



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

SUCCESSION CAUSE NO. 3 OF 2018

IN THE MATTER OF THE ESTATE OF JANET ELIUD TIMOTHY MWAMUNGA (DECEASED)

AND IN THE PETITION FOR SPECIAL LIMITED GRANT BY

ELIZABETH MALEMBA MWAMUNGA

R U L I N G

1. The Court has before it an "Application for Special Limited Grant of Letters of Administration" for the Estate of Eliud Timothy Mwamunga who died on the 9th day of June 2018 domiciled at Ndara Ranch. The Petition states that the proposed letters of administration are intended for the sole purpose of accessing monies from two bank accounts in the name of the Deceased being Account No 079***** and Account No 0790***** held at Equity Bank Voi Branch. It is then intended that the monies be deposited into the Bank Account of Samuel M. Mwamunga, Elizabeth M. Mwamunga & Josiah C. Mwamunga

2. The Petitioner is a daughter and beneficiary of the Deceased. She is asking for the Court to make an order that is in effect the paying out of the sum of KShs.5,718,007.00 out of the Estate to her for expenses said to be urgent and/or crucial. The Application is said to be made on the ground that the Estate's businesses are at the risk of grinding to a halt due to accruing the bills and there is need for repairs in the same. Elsewhere it has been said by the Petitioners, that they were given legal advice to the effect that this Court has powers to see to it that the Estate does not grind to a halt prior to the confirmation of the Grant; (see "Affidavit" of Samuel Mazera Mwamunga purported to be commissioned by the same Advocate who has conduct of the Petition). This is the second application made for the proceeds of the Estate. The Application is for a significant sum of money.

3. The Petition for Limited grant states:

1. THAT I present this petition in my capacity as a daughter/beneficiary of the deceased;

2. THAT a Petition has been filed in this Court but a Grant to the Estate has to date not been issued;

3. THAT I have the consent of the Petitioners and all the beneficiaries of the Estate file this Special Grant Application dated 27th March 2019.

4. THAT the Deceased's Estate is currently in urgent and/or crucial need of a total of Kes. 5,718,007/00 ("Funds") to meet expenditures relating to;

a) Mrs Priscilla Chizi Mwamunga medical costs, doctor review charges & upkeep amounts;

b) Employee outstanding Salaries;

c) Accruing Utility bills & repair costs.

5. THAT Mrs. Priscilla Chizi Mwamunga, the widow of the Eliud Timothy Mwamunga (Deceased) is currently unable to undergo monthly medical check ups due to financial constraints

6. THAT the widow of the deceased who is of advanced age, over 75 years, requires finances for her daily upkeep, which is now at the risk of withdrawal of much needed daily upkeep due to non payment of expenses/wages to care givers.

7. THAT the Estate's businesses are at the risk of grinding to a halt due to accruing the bills and there is need for repairs in the same.

4. The Petition is supported by the Affidavit of Elizabeth Mwamunga. She states that "the Grant to the Estate has not yet been issued".

5. The Court notes that a Petition has been filed and advertised but Letters of Administration have not been issued. The Court also notes the record shows that apart from the immediate family in the Chief's letter, there have been several complaints and/or applications and/or objections to the Petition. Those will be addressed later. The Petitioners' position is recorded in the proceedings.

6. In this Application, the Deponent relies of the Chief's Letter EMM 1 which list the persons who he says are beneficiaries of the Deceased. It has since transpired that there are other beneficiaries. The Affidavit repeats that the "Estate" is in urgent need of the significant sum of KShs5,718,007.00. those "Funds" it is said will be applied to medical expenses and maintenance of the widow, school fees, outstanding salaries and accruing utility bills. That suggests that the request relates to payments for future expenses, however, the Affidavit states that the expenses require immediate payment. They are:

(1) Medial Expenses for the Widow of the Deceased Priscilla Chizi Mwamunga

(2) School fees for a Grandchild

(3) Business expenses and household expenses for assets said to be owned by the Deceased but currently occupied by various adult Children of the Deceased.

The Deponent of the Affidavit also gave oral evidence.

5. The Court was told that the subject bank account is being targeted because the Petitioners to the Petition for Grant (the main petition) have convinced the Bank Manager to keep the account open following the death of the Account Holder. The Court has seen no independant verification from the Bank (Equity Bank) or its Manager substantiating its break from appropriate procedues. The Court is also live to suggestions that income is being paid into that account. Again, that would be exceptional and there is not independant evidence confirming that position.

4. In relation to the medical expenses of the Widow, the evidence produced relates only to historical expenses. The Court takes cognisance of the age and frailty of the Widow but there is nothing explaining her exact and immediate needs. However, when paragraph 5 of the Affidavit states that the Widow "is currently unable to undergo medical checkups and get medicines due to financial constraints; it raises concerns as to whether there is anyone able to care for the Widow and provide the support she needs. The Affidavit exhibits as EMM 1A a receipt from a Dr M.N. Wanyoike showing that about two weeks before the date of the Affidavit Priscilla Chizi Mwamungu had (1) a consultation (2) an electrocardiogram and (3) and ECH for which she paid KShs. 20,000/=. The source of those funds is not disclosed. Therefore, the statement that the Widow "is unable to meet those expenses" has not been demonstrated by the evidence and it is possible that those who paid those monies are unwilling to continue to do so. The Court is left in the dark.

6. Moving onto the question of school fees. The Court called for the Petitioner to give oral evidence. From that evidence it transpired that the student in question was no longer pursuing his education. That raises a question as to whether the payment of school fees is necessary, urgent and pressing. The Petitioner has neglected to file any independant evidence showing he is currently - or has ever been - enrolled in any educational establishment in USA.

7. There is also a further claim for household expenditure and outstanding salaries necessary for the Widow stated as generalities. In oral evidence the Petitioner informed the Court that those expenses relate to at least 3 homes and around 4 operating businesses. Those homes and businesses are said to be being operated by and for the Widow. Given, the state of here health that is implausible. In relation to the need for several homes, the Court takes into consideration that according to the Chief's Letter the Deceased was domiciled in one home namely Ndara Ranch in Sagalla.

8. In relation to the remaining properties names as homes, there is no objective evidence filed whether with the current application, or any other, showing that the named properties were owned, occupied and/or maintained by the Deceased at the time of his death. The Court notes that the Kileleshwa property is occupied by the Petitioner Josiah Chola and his wife but because his Mother visits when attending the Doctor the Estate should meet the cost of all the utility bills. The reason for that is unclear. The same applies to vehicle repairs which have shown numerous invoices emanating from the same quotation, is there duplication?

9. There are also further claims for repairs and improvements to several premises. Again there is no evidence of whether they were done or are necessary. In particular it is not explained by operating businesses including at least one limited liability company cannot continue to operate without accessing the bank account of the Deceased. The Court also takes cognisance of the fact that one of the persons named as an employee is one of the Beneficiaries of the Estate (Esther Sau).

10. Neither the Petition nor the Affidavit state clearly where the funds (a significant sum of over KShs.5,000,000/= Five Million) will eventually be paid. All that is said is that there is a Bank Account in the name of the intended administrators where they would like it to be received.

11. In this matter there have been several applications filed, namely;

(1) Petition for Letters of Administration with Will attached filed on 26th July 2018 by the two sons of the Deceased;

(2) Special Application under a Certificate of Urgency filed on 27th July 2018 seeking payment of KShs.1,119,000/= into the Bank Account of the two intended administrators for payment of inter alia the Widow's medical expenses;

(3) An Objection to the making of the Grant by two of the daughters of the Deceased, (Esther Sau and Elizabeth Malemba Mwamunga) filed on 18th October 2018

(4) Notice of Motion Application filed by Sheila Manga Mzungu as Objector asserting she is a beneficiary who was excluded by the Petition and wishes to be included. There is a Replying Affidavit in relation to this Application.

(5) The current Petition for Special Limited Grant by Elizabeth Malemba;

(6) Application by Campus City City and Dupoto Fams Limited filed on 13th May 2019 which alleges that the Petition knowingly and deliberately omits a liability pursuant to a Court Order from the Malindi Environment and Land Court No 239 of 2015

(7) Letter from Counsel with conduct to the DR complaining that there is no ruling date for the Petition.

12. That list demonstrates that there are beneficiaries other than those listed in the petition, including those with rights pursuant to court orders who can lay claim to the Estate as well as the right to administer. That taken with the vague and unsubstantiated nature of the Application leads the Court to the conclusion that any interim distribution of the Estate at this stage is not in the best interests of the Estate, nor the Beneficiaries taken as a whole.

13. This Court is very aware of how the delays have arisen in relation to issuing the letters of administration. There are objections to the grant. By the Petitioners, there are complaints of delay without willingness to resolve the questions raised by the applications eg the refusal of the Petitioners to respond on the question of non disclosure. Each application filed raises legal arguments as to the appropriate personal representative be it administrator and/or executor and/or trustee and also the conduct of the Petitioners in light of allegations of deliberate and material non-disclosure. At this stage those are only allegations, but in due course, the Court must decide who is the most "fit and proper person" to administer the Estate.

14. In order to do so, this Court is conscious that it must hear oral evidence as to those allegations before it can come to any decision. That could take a long time. Time is not on the side of at least one elderly beneficiary and her needs are immediate.

15. In view of that concern, this Court takes the view that the quickest and most efficient way to preserve the Estate and collect in the assets with a view to ultimate distribution to all entitled, there is a need for a more professional and principled approach to be taken. In the circumstances, this Court hereby appoints the Public Trustee to be the Administrator of the Estate.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED ON THIS the 18th day of July 2019.

In The Presence of :

Court Assistant: Josephat Mavu

Petitioners: Mr Kinango

Also present: Elizabeth Malemba & Samuel Mazera in person.