



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 856 OF 2013

IN THE MATTER OF THE ESTATE OF THIAKA BENJAMIN Alias THIAKA BENJAMEN...DECEASED

JOHN KARIUKI THYAKKAH.....PETITIONER

V E R S U S

JOHN NJIRU THIAKA.....PROTESTOR

RULING

1. The summons dated 16/7/2019 were taken out by the protestor as applicant seeking directions on the execution of the Judgment delivered by this court on the 14/6/2019. No appeal has been filed.

2. The estate involves numerous land parcels which, in execution of the decree will either be sold out and proceeds shared, or sub-divisions be carried out and registered to the beneficiaries.

The administrator and the beneficiaries have failed to agreed on the manner of execution of the decree, necessitating the protestor to approach the court for directions.

3. By the **Application dated 16/7/2019** the Protestor John Njiru Thiaka seeks for Orders:

(1) That the court be pleased to give directions that the Advocates for both parties do agree on the manner and mode of selling properties belonging to the deceased which were directed to be sold as contained in paragraphs 13,19 and 20 (e) of the Judgment, with first priority being given to a family member who may wish to purchase.

(2) That the Petitioner John Kariuki Thiaka do render accounts for the rent collected by him from the period between 2011 todate for purposes of determining his share from the proceeds of sale of the properties mentioned in prayer No. 1 above.

(3) That the petitioner be restrained from cutting down trees or committing any acts of waste on the properties left behind by the deceased until full transmission to the beneficiaries is done, and in the alternative the petitioner be directed to pay the equivalent value of the trees already cut down, estimated at Kshs 150,000/-.

(4) That once land parcel No. Kabare/Nyangati/4773 is surveyed, the beneficiaries do ballot for purposes of determining which beneficiary gets which parcel of land on the ground.

The protestor swore the Supporting affidavit on the 16/7/2019.

4. The Administrator of the estate, and Respondent in the application filed a Replying Affidavit on the 6/9/2019, stating the reasons for supporting and objecting some of the orders sought by the Protestor/Applicant. Both parties have also filed written submissions to further explain themselves in regard to the application. I have considered them.

5. Protestors Case

The protestor deposes that it is not possible for the family members to agree on how the sale of the properties would be done, and thus proposes that the Advocates for the parties do guide the family.

6. As to the property No. Kabare/Nyangati/4773 that was directed to be shared by the petitioners and Protestors sisters, it is proposed that balloting would be most appropriate after sub-division and new numbers issued, to avoid pre determination of which portions each should get on the ground.

7. On rent collection, the petitioner by his Replying Affidavit avers that he is ready to give a full account of money collected from property No. Kabare/Nyangati/609/15, from 2012, and not 2011 as deponed to by the protestor.

8. The petitioner while not objecting generally to the protestors purposes, he too seeks that the protestor be ready to account for rent he has been collecting after leasing land parcel Kabare/Nyangati/4773, to third parties. He too opposes involvement of Advocates in the sale of the properties earmarked for sale, rationalizing that it would involve added costs.

9. Mr. Kagio Maina Advocate for the Protestor/Applicant submits that for transparency purposes, it is important to involve the parties Advocates.

10. The Petitioner's submissions by his Advocate P.M. Muchira while objecting to the application partially is that the directions sought by the protestor are meant to interfere with the duties of the Administrator and executor of the Will, which has not been challenged citing Section 84 Law of Succession Act (LSA) that provides upon confirmation of the grant, in polygamous marriages, the court may appoint separate trustees of the property passing to each or any of those houses.

11. It is a further submission that Section 82,83 and 84 Law of Succession Act do not authorize the court to appoint other persons as co-administrators or supervisors of the duly appointed administrator.

12. To that extent, the petitioner proposes that the court do decline grant of prayer No. 1 of the summons. In the same breath, it is submitted that, while accepting to deliver account of rent collected since 2012, that should only be done upon completion of the administration of the estate.

13. Issues for determination:

(1) Whether the court mandated distribution of the deceased estate, by its Judgment dated 14/6/2019 ought to be executed by the Executor/ Administrator of the estate, or in conjunction with the protestor and/or the beneficiaries.

(2) Whether the parties Advocates should be involved in the sale of properties for distribution to the beneficiaries.

(3) Whether the orders sought by the protestor be granted.

14. The parties hereto largely agree to the proposals stated in the summons under review. The court in its Judgment confirmed the grant issued on the 20/5/2015. The petitioner was the only appointed executor of the Will. The court did not interfere with the testators choice of an executor but re-distributed the estate which the parties are content with.

Section 79 of the Law of Succession Act vests the property of the deceased in the personal representative.

It states:-

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of the grant, and subject to any limitation imposed in the grant all the property of the deceased shall vest in him as personal representative.

The effect of Section 79 is that the personal representative steps into the shoes of the deceased, but as trustee on behalf of the beneficiaries.

It is him who has the power to enter into contracts on behalf of the estate, like sale agreements, and to enforce any contracts existing between the estate and third parties.

15. Section 82 and 83 Law of Succession Act imposes certain duties on the personal representative. For instance Section 82(b), to sell or otherwise turn to account of all assets vested in him as he may deem necessary and best. – In Re the Estate of Thiong'o Ngingayyu Muthiora (deceased) (2013) eKLR.

16. Section 45(1) Law of Succession is clear that a person holding a grant of representation who takes possession of or disposes free property of the deceased person commits no offence.

However, it is to be understood that personal representations are, for all practical purposes trustees. As such they are obligated to account to the court and to those he holds the properties beneficiaries, creditors and dependants.

The property vested in a personal representative does not belong to him, but stands in a fiduciary position with respect to the estate. In the instant matter, the Petitioner remains the executor and administrator. It is him who has the duty to execute the Judgment.

17. However, for practical purposes, the Petitioner/Administrator requires assistance and cooperation by and from the beneficiaries, among them the protestor, to effectively administer the estate. The parties Advocates are not administrators or executors of the deceased's estate. They however possess knowledge on matters of sale of properties, among others and are better placed to advise the Administrator and beneficiaries on the modalities of sale and purchase of properties.

18. The court ordered and directed sale of certain properties and also subdivision of others for purposes of distribution to the beneficiaries. A part from the beneficiaries and the Administrator other, players will no doubt be involved being, surveyors and purchasers.

Unless the parties agree to engage the services of the Advocates to assist them on the manner stated above, the court cannot make such an order that they get involved, unless it becomes impossible, and the court is moved appropriately.

19. It has not been submitted that the Administrator/Executor is unable to carry out his duties effectively, nor that he is not competent to perform his duties. If that were so, the beneficiaries would be at liberty to approach the court for substitution or appointment of other executors, with good reasons – Re-Estate of David Kyuli Kaindi –(deceased)(2016)eKLLR.

To that extent, I am not persuaded to grant prayer No. 1 of the application save the last part that priority be given to a family member who may wish to purchase.

20. On prayer No.2 both parties agree on the necessity to render accounts of rent collected by the petitioner from property No. Kabare/Nyangati/609/15, from the year 2012. The only contention is when that ought to be done.

In my view, this exercise should commence immediately so as for the benefit (Rent) to be factored during the distribution, not after, as doing so later will only delay the completion of the distribution. This is so because an Administrator is required to render an account on the distribution of the estate within six months of confirmation of grant as stated under Section 83(9) Law of Succession Act. If not complied with, the grant may be revoked.

I therefore hold that the petitioner ought to render an account of the rent collected as soon as practically possible, not after the distribution of the estate. Accordingly, Prayer No. 2 of the summons is allowed save that the period is amended to read between 2012 to date.

21. As to prayer No. 4, all parties are in agreement. Granting the prayer for balloting, in view of the circumstances will place all the beneficiaries at par, and the process will be transparent. The prayer is granted.

22. By Prayer No. 3, it has been alleged that the petitioner has been committing acts of waste on the estate properties by cutting trees. In response, the Petitioner accuses the protestor of leasing of a portion measuring 1.25 acres of property No. Kabare/Nyangati/4773 to a third party. No supporting evidence has been adduced by both parties to demonstrate and prove the assertion. By the supplementary affidavit sworn by the protestor on the 11th November 2019, it is averred that the said portion is being cultivated by the Protestor's sister the same having been given to her by the deceased.

23. To bring this to halt, none of the beneficiaries, be it the Administrator or the protestor should commit any acts of waste or damage on the estates properties. All should wait for the distribution to be effected after which each party may deal as they would wish with the shares granted to them. Should wastage by any of the parties persist to the detriment of other beneficiaries, the affected party will be at liberty to approach the court for appropriate orders.

24. Consequently, the application dated 16/7/2019 is determined in the manner stated above.

Each party shall bear own costs on the application.

Dated. Signed and Delivered at Kerugoya this 10th day of December 2020.

J. N MULWA

JUDGE