REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO 1180 OF 2012

IN THE MATTER OF THE ESTATE OF ROSALINA HELLEN AJANDO MULINDI (DECEASED)

RULING

1. There are two applications for simultaneous determination, dated 10th July 2018 and 17th July 2018.

2. The deceased herein, Rosalina Hellen Ajando Mulindi, died on 5th June 2006. A letter from the Chief of Wodanga Location, dated 25th October 2012, indicates that she was the wife of the late David Mulindi, and a co-wife of the late Zibborah Demesi. She had eight children with the deceased, five of which are alive and three of them deceased. The surviving children are listed as Henry Amadalo, Sobbie Apungu Zebedee, Ruth Luziri Mulindi King, Margaret Ingado and Betty Malesi. Those who are dead are said to be Seth Vuyanzi, Mary Uside and Luke Indiazi.

3. Representation to the estate was sought in this cause by Ruth Luziri Mulindi King, in her capacity as daughter of the deceased, through a petition lodged herein on 12th November 2012. She listed the survivors of the deceased as Henry Amadalo, Sobbie Apungu Zebedee, Ruth Luziri Mulindi King, Margaret Ingado and Betty Malesi Shaiga. She expressed the deceased to have had died possessed of four assets, being Kakamega/Kedoli/1178 and 1179, and Kakamega/Lusengeli/179 and 180. Letters of administration intestate were made to her on 16th April 2013, and a grant duly issued to her dated 8th July 2013.

4. The grant was confirmed on 30th June 2014, on an application dated 20th January 2014. The estate was shared out amongst the five children listed in the petition, so that Kakamega/Kedoli/1178 and 1179 devolved wholly upon the administrator, Ruth Luziri Mulindi King; North Maragoli/Lusengeli/179 to Sobbie Apungu Zebedee Mulindi, Ruth Luziri Mulindi King, Margaret Ingado Mulindi, Betty Malesi Shaiga Mulindi and Henry Amadalo Mulindi, equally; and North Maragoli/Lusengeli/180 to Ruth Luziri Mulindi King, Margaret Ingado Mulindi and Betty Malesi Shaiga Mulindi, equally. A certificate of confirmation of grant issued thereon on 7th July 2014.

5. An application dated 3rd March 2015 was brought at the instance of Bernard Luvaha Mulindi, a grandson of the deceased, being a son of a late son of the deceased known as Luka Indiazi Mulindi. The said application was determined in a judgment delivered on 27th February 2017. The court in the judgment, noted, from the Chief's letter referred to in paragraph 1 of this judgment, that the deceased had had children who had predeceased her, among them being the father of the applicant herein. The court noted that representation was sought and the estate distributed, it was not indicated whether the dead children had been survived by families or not. The court noted too that the family of the applicant lived on one of the assets of the estate that had been distributed without involving him. In the end, the court, although satisfied that a case had been made out for revocation of the said grant, refrained from revoking it, instead it set aside the orders made on 24th June 2014, confirming the said grant, and cancelled the certificate of confirmation of grant issued on 7th July 2014. The administrator was ordered to file a fresh application for confirmation of her grant, and she was directed to disclose all the beneficiaries of the estate as well as all the assets of the estate in the said fresh application. She was directed to comply within sixty days, in default of which the applicant was at liberty to file for confirmation.

6. It would appear that the administrator did not comply with the said orders, whereupon the applicant, Benard Luvaha Mulindi, filed a summons on 19th March 2018 for confirmation of grant. He lists in it Henry Amadalo, the late Luke Indiazi Sobbie Apungu Zebedee, Ruth Luziri Mulindi King, Margaret Ingado, Betty Malesi, Benard Mugangu and the late Aggrey Mung'asia, as children of the deceased. The following grandsons are also listed, Benard Luvaha, Kennedy Mung'asia and Davis MMbwanga. The application is silent on Seth Vuyanzi and Mary Uside. It is proposed that Kakamega/Kedoli/1178 be shared out between Benard Luvaha, Kennedy Mung'asia and Davis MMbwanga, Benard Luvaha, Kennedy Mung'asia and Davis MMbwanga; Kakamega/Kedoli/1179 Benard Luvaha, Kennedy Mung'asia and Davis MMbwanga; Kakamega/Lusengeli/180 Benard Luvaha, Ruth Luziri Mulindi King, Betty Malesi and Margaret Ingado; and Kakamega/Lusengeli/952 Benard Luvaha.

7. There are on record two replies to the application, by the administrator, Ruth Luziri Mulindi King, and Margaret Ingado Mulindi, vide affidavits sworn on 2nd May 2018. The administrator avers that the applicant was not a child of the deceased, but a grandson by the deceased's son, Luke Mulindi. She pleads that she was unaware of the revocation proceedings that led up to the judgement of 27th February 2017. She asserts that the only persons entitled to the estate were the five individuals named in the certificate of confirmation of grant dated 7th July 2014. Margaret Ingado Mulindi, on her part, pleads ignorance to the revocation proceedings, and asserts that none of the children of

the deceased sat to consent to the distribution proposed in the application.

8. When the application dated 19th March 2018 came up for hearing before me, Mr. Chitwa, the advocate on record for the applicant, informed the court that the same had been filed by a person who was not an administrator. I directed that a summons for confirmation of grant could only be filed by an administrator, and suggested that the said application was not competent. Rather than withdraw the said application Mr. Chitwa sought time to reconsider their position and the matter was taken out of the cause list for that day.

9. Confirmation of grants is provided for in section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, which provides as follows, at subsection (1) -

> *'After expiration of a period of six (6) 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.'*

10. Section 71(1) ought to be read together with Rule 40(1) of the Probate and Administration Rules, which states that-

> *'Where the holder of a grant which has not been confirmed seeks confirmation of the grant he shall apply for such confirmation by summons in Form 108 in the cause …'*

11. Under these provisions it is clear that confirmation of a grant of representation can only be sought by the holder of such a grant. Section 71(2) does talk about situations where the court, if not satisfied with the work of the administrator or holder of the grant, may transfer the confirmed grant to some other person. However, these provisions refer to a situation where the court first confirms the grant before considering the transfer. In any event, the effect of the transfer would be revoking the grant held by the holder and appointing another administrator to hold the grant for the purpose of distribution, for distribution cannot be carried out by a person other than a holder of the grant, going by the language of section 83(f) and (g) of the Law of Succession Act. Section 71(2) states as follows –

> *'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 was administering, and will administer, the estate according to law, confirm the grant;*
>
> *(b) if not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 inclusive, 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 estates then in his hands or under his control; or*
>
> *(d) … '*

12. The applicant, in the application dated 19th March 2018, did not withdraw the same. Instead, he filed the two applications that are the subject of this ruling. The application dated 10th July 2018 seeks review of the orders made on 27th February 2017 on the application dated 3rd March 2015. He would like the grant made to Ruth Luziri revoked, and that he be appointed administrator in her place so that he can move the court for distribution of the estate. He asserts that Ruth Luziri did not reside in the country, and, therefore ,she was not interested in complying with the court's orders. The application dated 17th July 2018 seeks conservatory orders pending distribution of the estate.

13. The administrator swore two affidavits on 6th October 2018. The affidavits do not state the application that they relate to. In one, she avers that she had been entrusted with two parcels of land on behalf of three dead children of the deceased, that is to say Seth Vuyanzi, Mary Uside and Luke Indiazi. She avers that the applicant, being a child of Luke Indiazi, was entitled to part of the two parcels of land. She explains that she was in the process of clearing prohibitions on the land but that she was being frustrated in the process by the applicant. She asserts that the applicant was not qualified to administer the estate. In the other affidavit, she largely argues that she had never been served with the summons for revocation of her grant, nor with a copy of the judgement. She submits that as she had never been served with the application dated 19th March 2018 and copy of the judgment, the review application ought not be allowed.

14. The principal application before me is for review of the judgement of 27th February 2017. Review of court decrees and orders is provided for under the Civil Procedures Rules, and the relevant provisions of the Civil Procedure Rules on review are among those that have been imported into probate practice by Rule 63 of the Probate and Administration Rules. The probate court, therefore, does have jurisdiction, by dint of those provisions, to review its own orders and decrees.

15. The principles upon which a court may exercise review powers are notorious. Firstly, review can be on the basis that there is an error or mistake on the face of the record. Secondly, review would be had where the applicant has discovered material evidence of significant importance that he was not able to have as at the date of the hearing and determination of the matter. Thirdly, review can also be granted on the basis of analogous or other sufficient cause.

16. In the matter before me, the applicant has not sought to anchor his application on any of the two principal grounds, error on the face of the record or discovery of important new evidence. I shall, therefore, presume that the application before me is not sought on the basis of either of the two grounds. In any event, the applicant has not sought to demonstrate that there are any errors on the face of the judgement or allege discovery of any new evidence. It would appear to me that was case is mounted on the third ground, which is omnibus in nature, to the

extent that it is general. He appears to say that the court ought to have revoked the grant of the administrator and appointed him as administrator so as to make it easier for him to seek distribution of the estate of the deceased.

17. I have carefully scrutinized the judgement on record as against the provisions of section 76 of the Law of Succession Act, which provides for revocation of grants. It is clear that the power granted in there is discretionary. The court, upon being satisfied that a case for revocation of grant had been made out, need not necessarily revoke the grant, it may make other orders that it believes advance the course of justice. Section 76 is in permissive, rather than mandatory, language. It says that a '… grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion …' In the instant case, the court was satisfied that a case had been made out for revocation of the grant, for the administrator had not disclosed to the court the existence of certain survivors of the deceased, and had proceeded to propose distribution of the grant excluding them. That notwithstanding, the court was of the view that revocation would not serve the interests of justice as it would amount to taking the parties backwards. In exercise of the discretion in section 76, it decided to set aside the orders on distribution instead, and to order that that exercise be repeated. There is nothing untoward about those orders. They were made with the discretionary powers of the court, and therefore it cannot be said that the court fell into any sort of error.

18. The administrator has sought to lay blame for the delay in the finalization of the matter on the applicant, yet she is the administrator appointed by the court. It appears that after being granted representation she went to sleep and did not follow up on what was happening in the cause. Although she argues that there was no service of the revocation application, the trial court proceeded upon being satisfied as to that service.

19. Be that as it may. The court made its orders. She did not appeal against the judgement, nor seek review of the orders made therein. Those orders are still valid and substituting. They must be fully complied with. She alleges that the decree emanating from that judgement was never served. I would grant her that, it was incumbent on the applicant, having proceeded with the matter in her absence, whether or not he had properly served her with the application, to notify her of the outcome so that she could comply with the orders made in the judgement. Instead, he chose to sit on the judgment in the hope that he could himself solely take charge of the distribution of the estate. It would appear to me that he is now seeking review only because it has become apparent that he cannot possibly obtain confirmation of a grant that he does not hold. He is not innocent in the whole debacle as he appears to purport to be.

20. As the administrator does not appear to have had participated in the proceedings that culminated in the setting aside of the orders that had confirmed her grant, and as it also appears that she was never served with the decree emanating from the impugned judgement, so that she could comply with the orders made in the judgement, it would only be just to allow her to comply with the said judgement, now that she is aware of the contents of the orders, by applying afresh for confirmation of her grant.

21. I have seen from her affidavits that she seeks to justify the orders that confirmed her grant, which orders have been set aside. The position she is taking is in vain so long as the court has held that the process that she employed to obtain the grant, and to have it confirmed, was questionable. She cannot argue with that finding unless she moves the Court of Appeal appropriately against the said orders. As it is, she must comply with the decree by applying afresh for distribution of the estate.

22. I need to clarify certain matters so that in applying afresh for confirmation of grant the administrator does not make the same mistakes that caused the earlier confirmation orders to be set aside. The principal reason for that setting aside was that she had not provided, at distribution, for the families of her dead siblings - Seth Vuyanzi, Mary Uside and Luke Indiazi. It was mentioned in the Chief's letter on record that the deceased had such children who had since died. Yet, the proceedings that followed, or, more specifically, in the court papers that the administrator filed, there was no mention of them. I am referring to the petition filed herein on 12th November 2012 and the summons for confirmation of grant filed herein on 12th March 2014.

23. The law governing applications for grants of representation in intestacy, for the deceased herein died intestate, is section 51 of the Law of Succession Act. The provision requires disclosure of the survivors of the deceased, that is in terms of spouses and children, and where a child of the deceased was dead, any child of any such dead child of the deceased. For avoidance of doubt, the provision says as follows –

> *'(1). An application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.*
>
> *(2). An application shall include information as to –*
>
> *(a) …*
>
> *(b) …*
>
> *(c) …*
>
> *(d) …*
>
> *(e) …*
>
> *(f) …*
>
> *(g) in cases of total or partial intestacy the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased …*

(h) …

(i) … '

24. Section 51(2)(g) should be read together with Part V of the Law of Succession Act, which provides for distribution upon intestacy. The deceased herein was survived by children but no spouse. The relevant provision is section 38, which envisages equal distribution amongst the surviving children. The said provision states as follows-

> *'Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.'*

25. Section 38 makes reference to section 41 of the Act. The two must therefore be read together. Section 41 provides for, among other things, the interest of grandchildren of the deceased whose own parents have died. The grandchildren take the share that would have gone to their parents were they to be alive at the point of distribution. This is called substitution, for they substitute their dead parents or stand in the position of their dead parents. It is also called representation, for they represent their dead parents. In short, reference to children of an intestate includes any grandchildren of the deceased whose own parents are dead. Section 41 says –

> *'Where reference is made in this Act to the "net intestate estate," or the residue of 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 predeceased him and 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.'*

26. I have taken the liberty of referring to the above provisions because the administrator in her affidavit appears to entertain the misguided notion that the only persons who are entitled to the estate of an intestate should be the surviving children of the deceased to the exclusion of everyone else. She appears to harbour the view that the estate of a child who predeceased the deceased is not entitled to a share in the estate of the intestate. That is far from the truth. Whether the estate of a deceased child of an intestate would take a share in the estate would depend on whether the child predeceased the deceased, and whether the deceased child was himself or herself survived by a family in terms of a spouse or child. For a child who dies after the demise of the deceased, his or her estate would be entitled to a share in the estate of the deceased regardless of whether the said child was survived by a spouse or a child of their own. For a child predeceasing the deceased, the situation would be slightly different. If he or she died without a spouse or child, then his or her estate would not be entitled to anything out of the estate of either their deceased mother or father. However, if they were survived by a spouse or, particularly, a child, then their estate would be entitled to a share in the estate of their parent. Indeed, such a child would be treated as child alongside his or her uncles or aunts, but taking the share due to his or her dead parent. If he or she is the only child, he or she would take the full share of their dead parent. If there be more than one child, then the children would take their parent's entitlement equally. That is the effect of section 41 of the Act.

27. The effect of the foregoing is that the administrator misled the court into believing that the dead children of the deceased did not have children, and therefore the court proceeded to distribute the estate with that misleading view in mind. She knew all along that Luke Indiazi had children who should have been disclosed and involved in the process, yet she proceeded to have the estate dealt with as if the said children did not exist. I note too that she made no effort to comply with section 51(2)(g) of the Act by disclosing to the court whether Seth Vuyanzi, Mary Uside and Luke Indiazi had been survived by children, and if they had, disclosing to the court the names of the said children. That information was concealed from the court. Such concealment distorts the picture as to who exactly is entitled to a share in the estate, and the court is misled into leaving out some of the survivors from distribution. That is what the administrator did in this case, and that was the reason why the court came close to revoking her grant. The children of Seth Vuyanzi, Mary Uside and Luke Indiazi ought to have been disclosed when the administrator petitioned for representation and when she sought confirmation of her grant.

28. The other thing is that section 71 of the Law of Succession Act and Rule 40(4) of the Probate and Administration Rules oblige the administrator, in the application for confirmation of grant, to satisfy the court that the identification and shares of all the persons beneficially entitled to the estate have been ascertained and determined. In other words, before the administrator comes to court to have their grant confirmed they must first ensure that they have ascertained the identities of all the persons entitled to the estate and they must also ascertain the shares to which such persons are entitled. In intestacy, the persons entitled would be those the subject of Part V of the Act. In this case, the persons entitled would have to be identified in terms of section 38, as read with section 41, of the Act. Quite clearly, the administrator did not comply with these provisions. She failed to ascertain all the persons beneficially entitled and to identify the shares to which the said persons were entitled. She did not seek to satisfy the court of these matters as required by the rules, instead she appears to have sought to mislead the court. The proviso to section 71(20 says as follows –

> *'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 the grant shall specify all such persons and their respective shares.'*

While Rule 40(4) says as follows -

> *'Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined.'*

29. In one of her affidavits of 6th October 2018 the adminstrator seeks to explain that she had intended to take care of the interests of the children of Seth Vuyanzi, Mary Uside and Luke Indiazi by holding two assets of the estate in trust for them. Curiously, she does not, in that affidavit, identify the alleged children of Seth Vuyanzi, Mary Uside and Luke Indiazi in respect of whom she was hold the two assets in trust. The position that she takes in that affidavit cannot be true. In the first place, there is no mention of Seth Vuyanzi, Mary Uside and Luke

Indiazi, nor their children, in the summons for confirmation of grant dated 20th January 2014. Neither is there any proposal in that application that the said property, Kakamega/Kedoli/1178 and 1179, would be held in trust for the said children. The certificate of confirmation of grant that the court issued on 7th July 2014 does not state that the two assets were to be held by the administrator in trust for anyone. If the intention was that the same would be held in trust, nothing would have been easier than for the administrator to propose so and for the court to approve distribution in those terms. I am not persuaded that there was any intention on the part of the administrator to hold the said two assets in the trust for the unnamed children of Seth Vuyanzi, Mary Uside and Luke Indiazi.

30. In view of what I have stated so far I am persuaded that the administrator cannot be trusted to administer the estate herein alone. I am further persuaded that she has not been diligent in moving quickly to have administration completed, ostensibly as she resides abroad. For the interests of the children of Seth Vuyanzi, Mary Uside and Luke Indiazi, I believe it would be democratic to have one of them appointed administrator to work with the administrator herein to finalize distribution of the estate herein.

31. The orders that I am persuaded to make in the circumstances are as follows-

(a) That the application dated 19th March 2018 is hereby struck out for being incompetent;

(b) That I hereby partially allow the application dated 10th July 2018 by appointing Benard Luvaha Mulindi as co-administrator with Ruth Luziri Mulindi King of the estate of the deceased herein;

(c) That the grant of letters of administration intestate issued on 8th July 2013 shall be amended to conform with (b) above;

(d) That two administrators, shall jointly or severally within the next thirty days, apply for confirmation of the grant in (c) above;

(e) That in the said application the administrators shall list all the surviving children of the deceased and all the surviving children of Seth Vuyanzi, Mary Uside and Luke Indiazi, and shall propose distribution of the estate to all the said survivors in keeping with sections 38, 41 and 71 of the Law of Succession Act;

(f) That any person not interested in taking a share in the estate shall be at liberty to file either a deed of renunciation or an affidavit renouncing or waiving their entitlement;

(g) That any party not satisfied with the distribution proposed in the application filed under (d) above shall be at liberty to file and serve an affidavit of protest, stating their case and proposing an alternative distribution;

(h) That the matter shall be mentioned after thirty (30) days to confirm filing of the confirmation application;

(i) That the mention date shall be given in open court at the delivery of this ruling;

(j) That in the meantime *status quo* shall be maintained until after confirmation of the grant herein, or further or other orders of the court;

(k) That each party shall bear their own costs; and

(i) That any party aggrieved by the orders that I have made herein above shall be at liberty to move the Court of Appeal appropriately within twenty-eight (28) days.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 14TH DAY OF JUNE 2019

W. MUSYOKA

JUDGE