



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**CORAM: A.K NDUNG'U J**

**SUCCESSION CAUSE NO 315 OF 2015**

**IN THE MATTER OF THE ESTATE OF MORUMBWA MOGONGO NYARINGO - DECEASED**

**AND**

**RICHARD MASESE MORUMBWA.....APPLICANT**

**VERSUS**

**ESTHER KERUBO MORUMBWA.....RESPONDENT**

**RULING**

1. The Motion for determination is dated 19<sup>th</sup> March 2019 brought under **Section 84 and 40** of the **Law of Succession Act** (*the LSA*). It is brought at the instance of the applicant, Richard Masese Morumbwa, seeking that the court directs how the deceased's property should be distributed and that the court adopts the mode of distribution as proposed by the applicant.

2. The motion is based on the grounds on its face and the facts set out in the supporting affidavit. It is averred that the deceased subdivided Parcel No MATUTU SETTLEMENT SCHEME/31 into Parcel No MATUTU/SETTLEMENT SCHEME/372 (*'Parcel No. 372'*), MATUTU/SETTLEMENT SCHEME/373 (*'Parcel No. 373'*), MATUTU/SETTLEMENT SCHEME/374 (*'Parcel No. 374'*) and MATUTU/SETTLEMENT SCHEME/375. He explained that the deceased sold Parcel No. Matutu Settlement Scheme/375 to Victor Ogeto Swanya. Eucabeth Mora Morumbwa, the deceased's first wife, was bequeathed parcel 375 and land title no. Bassi/Bondonya/469 while Parcel No. 374 was transferred to his second wife, ESTHER KERUBO MORUMBWA (the respondent herein). The applicant states that the only properties to be distributed to the beneficiaries are parcel no. 372 and Basi/Bondonya/469 and proposes that the two parcels should devolve to each house equally. The appellant submitted that parcel 372 was the deceased's *'emonga'* and not the respondent's matrimonial home as alleged.

3. The respondent opposed the application and in her replying affidavit stating that parcel 374 was transferred in her name during the lifetime of the deceased and that the deceased's properties available for distribution are Parcel No 373, 372 and Bassi/Bondonya/469. She proposed that Parcel No. 373 and Bassi/Bodonya/469 to devolve to the first house while Parcel No. 372 to the 2<sup>nd</sup> house as those were the wishes of the deceased according to his will. She submitted that parcel 372 was the respondent's matrimonial home where she lived with the deceased and if the same is distributed as proposed by the applicant it will render her homeless.

4. I have considered the Notice of Motion dated 19.3.19, the affidavits on record as well as the learned submissions by counsel.

5. The Notice of Motion seeks the distribution of the estate of Morumbwa Mogongo Nyaringo. It further seeks the creation of trusts in respect of each of the houses herein under **S 84** of the **Law of Succession Act**.

6. At the outset, it is manifestly clear that the Notice of Motion has been brought under a misapprehension of the Law. The distribution of the estate of a deceased person is only available under **S 71 (1)** of the **Law of Succession Act**. S 71 provides;

*"S 71 1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.*

*(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—*

*(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or*

(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or

(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or

(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

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.

(2A) Where a continuing trust arises and there is only one surviving administrator, if the court confirms the grant, it shall, subject to section 66, appoint as administrators jointly with the surviving administrator not less than one or more than three persons as proposed by the surviving administrator which failing as chosen by the court of its own motion.

(3) The court may, on the application of the holder of a grant of representation, direct that such grant be confirmed before the expiration of six months from the date of the grant if it is satisfied—

(a) that there is no dependant, as defined by section 29, of the deceased or that the only dependants are of full age and consent to the application;

(b) that it would be expedient in all circumstances of the case so to direct.

(4) Notwithstanding the provisions of this section and sections 72 and 73, where an applicant files, at the same time as the petition, summons for the immediate issue of a confirmed grant of representation the court may, if it is satisfied that—

(a) there is no dependant, as defined by section 29, of the deceased other than the petitioner;

(b) no estate duty is payable in respect of the estate; and

(c) it is just and equitable in all circumstances of the case immediately issue a confirmed grant of representation.

7. Section 84 of the Law of Succession Act can only be activated through a summons for confirmation of grant. The section provides;

**“S 84** Where the administration of the estate of a deceased person involves any continuing trusts, whether by way of life interest or for minor beneficiaries or otherwise, the personal representatives shall, unless other trustees have been appointed by a will for the purpose of the trust, be the trustees thereof:

**Provided that, where valid polygamous marriages of the deceased person have resulted in the creation of more than one house, the court may at the time of confirmation of the grant, appoint separate trustees of the property passing to each or any of those houses as provided by section 40.**

8. Thus, it is during the confirmation of grant that the court will deal with the creation of a trust under **S 84** of the Act.

9. On 20.6.18 this court (Majanja J) issued the following orders;

1. The Grant of letters of Administration issued herein confirmed on the 9<sup>th</sup> of February 2017 is hereby revoked. The original grant to be returned to court within 14 days.

2. A fresh grant shall issue to ESTHER KERUBO MORUMBWA and RICHARD MASESE MORUMBWA.

3. For avoidance of doubt all the deceased's properties transferred to other parties are cancelled and shall revert to the deceased.

4. The administrators to apply for confirmation within 30 days.

10. Of note from these orders is that a fresh grant of letters of administration was issued to Esther Kerubo Morumbwa and Richard Masese Morumbwa. The two administrators were to apply for confirmation of grant within 30 days.

11. The record shows that no summons for confirmation of grant was taken out but the current application was filed. Curiously, it is stated that the said application has been filed because the parties have failed to agree on distribution.

12. Section 71 of the Law of Succession Act and the provisions of rules 40(1) under the Act provides the modalities of a confirmation of a grant. The parties do not have to necessarily agree on distribution. An objecting party has the recourse to file a protest. All beneficiaries are

to be listed and they have to consent in writing their agreement on the proposed distribution.

**13.** This is what the administrators ought to do in this matter. Either or both of them can take out the summons for confirmation and if there be disagreement as already seen herein, then a protest be lodged by not only the respondent herein but by any other beneficiary who does not consent. The application before court is not adequate to address the issue of distribution.

**14.** One more thing. The parties allude to the existence of a written will. If there be existence of a will, then the legal scenario changes. The grant herein is of letters of administration intestate. Anyone claiming that there is existence of a will must move the court to revoke the grant of letters of administration intestate and to proceed and prove the will within the parameters set out in Law and possibly obtain a grant of probate with will annexed.

**15.** With the result that the application before court is not legally tenable. The same is dismissed and I make the following orders;

- 1. A summons for confirmation of grant be filed by either one administrator or both as the case may be within 30 days hereof.**
- 2. Any party desirous of relying on any will to move the court appropriately for revocation of grant.**
- 3. Matter be mentioned in 30 days for further directions.**
- 4. Each party to bear its own costs.**

**Dated and Delivered at KISII this 14<sup>TH</sup> day of OCTOBER 2020.**

**A. K NDUNG'U**

**JUDGE**