REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 450 OF 2012

IN THE MATTER OF THE ESTATE OF EDN (DECEASED)

RULING

1.There are two applications for determination, dated 23rd January 2018 and 6th April 2018, respectively.

2. The first in time is the summons dated 23rd January 2018. It is brought at the instance of NSON. He seeks several orders: RCAN and FEON be compelled to deposit in court all titles and valuable securities in respect of the estate, he be allowed to access and occupy the estate assets situated at LR No. 12882/ [xx] or Kisumu Municipality/Block 11/ [xxx], RCAN and FEON be compelled to render a full account of the deceased's estate for the period running between 4th February 2012 to date, and confirmation of the grant made on 19th May 2017.

3. In his affidavit in support of the application, the applicant states that his co-administrators have refused to cooperate with him, a fact which he says has made it difficult for him to distribute the estate. He says that all valuable securities and the title documents of the assets of the estate are in the custody of his co-administrators, yet they have refused to release them to him so that he could complete administration. He has identified the persons who have survived the deceased, as well as all the assets that he died possessed of. He states that in view of the non-cooperation and the difficulty in administering the estate the court ought to distribute the assets amongst the beneficiaries. He accuses his co-administrators of wasting the estate and generally handling it in a fraudulent manner. He mentions FEON as having been charged with a criminal offence of obtaining money by falsely pretending that he was in a position to sell one of the estate assets, Kisumu Municipality/Block 11/[xxx]. He states that the other administrators were the ones solely enjoying residence in estate assets, and therefore he prays that he too be allocated estate property to occupy.

4. FEON swore an affidavit on 6th April 2018 in reply to the application. He denies disposing of estate assets. He also avers that the order sought for deposit of estate assets would render the administration of the estate extremely difficult. He further avers that allowing the applicant to access and occupy one of the estate assets would amount to distribution before grant was confirmed. He says that LR No. 12882/[xx] was occupied by his mother, the widow of the deceased. He states that Kisumu Municipality/Block 11/[xxx] was subject to a land dispute since 2009. He states that the prayer for confirmation was premature and the application was not supported by consents as required by the law. He prays that the application be dismissed.

5. Contemporaneously, FEON lodged at the registry on, even date, the application dated 6th April 2018, seeking review of the judgement that I delivered herein on 19th May 2017, and upon the review remove NSON as one of the administrators of the estate. The review application is essentially founded on the assertion that the applicant was not notified by his advocates of the dates when the application leading up to the judgement was coming up for hearing despite the said advocates having been served with notice. He states that he would have attended court without fail had he been notified of it, and his attendance and participation in the proceedings would have shed light on the matter. He states that the judgment was unfair to the extent that orders were made without hearing their side of the matter. He further avers that mistake of counsel ought not to be visited on the innocent party. He asserts that he was ready to undergo a deoxynucleic acid(DNA)test to establish paternity, saying that he failed to attend the laboratory previously for conduct of the test on account of lack of communication from his advocates, among other reasons.

6. Upon being served with the application, NSON swore an affidavit on 2nd May 2018 in response. He asserts that from an annexture to the affidavit under response, a letter dated 15th February 2018 addressed to the Honourable the Chief Justice, FEON had conceded that he had been notified of the hearing dates in question but had informed his advocates that the date was not suitable as his mother was unwell. It is also pointed out from the said letter that FEON was alleging that he had called his lawyer on phone on the day appointed for hearing to find out what had transpired and was informed that the matter had proceeded in their absence but the lawyer had attended and cross-examined NSON. On the question of NSON being recognized as a beneficiary in the judgment, it is pointed out that, that issue had been resolved in previous proceedings and the judgement merely confirmed the position. It is also pointed out that FEON contradicted himself in his letter to the Chief Justice in that in one breath he was saying that he and other family members had recognized NSON as a child of the deceased, while at the same time he denounces him as a stranger to the estate. On the DNA test it is averred that the matter had been addressed comprehensively in previous proceedings.

7. There are also two rival affidavits by the parties on the accounts filed by the initial administrators as ordered earlier by the court.

8. It was directed that the two applications be disposed of simultaneously by way of written submissions. There has been compliance. Both sides have filed write submissions complete with supporting authorities. I have read through the submissions and the authorities and noted the arguments advanced.

9. Although directions were given for the simultaneous disposal of the two applications, it would be prudent to dispose of the review application first, for its disposal could have an effect on the manner of the disposal of the confirmation application.

10. Review of court orders is provided for in provisions to be found in the Civil Procedure Rules. Rule 63 of the Probate and Administration Rules imported the review remedy into the probate practice. Review may be obtained where there is an error apparent on the face of the record or on account of discovery of new and important of evidence that was not available as at the date of the hearing of the matter, or on account of any other sufficient reason. It has not been demonstrated that there was an error apparent on the face of the record or that the applicant had come by information or had discovered evidence that was important enough to warrant upset of the impugned judgment.

11. Is there any other sufficient reason? The applicant argues that his advocate let him down when he failed to notify him of the hearing dates after he had been served by the advocates for the other side. That explains, according to him, why he was not in court. His advocate was also not in court. He says his advocate lied to him, and pleads that he ought not to be punished for the sins of his advocate. Curiously, the applicant has attached a document, in the form of a letter of complaint addressed to the Chief Justice, which completely contradicts what he has averred in his affidavit in support of the application. He tells the Chief Justice that he had notified his advocates that the dates picked for hearing were not convenient as his mother was unwell and would not be in a position to attend court on that day. He further informs the Chief Justice that on the morning that the matter was coming up for hearing he called up his advocate for update on what had transpired in court, and he was informed that the matter had proceeded. It cannot therefore be true that the applicant had not been notified by his advocate of the hearing date. His whole review application is pegged on the alleged failure to be notified about the scheduled hearings. That being the case it cannot be said that there had been other sufficient reason for review of the judgement.

12. He raised issue with the court recognizing NSON and appointing him an administrator, arguing that he was not a son of the deceased. The issue as to whether NSON was a son of the deceased was really water under the bridge. It had been dealt with previously in earlier rulings delivered by this court. Even then it had been dealt with prior in other suits, including HCCC No. 61 of 2012, where NSON was recognized as a son of the deceased. In the letter to the Chief Justice, FEON accuses his advocate of acting contrary to his instructions by pursuing a line that NSON was not a son of the deceased when the family, including himself, had acknowledged him as such. The recognition of NSON as a beneficiary and his appointment as administrator cannot surely be matters that can be subjected to review in the circumstances. On the DNA, test the record is very clear. It was ordered by Kimaru J on 29th January 2014, but FEON failed to cooperate to have it conducted and thereby frustrated the process.

13. On the whole, I do not find any material upon which I can review the orders made in the judgement. It should be open to the applicant to challenge the judgement by way of appeal, if he is so minded.

14. On the confirmation application, I note that the parties hereto have not been working in tandem and therefore it should be expected that the applicant in that application could not have obtained consents to support his application. The deceased herein died in February 2012. The cause was initiated in the same year. The estate remains undistributed to date. The applicant cannot be faulted for moving the court to have the estate distributed. Confirmation of the grant is the surest way to resolve all issues that the parties wish to place before the court. Section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, has set out the parameters of what the court may consider. It considers and identifies the correct survivors of the deceased, determines who should be allowed to administer the estate, identifies the assets and liabilities, and determines how the same ought to be distributed. The respondent sought to file their protests instead of claiming that the application was premature. Among the issues that they can raise to be determined at the hearing of the confirmation application would be the status of NSON as a beneficiary and administrator.

15. On deposit of title documents and securities, I would say that the same ought to be made available to all the administrators. Section 79 of the Law of Succession Act vests all the assets of the estate in the administrators. That would then mean all the administrators are entitled to have access to documents of title relating to such assets. They all ought to have access to at least photocopies of the relevant documents. The prayer by the applicant for title and security documents being made available to him is therefore not misplaced. The prayer relating to accounts has been dealt with for the court has since directed that accounts be filed. Accounts have been filed. I note that the applicant, NSON, is unhappy with them. He should have a chance to cross-examine his co-administrators thereon at the hearing of the confirmation application. On NSON being allowed to take occupation of one of the estates assets, I would agree with the respondents, that would amount to distribution of the estate ahead of confirmation. He should be patient and wait for confirmation, after which he can take possession of whatever property that will be allocated to him.

16. In the end the orders that I am moved to make with regard to the two applications are –

(a) That the application dated 6th April 2018 is hereby dismissed in its entirety;

(b) That RCAN and FEON are hereby directed to avail copies of all title deeds and securities documents relating to assets of the estate to NSON within thirty (30) days of date of this order;

(c) That RCAN and FEON to file affidavits of protest to the confirmation application dated 23rd January 2018 within thirty (30) days of date of this ruling;

(d) That upon compliance with (c) above, the matter shall be listed for directions on the disposal of the application by way of *viva voce* evidence; and

(e) That costs shall be in the cause.

PREPARED, DATED AND SIGNGED AT KAKAMEGA THIS 31st DAY OF January, 2019

W. MUSYOKA

JUDGE

DATED, SIGNED and DELIVERED at NAIROBI this 15th DAY OF February, 2019

ASENATH ONGERI

JUDGE