



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

PROBATE & ADMINISTRATION NO. 228 OF 2015

IN THE MATTER OF THE ESTATE OF STANLEY OMAMBIA OGERO (DECEASED)

1. DUKE KEBASO OMAMBIA.....1ST APPLICANT

2. EVANS MONGARE OMAMBIA.....2ND APPLICANT

3. VITALIS NYACHIRO OMBAMBIA.....3RD APPLICANT

=VRS=

WILSON KAISONGO OGERO.....RESPONDENT

RULING

What is before me for ruling is the Notice of Motion dated 28th August 2017 which seeks orders: -

“1. That the Honourable Court be pleased to find that Wilson Kaisongo Ogero is Contempt of Court for willfully failing to produce to the Court an account or inventory of the assets of the deceased: Stanley Omambia Ogero within six months from the date of confirmation of Grant.

2. That this Honourable Court be pleased to commit the Administrator herein: Wilson Kaisongo Ogero to prison for a term not exceeding one year for willfully failing to produce to the Court an account or inventory of the assets of the deceased: Stanley Omambia Ogero within six months from the date of confirmation of Grant.

3. That there be liberty to apply.

4. That the costs of this application be borne by the Respondent.”

The application is premised on five grounds on the face thereof and which state:-

“(a) That the Grant of the Letters of Administration Intestate was confirmed on 17th July, 2009.

(b) That the Administrator has willfully failed to complete the administration of the estate.

(c) That the Administrator has willfully failed 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.

(d) That the Administrator has willfully failed to complete the administration of estate of the deceased and to produce to Court full and accurate account of the completed administration.

(e) That the interests of justice would be best served if the Contemnor is punished in order to uphold the integrity and honour of the Court.”

The same is supported by the affidavit of Duke Kebaso Omambia, Evans Mongare Omambia and Vitalis Nyachiro Omambia sworn on 28th August 2017 in which they depone that they are beneficiaries of the estate to which Wilson Kaisongo Ogero (the respondent) is the administrator; that the grant of letters of administration issued to the respondent was confirmed on 17th July 2009 but to date the respondent has willfully and unlawfully neglected and/or refused to complete the administration of the estate and has also totally refused to account for a sum of Kshs. 3,000,000/= which was paid into the estate vide Kisumu HCCC No. 31 of 1995. They further depose that the delay in

completing the administration is not only inordinate and inexcusable but that it has occasioned injustice to them and is an abuse of the process of court.

The application is opposed. In response to the application Wilson Kaisongo Ogero, the Administrator/Respondent filed a Notice of Preliminary Objection dated 9th October 2017 and stated: -

“1. THAT the Notice of Motion dated 28th August, 2017 served upon the respondent’s advocates on 29th August, 2017 instead of the same being served upon him personally. (See Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others, [2014] eKLR).

2. THAT the Notice of Motion dated 28th August, 2017 as filed on top of another involving the same parties and seeking the same prayers while the earlier application is undetermined is not proper and honest use of court process.

In the circumstances of the foregoing the present application is an abuse of the court process as its net effect is not only oppressive but also vexatious to the respondent. (See Beullen & Leak and Jacobs, Precedents of Pleadings).”

He also filed a replying affidavit also sworn on 7th October 2017.

The application is supported by Mary Nyaboke and Linnet Nyanchama who like the applicant describe themselves as beneficiaries of the estate. They do so through a summons dated 5th August 2020 in which they seek orders: -

“(a) THAT the grant of letters of Administration issued to WILSON KAISONGO OGERO on 6th July 1994 and confirmed on the 17th day of July, 2009 by the high court sitting in Kisumu in Succession Cause No. 75 of 1995 be revoked.

(b) THAT Contempt proceedings against WILSON KAISONGO OGERO as the Administrator to the estate of the deceased, in Miscellaneous Application No. HCFMISC/223/2015 filed in this court be stayed until the final determination of this application.

(c) THAT an injunction order be issued against the said Wilson Kaisongo Ogero against disposing off any of the remaining assets of the Estate and the status quo in respect of the preservation of the assets be maintained until final determination of this Application.

(d) Any other order that the honourable court may deem fit.

(e) Costs of this Application.”

The grounds for that application are that: -

“1. The proceedings to obtain the grant were defective in substance.

2. The grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material.

3. The grant was obtained by means of an untrue allegation of a fact essential in point of law.

4. The person to whom the grant was made has failed, after due notice and without reasonable cause either to proceed diligently with the administration of the estate by applying for rectification of the grant.

5. The grant has become useless and inoperative by such concealment.”

The application was canvassed by way of written submissions. Those of the applicants were filed way back on 16th November 2017 through the firm of Kerandi Manduku & Ondabu Advocates while those of the Administrator/Respondent which were filed through N. O. Migiyo Advocates were received on 17th November 2017 while those of the beneficiaries Linnet Nyanchama Omambia & Mary Nyaboke were filed on 7th October 2020 through Goretta & Co. Advocates.

I have considered the application, the grounds thereof, the replying affidavit and preliminary objection, the summons dated 22nd August 2020 by the other beneficiaries and the rival submissions. It is my finding that the Notice of Motion dated 28th August 2017 is misconceived. The deceased having died intestate his estate is governed by the **Law of Succession Act (See Sections 2 & 4 of the Law of Succession Act)**. **The Law of Succession Act** is a complete code with its own rules and in particular the Probate and Administration Rules.

The grant of letters of administration into the estate of the deceased herein were issued to Wilson Kaisongo Ogero the Administrator/Respondent sometimes in the year 2009 and were subsequently confirmed on 17th July 2009. The court record indicates that confirmation and the mode of distribution was by way of a consent recorded by the advocates for the parties. The duties of personal representatives such as the Administrator/Respondent herein are expressly spelt out in **Section 83 of the Law of Succession Act**. The duties

relevant to this cause are: -

“83. Personal representatives shall have the following duties—

.....

- (e) 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;**
- (f) subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;**
- (g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, 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;**
- (h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, 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;**
- (i) 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.”**

It is clear therefore that an administrator does not act on a whim. The Administrator’s role is guided by the Law of Succession Act and the Probate & Administration Rules right from the time he/she petitions for the grant up to the time he/she concludes administration of the estate. The manner in which the estate is administered and distributed is also guided by the Act and is not done arbitrarily. The **Law of Succession Act** does also have its own provisions on what should be done in the event the administrator falls short. Those provisions are to be found in **Sections 94 and 95 of the Act** which state: -

“94. When a personal representative neglects to get in any asset forming part of the estate in respect of which representation has been granted to him, or misapplies any such asset, or subjects it to loss or damage, he shall, whether or not also guilty of an offence on that account, be liable to make good any loss or damage so occasioned.

95 (1) Any personal representative who, as regards the estate in respect of which representation has been granted to him—

- (a) wilfully or recklessly neglects to get in any asset forming part of the estate, misapplies any such asset, or subjects any such asset to loss or damage; or**
- (b) wilfully fails to produce to the court any such inventory or account as is required by the provisions of paragraphs (e) and (g) of section 83; or**
- (c) wilfully or recklessly produces any such inventory or account which is false in any material particular; or**
- (d) knowing or having reason to believe that the estate will prove to be insolvent, continues to administer it without petitioning for administration thereof in bankruptcy,**

shall be guilty of an offence, and shall be liable to a fine not exceeding ten

thousand shillings, or to imprisonment for a term not exceeding one year, or to both such fine and imprisonment.

(2) Any personal representative who, as regards the estate in respect of which representation has been granted to him if at any time there is a continuing trust and he is the sole surviving administrator, wilfully fails to apply to the court within three months in accordance with section 75A for the appointment of further administrators shall be guilty of an offence and shall be liable to a fine not exceeding five thousand shillings.”

It is for the foregoing reasons that I find that the **Contempt of Court Act** and the other provisions cited by Counsel for the applicants are not relevant to this cause and cannot be invoked to punish the administrator/respondent. In the premises the Notice of Motion dated 28th August 2017 is dismissed but with an order that parties shall bear their own costs.

Be that as it may, through Mr. Migiro, Learned Counsel for the Administrator/ Respondent I wish to draw the Administrator/Respondent’s attention to **Section 83 (f), (g) (h) and (i), Section 94 and Section 95 of the Law of Succession Act** and order: -

1. That the Administrator/Respondent shall within ninety (90) days of today’s date complete administration of the estate and produce to this court a full and accurate account of the completed administration.

2. Mention on 4th February 2021 to confirm compliance and/or give further directions. It is so ordered.

Judgment signed, dated and delivered electronically via Microsoft Teams on this 5th day of November 2020.

E. N. MAINA

JUDGE