressly provide for substitution of personal representatives who die in office, particularly in cases where the estate is left without one. The closest provision is section 81 of the Act, which provides for vesting of the powers and duties of personal representatives in the survivor or survivors of a dead personal representative… It would appear to me that once all the holders of a grant die, section 81 of the Act would be of no application. Indeed, the said grant becomes useless and inoperative, and liable to revocation under section 76 (e) of the Law of Succession Act, to pave way for appointment of new administrators. The appointment of fresh administrators to take the place of the previous ones following their death is subject to the provisions of sections 51 through to section 66 of the Act."**

[27] And in the case of **Florence Okutu Nandwa & Another vs. John Atemba Kojwa, Kisumu Civil Appeal No. 306 of 1998,** the Court of Appeal made it clear that:

> **"A grant of representation is made in *personam*. It is specific to the person appointed. It is not transferable to another person. It cannot therefore be transferred from one person to another. The issue of substitution of an administrator with another person should not arise."**

[28] Hence, I would agree with the position taken by **Hon. Musyoka, J.** in **Re Estate of Charles Ngotho Gachunga (Deceased) [2015] eKLR, that the office of an administrator is for life, and that he/she** can be called to account at any time so long as he/she is still alive. That being my view, it follows that the applicant's prayer for the substitution of the petitioner as the administrator of the estate of **Ngaruhia Kamau** is, likewise, untenable.

[29] In the result, other than the prayer for accounts, the rest of the prayers sought by the applicant in his application dated **4 February 2021** are untenable and are hereby dismissed. It is accordingly ordered that

> [a] That the petitioner be and is hereby ordered to produce to the Court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of the dealings therewith up to the date of the account.
>
> [b] That the costs of the application be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 12TH DAY OF JULY 2021

OLGA SEWE

JUDGE