



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 584 OF 2005

IN THE MATTER OF THE ESTATE OF LILLIAN CHRISTINE UDE-HANSEN – (DECEASED)

TONY OCHOLLA alias TONY OMONDI OCHOLLA.....APPLICANT

VERSUS

TERRI FAIRES.....1ST RESPONDENT

RAPHAEL KAMAU NGETHE..... 2NDRESPONDENT

RULING

1. The Application coming for consideration in this Ruling is the summons for revocation dated 15.7.2019 seeking the following orders:

(i) THAT a Grant of Letters of Probate made to 1st and 2nd Respondents in this cause on the 16th August 2006 and Confirmed on 9th October 2006 be revoked.

(ii) THAT pending the hearing and determination of this application, there be an Order of Injunction restraining the 1st and 2nd Respondents by themselves or through their agents from disposing, selling transferring, alienating or in any way dealing with the assets of the Estate of Lillian Christine Ude-Hansen (Deceased).

(iii) THAT in particular, pending the hearing and determination of this application, there be an Order of Injunction restraining the 1st and 2nd Respondents by themselves or through their agents from disposing, selling transferring, alienating or in any way dealing with Land Reference No. 1870/11/227 Nairobi.

(iv) THAT in the alternative, this Court be pleased to Order the Revocation and Cancellation of any entry that goes towards disposing, selling, transferring, alienating or in any way dealing with the Property and Title to Land Reference No. 1870/11/227 Nairobi.

(v) THAT further and in the alternative, the 1st and 2nd Respondent be directed to render a full and accurate account for the assets, funds and properties received which are the property of the Estate of the Deceased and to return the said funds and properties to a neutral account pending the distribution of the estate of deceased herein.

(vi) THAT a grant of Letters of Administration be made in this cause in the name of the Applicant herein.

(vii) THAT the Costs of this application be borne by the Respondents

2. The Summons for revocation is supported by the Affidavit of the Applicant TONY OCHOLLA also known as TONY OMONDI OCHOLLA in which he has stated that he is the only surviving beneficiary of the Estate of the deceased herein LILLIAN CHRISTINE UDE – HANSEN.

3. Further, that the 1st and 2nd Respondent while hiding behind the veil of Executor of the Will of the Deceased have dealt exclusively and unilaterally with the prime asset of the Estate being IR. No. 28473 or LR No. 1870/11/227 which was to be held upon trust.

4. The Respondents filed Replying Affidavits as follows:

(i) The 1st Respondent filed a Replying Affidavit dated 7.11.2019.

(ii) The 2nd Respondent filed a Replying Affidavit dated 26.8.2019,

(iii) The applicant filed a further Supplementary Affidavit dated 14.11.2019.

5. The Parties filed written Submissions save for the 1st Respondent who stated that she wished to rely on the Replying Affidavit dated 7.11.2019. I have considered the said submissions and I find that it is not in dispute that the 1st and 2nd Respondents were appointed Executors of the Will of the Deceased.

6. The 1st Respondent in her Replying Affidavit dated 7.11.2019 has deposed that she was appointed as Trustee to hold the estate on behalf of the beneficiaries and to pay the income to LUCY OCHOLLA (now deceased) and TONY OCHOLLA (the applicant).

7. The 1st Respondent further stated in her Replying Affidavit on 15.1.2008 as executor of the estate she registered an Assent to bequest in respect of the Property known as LR NO. 1870/11/227.

8. Further that in Exercise of powers conferred upon her by the Will and the Law she sold the said property in or about June 2015 for Ksh.130,000,000/-.

9. The 1st Respondent further deposed that she did not use the land funds to her own benefit but she purchased three (3) additional properties being

(i) Apartment A5

(ii) Apartment 5B and

(iii) Trident Park.

10. The 1st Respondent also stated that she further utilized the proceeds from the sale in the following manner:

a) Payment of debts owed by the deceased to her former business Partner.

b) Payment of Medical Expenses for Lucy Ocholla (now deceased).

c) Funeral Costs.

d) Payment of monthly upkeep for LUCY OCHOLLA (now deceased) and TONY OCHOLLA.

e) Payment of Service Charge to the Properties.

f) Land rent.

g) Repairs to the said properties.

11. The 1st Respondent stated in the said Affidavit that the Will has not been declared invalid and further that she acted in accordance with the will and her duty is to ensure that the applicant gets such amounts from the estate as she shall determine until he attains the age of 32 and further that he has attained the said age.

12. The 2nd Respondent filed a Replying Affidavit dated 26.8.2019 in which he deposed that he was appointed executor and upon discharge of his duty to 1st respondent took over as trustee in accordance with the Will of the deceased.

13. The 2nd Respondent further stated that the Will was valid and prayer 6 of the Application dated 15.7.2019 has no basis.

14. I have considered the Affidavits filed in the Application dated 15.7.2019 together with the Submissions by the Applicant and 2nd Respondent and I find that it is not in dispute that the two Respondents were appointed executors of the Will dated 1.1.2004.

15. The deceased herein LILLIAN CHRISTINE UDE-HANSEN (Deceased) died testate on 15.1.2004 domiciled in Copenhagen Denmark.

16. The deceased left a Will dated 1.1.2004 in which she appointed her sister TERRI FAIRES (the first Respondent) and RAPHAEL KAMAU NGETHE (the 2nd Respondent) as executors of the Will.

17. She also appointed 1st Respondent as Trustee of the Will.

18. The Beneficiaries of the Will are as follows:

(i) LUCY OCHOLLA (now deceased)

(ii) TONY OCHOLLA (the Applicant herein)

19. The issues to determine in the Application dated 15.7.2019 are as follows

- (i) Whether the grant of Probate issued to the 1st and 2nd Respondents on 16.8.2005 and confirmed on 9.10.2006 should be revoked.
- (ii) Whether an order of injunction should issue against the 1st and 2nd Respondents restraining them from disposing, selling, transferring, alienating or in any way dealing with the assets of the Estate of the deceased and in particular Land Reference No. 1870/11/227 Nairobi.
- (iii) Whether an order of revocation and cancellation should issue on any entry that goes towards disposing, selling transferring alienating in any way the property and Title land Reference No. 1870/11/227 Nairobi.
- (iv) Whether the 1st and 2nd Respondents should be directed to render a full and accurate account for the assets, funds and properties received which are the properties of the Estate and to return the said properties and funds to a neutral account pending distribution of the estate.
- (v) Whether Letters of Administration should be issued to the Applicant.
- (vi) Who pays the costs of this Application?

20. On the issue as to whether the grant of the probate and confirmation should be revoked, I find that there is no allegation that the Will herein dated 1.1.2004 is invalid.

21. I find that the grant of Probate was properly issued and the Confirmation done in accordance with the Will. The Circumstances for revocation of grant are clearly set out in **Section 76** of the Law of Succession Act;

76 Revocation or annulment of grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

- a. that the proceedings to obtain the grant were defective in substance;*
- b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;*
- c. that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;*
- d. that the person to whom the grant was made has failed, after due notice and without reasonable cause either—*
 - i. to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or*
 - ii. to proceed diligently with the administration of the estate; or*
 - iii. 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 or has produced any such inventory or account which is false in any material particular; or*
- e. that the grant has become useless and inoperative through subsequent circumstances.*

22. On the issue as to whether the 1st and 2nd Respondents should be restrained from disposing, selling, transferring, alienating or in any way dealing with the assets of the estate of the deceased, I find that both the 1st and 2nd Respondents have stated in their respective Replying Affidavits that they acted in accordance with the bequest in the Will.

23. The 1st Respondent was appointed both executor and Trustee while the 2nd Respondent was only Executor and his role ended when the properties were transferred to the 1st Respondent who was mandated to deal with them as she deemed fit.

24. **Section 45** of the Law of Succession Act. provides:-

“45. (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall-

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

25. In the case of **Gitau and 2 others – Vs – Wandai & 5 others(1989) KLR 23**, Tanui J, as he then was stated as follows:-

“According to Section 45 of The Law of Succession Act, Cap.160 intermeddling with the property of a deceased man consists of taking possession, disposing or otherwise intermeddling with any free property.”

26. See **GLADYS NKIROTEM'ITUNGA vs. JULIUS MAJAUM'ITUNGA[2016] eKLR** that;

*Whereas the law of succession does not define what intermeddling with the property of the deceased is, there is ample judicial decisions on acts which may amount to intermeddling. For instances, in the case of **BENSON MUTUMAMURIUNGI vs. C.E.O. KENYA POLICE SACCO & ANOTHER [2016] eKLR** the court observed that:*

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”

27. See also the case of **MACHAKOS HIGH COURT CIVIL CASE NO. 95 OF 2001JOHN KASYOKIKIETI – vs- TABITHA NZIVULU KIETI & AOTHER** it was held that doing anything affecting the estate of a deceased person amounts to intermeddling. In the case cited, the court considered commencing a suit on behalf of the estate before obtaining a grant of representation to be an act of intermeddling with the estate. Again, consider the case of **GITAU AND TWO OTHERS -vs- WANDAI AND FIVE OTHERS (1989) KLR 231** where it was held that entering into an agreement to sell estate property before getting a grant or without such a grant is an act of intermeddling.

28. There is no basis for issuing an injunction as the 1st Respondent under the law and in accordance with the Will has power to deal with the properties.

29. The 1st Respondent stated in her Replying Affidavit that she registered an assent to bequest in respect of the property Land Reference No. 1870/11/227 (hereafter known as the suit property) on 15.1.2007 and she sold it for Ksh.130,000,000 and invested in three other properties namely:

(i) Apartment A5

(ii) Apartment 5B and

(iii) Trident Park

30. I therefore find that the prayer for an injunction has been overtaken by events. The prayer for revocation and cancellation of any entry in respect of the disposing of the suit property has equally been overtaken as the said property was sold way back in January 2007 or thereabout.

31. I find that the Applicant has not shown basis for his appointment as Administrator since he is not challenging the validity of the Will which states that the trustee will hand over the property when he attains the age of 32 years.

32. I find that the Trustee acted in accordance with the bequest in the written will dated 1.1.2004.

33. However, with Respect to the prayer seeking that the 1st and 2nd Respondents render a full and accurate account of their dealings with the assets of the estate, I find that the averments in the Replying Affidavit of the 1st Respondent who is the Trustee under the Will are scanty.

34. The 1st Respondent merely stated that she sold the only assets which is the suit property and bought other properties which are as follows:

(i) Apartment A5

(ii) Apartment 5B and

(iii) Trident Park

35. There are no details of the purchasers of the suit properties or the sellers of the three properties and the incomes derived from the same.

36. The list of the expenses incurred is also incomplete as it does not state how much has been spent on the liabilities of the Estate.

37. The 1st Respondent as the Trustee of the Will is under a fiduciary duty to act in good faith for the best interest of the estate.

38. I accordingly direct that the 1st Respondent files a full inventory of all the assets at her disposal as Trustee of the Estate and also gives a detailed account of her dealings with the assets since she took over as Trustee of the Estate.

39. However, the 2nd Respondent's duty was discharged when he transferred the Properties to the 1st Respondent and he is accordingly not liable to render any accounts.

40. The Application dated 15.7.2019 be and is hereby partially allowed in the following terms:

(i) THAT the 1st Respondent be and is hereby directed to render a full and accurate account of her dealings with the assets of the estate since she took over as trustee to the date of filing the same.

(ii) THAT the said accounts to include details of all sales and purchases of assets, all liabilities incurred and incomes received in respect of the Estate.

(iii) THAT the said accounts to be filed within 30 days of this date.

(iv) THAT this being a family matter, each party to bear its own costs of this Application.

(v) Mention on 17.3.2020 for compliance.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 14TH DAY OF FEBRUARY, 2020

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.