



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

SUCCESSION CAUSE NO.222 OF 2010

IN THE MATTER OF THE ESTATE OF PAUL JOSEPH NGEI (DECEASED)

NDUKU MWANTHI.....APPLICANT

VERSUS

HENRY MSAKU NGEI

PATRICK MUTINDA NGEI

VICTOR NGEI

HUMPHREY MUTUKU NGEI.....ADMINISTRATORS/RESPONDENTS

RULING

1. Elizabeth Nduku Mwanthi, a beneficiary of the estate of the deceased filed the application dated 29.4.2019 under section 47 and 83 of the Law of Succession Act and Rules 49 and 73 of the Probate and Administration Rules that sought the following orders

a) That the administrators be compelled by this Honourable court to produce to court full and accurate inventory of the assets and liabilities of the deceased as at the date of the partial grant.

b) That the Administrators be compelled to produce to court a full and accurate accounts of all dealings therewith up to the date of the accounts.

c) That the court be pleased to grant preservative orders for preserving the properties of the estate by stopping the Administrators from dealing, alienating, selling and or disposing of the properties of the estate pending the hearing and determination of this application.

d) That this Honourable court be pleased to order the manager Eco Bank, Fedha Towers branch Nairobi to provide to the applicant the statement of account for the estate of the late Paul Ngei Account Number 0013215018245401 from the date it was opened.

e) That this court be pleased to remove Henry Masaku Ngei, Patrick Mutinda Ngei, Victor Ngei and Humphrey Ngei as administrators of the estate of the deceased and instead substitute them with Claudine Mwelu Ngei, Flora Itumbi Ngei, Dennis Babu Ngei and Elizabeth Nduku Mwanthi.

f) That this court do grant any other or further relief that it may deem necessary.

g) That the costs of this application be provided for.

2. The application was grounded on the following facts as per the application and supported by affidavit of Elizabeth Nduku Mwanthi; That the applicant is a daughter and beneficiary of the estate of the deceased and that the grant of letters of administration intestate were issued on 19.7.2012, which grant was partially confirmed on 8.10.2015. It was averred that the administrators are in the process of selling LR 12055(IR 23921/1 4.066 ha situate at Mito Andei. It was averred that after the partial confirmation of the grant the family sad down and agreed to sell LR Machakos Block 11/521 and out of the proceeds, the administrators deducted a sum of Kshs 250,000/- per person as well as Kshs 150,000/- was deducted from each beneficiary and all these actions were without the consent and authority of the beneficiaries. It was

averred that the administrators had not filed or produced accounts and also added George Kasyoka Ngei aka Nakron as an adopted son of the deceased yet his name was not included in the letter from the chief. It was averred that the applicant discovered that the administrators had withdrawn from the estate account Kshs 1.6m/- for their own personal needs. It was further averred that the applicant discovered that Henry Masaku Ngei, one of the administrators had rented out LR Machakos Municipality Block 11/521 and had been receiving rent on behalf of the estate from a church called Around the Globe deliverance ministry. Annexed to the affidavit were copies of the grant of letters of administration intestate, partial confirmation, minutes of family meeting, documents in support of application for letters of administration, affidavit including Nakron as a beneficiary, schedule of distribution of assets, cheque, bank statement, m-pesa statement in respect of payments received from a church.

3. Vide a further affidavit deponed by the applicant, it was averred that this court had jurisdiction to remove an administrator. She confirmed receiving payment of the administrators of sitting and transport allowances for the family meetings and therefore the amount of Kshs 400,000/- paid to the administrators was not warranted. She denied asking for any commission and also denied that Nakron/George Kasyoka was never an adopted child of the deceased. It was averred that the administrators abdicated their duty of administration of the estate of the deceased

4. In reply to the application, was an affidavit deponed by Patrick Mutinda Ngei, one of the 4 administrators of the estate of the deceased on 22.7.2019. It was averred that each of the four households had an administrator and that the applicant came from the 1st house that was represented by Henry Masaku Ngei. It was averred that the proposal to appoint Flora Itumbi Ngei as an administrator to represent the 3rd house was rejected in favour of Victor Ngei who represents the 3rd house. It was averred that the applicant's attempt to procure Dennis Babu Ngei as an administrator to represent the 4th house in place of Humphrey Mutuku Ngei was rejected as the said Dennis Babu Ngei wishes that Humphrey continues with his role. It was averred that the administrators held a common view that their continuance in role as administrators was subject to the mothers in each house as well as the siblings and inviting the court to change administrators would be an interference in internal family affairs. With respect to the Kshs 400,000/- it was averred that the same was reimbursement to the administrators for the cost incurred in travel to check on the property of the deceased which reimbursement was sanctioned after consultations and the travel expenses well documented. With respect to family meetings, it was averred that the families could not agree on a suitable date for a joint meeting but however meetings have been called for when there was need and that the administrators were open to call for the meetings on need basis. With regard to the inclusion of Kasyoka Ngei George aka Nakron as a beneficiary of the estate, it was averred that the applicant herself insisted on the inclusion of the said George Ngei as beneficiary before the grant could be partially confirmed and further that the same was agreed by the families hence the applicant is now challenging the same in bad faith. In respect of the money received from Around the Globe Ministry, it was averred that the said ministry was an illegal squatter which was evicted from Machakos Municipality Block 2/521 and that no rents were received as alleged. It was further averred that the Machakos Municipality Block 2/521 was sold in March 2018. It was pointed out that the copy of cheque marked ENM 9a was a manipulation; that the bank statement ENM9b had a credit balance of Kshs 382,351.75 before the payout and Kshs 117,648.25 after the payout hence not indicative that Kshs 500,000/- was paid to Henry Masaku Ngei and *a priori*, there was no evidence of payment of the said Kshs 500,000/-. The deponent annexed a copy of statement of account for all the funds of the estate that was marked PMN 4. On the prayer for provision of Bank account statement by Eco Bank Fedha, it was averred that the applicant had access to the same as her daughter works in the said bank. It was averred that the applicant is aware of the other assets of the estate and that the bad blood was created by the applicant who sought a commission of Kshs 1m/- after the sale of Machakos Municipality Block 2/521. The court was urged to dismiss the instant application.

5. On record is a further affidavit by Claudine Mwelu Ngei, a former administrator of the estate of the deceased deponed on 9.10.2019. It was averred that there are other stakeholders who had issues with the way the administrators were running the estate of the deceased; that she is the bona fide administrator of the 2nd family and not Patrick Mutinda Ngei whom she viewed as an imposter. The deponent lamented that she was removed via a coup. It was averred that it was agreed that whoever brought a buyer was to be paid a commission and that the applicant who brought the buyer was never paid and yet the administrators paid themselves over and above what other stakeholders received. The deponent pointed out to court that Kshs 101,000/- was paid to a Halima without the blessings of other stakeholders. It was averred that the issue of Nakron was never deliberated; no record of accounts had ever been submitted by the administrators; the 400,000/- reimbursement was a fictitious claim.

6. When the matter came up for hearing the court directed the parties to file and exchange submissions.

7. Counsel for the applicant cited the import of Sections 79, 82 and 83 of the Law of Succession Act that provide for powers and duties of personal representatives and argued that the administrators had no power to pay themselves any reimbursements unless with the consent of other beneficiaries, which consent had not been obtained in this case either from court or from the beneficiaries. Counsel placed reliance on the case of **Esther Wanjiku Machatha & 4 Others (2015) eKLR** and urged the court to grant the orders sought in the application.

8. Learned Counsel for the 2nd to 4th administrators vide submissions filed on 22.1.2020 replied to the application and submitted on each of the orders sought. On the issue of accurate inventory, it was submitted that the order was being sought in vain because all the assets were listed in the application for grant of letters of administration. On the issue of accurate accounts of the estate, it was submitted that the applicant did not make the request for accounts to the administrators hence the order sought is premature. In respect of the order for preservation of the assets of the deceased, it was submitted that it was only the dividends from EABL and BAT as well as the proceeds from the sale of Machakos Municipality Block 2/521 which were distributed hence the order sought is speculative. On the issue of statement of account from Eco Bank for account 001321501825401 from its opening to date, it was submitted that the administrators had no objection to the same. On the issue of removal of and substitution of administrators, it was submitted that the proposed substitute administrators had rejected the proposal; that the administrators of the 1st and 2nd house had the majority and other family members and further that Claudine Mwelu Ngei had no support. On the aspect of intermeddling, counsel submitted that there was no proof of intermeddling and pointed out that the high court in Makueni ELC 1 of 2020, Ola Energy Kenya Ltd v Henry Masaku Ngei, Patrick Mutinda Ngei, Victor Ngei and Humphrey Mutuku had issued a conservatory order thus the property LR 12055(IR 23921/1-4) was in no danger of being disposed of.

9. Counsel for the 1st administrator vide submissions filed on 22.1.2020 submitted in respect of the orders sought. On the issue of inventory of assets and liabilities, in placing reliance on section 83(e) of the Law of Succession Act, it was submitted that there was no issue of misuse of the property. On the issue of full and accurate accounts, reliance was placed on section 83(h) of the Law of Succession Act and it was

submitted that annexure PMN-4 was evidence of compliance. On the issue of orders for preservation of the estate, reliance was placed on section 82 of the Law of succession Act and it was submitted that there was no material evidence presented in respect of wastage of LR 12055(IR 23921/1-4.066 ha) and further that the applicant did not meet the threshold for grant of the orders sought. On the issue of statement of account from Eco Bank for account 001321501825401, it was submitted that no justifiable reason was produced by the applicant as to why she sought the order. On the issue of removal of administrators, it was submitted that there is no situation that warrant's their removal. The court was urged to dismiss the application.

10. In this cause, the death certificate of the deceased indicated that the deceased died on 15.8.2004, it appears that the contest is whether or not the administrators should continue to be administrators of the estate of the deceased and what is the inventory and account of the estate of the deceased so that the orders sought may be granted and whether the parties have demonstrated whether or not the orders should be allowed or declined. After going through the evidence on record, I find the following issues:

- i. *Has the applicant shown cause why the current administrators should not remain as administrators?*
- ii. *Whether there has been intermeddling in the estate of the deceased.*
- iii. *Whether the court may grant the orders sought.*
- iv. *What orders may the court grant?*

11. The petition herein was filed on 26.3.2010 by Henry Masaku Ngei, the son of the deceased and according to the record, the deceased was a husband of 5 wives who survived him. According to the record, the deceased was survived by 11 sons and 10 daughters and the grant was issued to Henry Masaku Ngei, Patrick Mutinda Ngei, Victor Ngei and Humphrey Mutuku Ngei on 21.6.2012 as joint administrators. The grant had been partially confirmed on 8.10.2015. The various administrators are accused of intermeddling, and failing to provide account and inventory of the assets of the deceased as well as including a person as beneficiary who is not a son of the deceased and hence this application. The applicant, a daughter to the deceased and a beneficiary therein seeks the preservation of the estate of the deceased and issuance of injunction and conservatory orders as well as orders for account.

12. The applicant seeks that the administrators Henry Masaku Ngei, Patrick Mutinda Ngei, Victor Ngei and Humphrey Mutuku be removed and replaced with Claudine Mwelu Ngei, Flora Itumbi Ngei, Dennis Babu Ngei and Elizabeth Nduku Mwanthi. The operative section in this regard would be Section 66, 41 and 42 that provide as follows:

“66. Preference to be given to certain persons to administer where deceased died intestate.

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

- (a) *surviving spouse or spouses, with or without association of other beneficiaries;*
- (b) *other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;*
- (c) *the Public Trustee; and*
- (d) *creditors:*

41. Property devolving upon child to be held in trust

Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.

42. Previous benefits to be brought into account

Where—

- (a) an intestate has, during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
- (b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

13. From the evidence on record, the surviving children of the deceased are the listed beneficiaries. In accordance with Section 38 and 66 of the Law of Succession Act, they are the persons entitled to be administrators of the estate. The application has not convinced me as to why the current administrators ought to be removed; I expected to see affidavits from the beneficiaries indicating that they do not want the current

administrators. None were filed in support of the application. There are two types of consents by beneficiaries for and against the application. I can see a majority are against the applicant's moves as they seem to be in favour of maintaining the Administrators. In fact, some of those proposed as substitute administrators have rejected the applicant's arrangement. It would appear that the applicant's grouse against the administrators has to do with the fact that she was not paid a commission upon the sale of one of the assets contrary to an earlier gentleman's agreement that whoever secures a buyer would get a commission of Kshs 1million. The sale of one such property is not in dispute. Hence I am inclined to decline the request vide prayer 5 of the application.

14. Section 45 of the Law of Succession is to the effect that no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person. The grant had been partially confirmed in respect of LR Machakos Municipality Block 2/521 that the administrators admit to have sold; Shares in EABL and BAT that the administrators admit to have distributed; LR 12055(IR 23921/1-4.066 ha) and un-surveyed plot 1085 at Athi River. The applicant took issue with LR 12055(IR 23921/1-4.066 ha) and yet she consented to a grant being confirmed in respect of the same and in addition if the grant had been confirmed any actions on the said property would not amount to intermeddling. There is nothing tabled before the court to show any dealings with the deceased's free property therefore any finding in respect of the intermeddling is without basis. It is for this reason that prayer 3 fails. In any case the applicant's concerns over the above property namely LR No. 12055(IR No. 23921/1-4) situate at Mtitio Andei have already been taken care of as there are conservatory orders vide Makueni ELC case No. 1 of 2020 (**Ola Energy Kenya Limited vs. Henry Masaku Ngei, Patrick Mutinda Ngei, Victor Ngei and Humphrey Mutuku**). I note that there is an additional beneficiary included in the list of the beneficiaries to the estate of the deceased in the absence of an application to include him. The applicant has taken issue with the same in her affidavit in support of the application. However, she had consented to the confirmation of grant and is going back on her earlier position, which is indicative of lack of good faith. Be that as it may, I would counsel the applicant to move the court with the requisite application to address the same as this court cannot grant orders in respect of a prayer not made.

15. In respect of prayers 1, 2 and 4, section 51(2)(h) of the Law of Succession Act provides that every application for a grant shall include inter alia information as to:

“a full inventory of all the assets and liabilities of the deceased; Were there any assets of the deceased that were left out? The applicant has not indicated so. It is also noted that the applicant duly signed the consent to the petition for letters of grant and was thus deemed to have been aware of the assets. This would mean that prayer 1 will serve no useful purpose and if the applicant felt that there are any assets that were left out then she can file an application to include the same. In this regard I decline to grant prayer 1 of the application.

16. In respect of prayer 2 and 4, beneficiaries have the statutory right to obtain an account from the executors of the estate, and at any time they may ask for estate books and documents (See **In re Estate of Abdulkarim Chatur Popat (Deceased) [2019] eKLR**). This is because an executor or administrator is a trustee and is accountable to the beneficiaries for his handling of the estate administration. Further, the executor or personal representative is accountable to the court on how he deals with the estate of the deceased. (See **Paul Rono Pymto & Another v Giles Tarpin Lyonnet [2014] eKLR**. Failure to provide the same is a ground for revocation of grant issued to the administrator.

17. Justice Musyoka in **In Re Estate of David Kyuli Kaindi (Deceased) (2016) eKLR** in addressing the responsibility of an executor or representative to account stated that *“the personal representative must give account of the assets and liabilities that he has ascertained, and the assets that he has collected, gotten in, recovered or gathered and the titles he has perfected, and the steps taken to preserve the estate. He should also state the debts and liabilities that he has paid or settled before moving to court for confirmation of the grant, and if he has not yet settled the debts, state how he proposes to have them settled. The account at this stage should also state the assets that generate income, stating how much has been collected and how it has been utilized.”*

18. According to the record, the administrators have not provided a full and accurate account of the assets and liabilities of the estate, income received from the property of the estate, and how they had applied the same. An order for account is the most potent remedy available to a beneficiary to the estate of the deceased and the annexure to the affidavit of one of the administrators do not meet the test of a full and accurate account. I find that prayer 2 and 4 have merit. Further section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules enjoin the court to exercise inherent jurisdiction to make orders as are necessary to meet the ends of justice.

19. In the result the applicant's application dated 29.4.2019 succeeds to the extent as follows:

i. Prayers 1, 3 and 5 are declined.

ii. Prayer 2 and 4 are allowed and that the same be complied with within sixty (60) days from the date of this ruling.

iii. Each party shall bear their own costs.

It is so ordered.

Dated and delivered at Machakos this 19th day of May, 2020.

D. K. Kemei

Judge