



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 31 OF 2016

IN THE MATTER OF THE ESTATE OF SAMSON NYAMBATI NYAMWEYA (DECEASED)

ALICE KERUBO NYAMBATI.....PETITIONER

VERSUS

CHARLES RATEMO NYAMBATI.....OBJECTOR

RULING

1. **Samson Nyambati Nyamweya**, the deceased, whose estate is in issue herein died on 30th September, 2013 at the Nairobi West Hospital. On 15th April 2016, **Alice Kerubo Nyambati** ('Alice'), the Petitioner herein, filed a Petition for Probate of Written Will seeking to be appointed as Executrix of the said will. The Petition is supported by an affidavit sworn by Alice on 13th April, 2016 in which she deposes that the deceased died leaving a valid written will dated 15th November, 1996. A copy of the will is annexed to the affidavit. Alice sought grant of representation to the deceased's estate on the ground that she is the executrix named in the deceased's written will.

2. **Charles Ratemo Nyambati** ('Ratemo') filed an Objection to the making of grant of probate on 6th June 2016 together with an answer to the petition and a cross petition. The grounds on the face of the answer to the petition and a cross petition and the deposition in support are that Alice is unsuitable to be issued with the grant because she has intermeddled with the estate of the deceased. He explained that Alice participated in a fraudulent sale of an asset of the deceased comprised in Kisii Municipality Block III/139 ("Parcel 139") and ignored his advice contained in his letter dated 21st March, 2016 where he asked that intended sale be set aside. It was Ratemo's case that he is a son of the late Peris Nyoando Nyambati who predeceased the deceased. It is his claim that Peris Nyoando Nyambati was entitled to inherit the said parcel 139 but Alice conspired with the co-owners namely, Jackton Ocharo and Charles Ratemo Nyamweya to fraudulently sell the same and defeat the will of the deceased. He stated that Alice without grant of representation caused parcel 139 to be transferred and registered in the name of Kefa Nami Nyangito on 15th October, 2013. He contends that upon his discovery of Alice's involvement in the fraudulent sale of parcel 139, he filed **Kisii High Court ELC Petition No. 33 of 2013** to stop further dealings in the land, however his application was struck out on 26th February, 2016. He did not stop there, he has sought injunction on the sale and/ or purchase parcel 139 by filing **Kisii High Court ELC Suit No. 100 of 2016** which remains pending before the Environment and Land Court.

3. The objector further contends that Alice has engaged in fraudulent transactions concerning the management of the deceased's assets since 2006 when she was appointed a guardian of the deceased and a manager of his estate in **Kitale High Court Civil Case No. 26 of 2003**. He further averred that Alice has not accounted for the rent she received from letting the Kitale Manor House Farm, Kisii Municipality Block III/141 and parcel 139 before it was sold. It was his case that Alice also failed to account for the Kshs. 20 million which were the proceeds of sale of parcel 139. The objector avers that all the assets of the deceased are as set out in his will made on 15th November, 1996 but have not been fully listed in paragraph 6 of the supporting affidavit to the Petition sworn on 13th April, 2016. He denies the allegation that there are persons with purchaser's interests in the Kitale Farm as alleged in paragraph 6 of the supporting affidavit. He also stated that Alice by virtue of **Section 79 of the Law of Succession Act**, is a trustee who is required by the doctrines of equity to ensure that there is no conflict between her interests and those of the office of executor and Alice has permitted that conflict to exist. He seeks in his cross petition that he be issued with a grant of probate in respect of the deceased's will made on the 15th November 1996.

4. Alice filed her Replying Affidavit to Ratemo's application on 28th August 2018. She acknowledged that Peris Nyaondo was her co-wife. She deposed that the deceased only held a third share of parcel 139 and the rest was owned by Jackton Ocharo and James Nyamweya who transferred his share to his son Charles Ratemo Nyamweya. The sale of parcel 139 was done with the consent of all the owners of the property and the beneficiaries of the deceased's estate. She averred that vide a meeting held by the deceased's family, it was agreed that the proceeds of the sale of parcel 139 be used to cater for the deceased's medical bills and the balance deposited in his bank account. She stated that though the objector obtained a limited grant in **Succession Cause No. 558 of 2013**, the same were revoked as he had not sought consent of other beneficiaries and **ELC Petition No. 33 of 2013** which he had subsequently filed was struck out. Alice pointed out that the objector refuses to participate in family meetings particularly the meeting held on 3rd November 2013 set to discuss burial of the deceased, his pending medical expenses and a report in regard to the Kitale firm.

5. William Nyamwamu Nyambati filed an affidavit in support of the petition on 25th January 2019. He is the elder son of the deceased and a beneficiary of the estate of the deceased. He deposes that the petitioner Alice has related well with them and that she is capable of administering the estate and to distribute the assets of the late father's estate.

6. The court directed that the matter proceed by viva voce evidence. Ratemo (Pw1) testified for the objector while Alice (Dw1) and William Nyamwamu Nyambati (Dw2) for the petitioner

7. Ratemo (Pw1) adopted his affidavit and further affidavit as evidence. He testified that as per the will Peris Nyaondo is to inherit parcel 139 but the same was not transferred to Peris. That on 12th August 2013 the deceased entered into a sale agreement and executed the agreement despite not having the capacity to do so. Alice who had been appointed as guardian did not make an application before court for the sale of parcel 139. He noted that the transfer was effected on 15th November 2013 after the death of the deceased which occurred on 30th October 2013. He also testified that after her appointment as guardian Alice did not account for rent collected from the property.

8. **Alice (Dw1)** testified that she was married to the deceased for 50 years. She adopted her affidavit in support of the petition dated 13th April 2016 and her further affidavit is filed on the 28th August 2018 into evidence. **Dw2** told court that he is the 1st born son of the deceased. He testified that 6 of the deceased's children authorized the Petitioner to borrow money. He testified that some beneficiaries wanted the Kitale land which was owned by 4 partners sold and authorized Alice to sell. He testified that Alice was also authorized to sell parcel 139 and the proceeds from the sale were Kshs 10,000,000/- which is held at the bank. That it was also agreed that the proceeds be shared amongst the children of Peris Nyoando. That a Clan meeting was held in 2018 where distribution of the estate of the deceased was undertaken. That Alice had permitted him to sell about 2 acres of his share in the Kitale farm.

9. At the close of the hearing parties filed their written submissions. The objector filed its written submissions on 14th February 2019 and urged this court that an executor has an obligation to account for monies which come to his hands quoting **paragraphs 1551 to 1553 of the 4th Edition of Halsbury's Laws of England, 4th Edition, Volume 17**. He also relied on; *the Matter of the Estate of D.B Shah (Deceased), Rakhi Bedi –v- Ramesh B. Shah Succession Cause No. 793 of 2013*; and the Swaziland Authority in the High Court of Swaziland, *the Master of the High Court –v- The Executor Martin Nkululeko Dlamini (Estate late Jericho David Matsebula (1620/2012) [2014] SZHC 22(12st February 2014)*. He submitted that in *Keech vs. Sandford*, the trustee who breaches her duties and obtains a personal benefit from the estate is obliged to restore it to the trust. He submitted that under **Section 29 of the Mental Health Act**, it is only the court which can sanction the sale or charging of a property of a person of unsound mind for his or her support on the application of the guardian and manager, which was not sought by Alice in her capacity as a manager before the sale of *parcel 139*. He also contends that the assets of the deceased set out in his said will made on 15th November, 1996 are not as described in paragraph 6 of the supporting affidavit to the Petition sworn on 13th April, 2016.

10. Through her written submissions filed on 10th April 2019 Alice urged the court that the will has not been challenged and Ratemo's only contention is that she intermeddled in the deceased estate. She submitted that she is the rightful executor under the will together with Ratemo, Martin Oigara, Isaac Onyangore and Judson Nyambane. She submitted that the beneficiaries, prior to the death of the deceased, deliberated over the deceased's medical expenses and agreed to sell parcel 139. They further agreed to utilize the sale proceeds for burial expenses and the same was deposited in the Estate's Bank Account No. 011xxxxxxxxx00 at the Co-operative Bank. She submitted that Peris Nyaondo predeceased the deceased thus her gift abated and is not available to her estate. In any case she stated that Ratemo has no *locus standi* to lay claim of the share as he is not the administrator of Peris Nyaondo's estate. She further submitted that the reasons advanced by Ratemo seeking her disqualification as executrix are not sufficient as it is clear that all beneficiaries are in support of her appointment as executrix of the estate. Alice urged the court to use its discretion as provided by **Section 66 of the Law of Succession Act** in appointing an administrator for the estate. She further contends that there was no proof tabled to show that the deceased was incapable of executing contracts. It was her case that her appointment as guardian only entitled her to prosecute or defend and or step in the shoes of the deceased in **Kitale High Court Case No. 26 of 2013** and that authority could not be extended to cover other matters. In advancing her case Alice relied on *Beatrice Nini v George M. Kagwe [2012] eKLR* and *Ellen Nyatetu Mugweru & another Danson Were & 7 Other [2017] eKLR*.

11. I have carefully considered all the pleadings on record and the submissions and the authorities relied on. In my view, the following are the key issues for determination:

(a) *Whether this court has the jurisdiction to determine whether Alice made proper account after her appointment as guardian ad litem Kitale High Court Civil Case No. 26 of 2003.*

(b) *Whether the objector has proved that the petitioner was involved in intermeddling of the deceased's assets.*

(c) *Whether Alice breached her duties as a personal representative.*

(a) Whether this court has the jurisdiction to determine whether Alice made proper account after her appointment as guardian ad litem Kitale High Court Civil Case No. 26 of 2003.

12. The objector testified that Alice was appointed a guardian of the deceased and a manager of his estate by Ochieng J. in **Kitale High Court Civil Case No. 26 of 2003** from 2006, but has not presented an account of how the property was managed. He contends that Alice has not accounted for the rent she has received from letting the Kitale Manor House Farm, Kisii Municipality Block III/141 and rent from parcel 139. Before making a determination on whether Alice as manager under **Mental Health Act** gave proper accounts in regard to the rents collected from the deceased property, I must point out that present suit is a succession cause. The Law of Succession regulates intestate and testamentary succession and the administration of estates of deceased persons. It comes into play upon the death of the deceased. This court will therefore only look at the administration of the estate after the death of the deceased and not at actions done prior to the death of the deceased, although such action could also have a bearing during the determination of the succession cause.

13. In this cause the will is not contested by either party. Proceeding on the basis that the deceased died testate the distribution of the

deceased estate cannot be left for distribution by Clan as suggested by Alice and must be distributed in accordance to the laid down procedure of testate succession and the will which is not challenged.

(b) Whether the objector has proved that the petitioner was involved in intermeddling of the deceased's assets.

14. The substantive issue in this cause is whether Ratemo has established that Alice intermeddled in the deceased estate. The central issue in the objector's case is the disposal of parcel 139 by Alice. Ratemo alleged that Alice intermeddled with the estate of the deceased as she participated in a fraudulent sale of parcel 139 with the intention of disinheriting Peris Nyoando. This court is being called upon to make a determination on whether Alice is an intermeddler in the estate of the deceased as alleged. If so, should she be restrained from interfering with the estate of the deceased? **Section 45** of the **Law of Succession Act** provides

“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

15. In **Kothari vs. Qureshi & Another [1967] E.A** at page 566 Rudd J opined thus:

“It is elementary law that an executor's title dates from the date of the death of the deceased and springs from the will not from the grant of probate. An executor's actions before probate are valid in themselves without recourse to any doctrine of relation back and they have effect by virtue of the will. Probate is merely authentication of the will in such cases and if the will is ultimately proved no one can question the validity of such acts. An executor can before grant of probate commence an action, release a debt and generally act as the personal representative of the deceased until he is required to prove his title as such.”

16. At the time of transfer of parcel 139 Alice had been an executor from the date of the death of the deceased as per the will. I agree with the objector that it was not possible for the deceased to sign the transfer document after his death. The manner in which parcel 139 was transferred remains an issue for determination in the Environment and Land Court in **Civil Suit 100 of 2016** now **ELC No. 302 of 2016**. Under **Section 79** of the **Law of Succession** the executor to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative. In essence **section 79** of the **Law of Succession Act** allows the personal representative to deal with the assets of the estate as if she were the owner thereof so far as she acts as such in her representative capacity. This however must be done in accordance with the law.

(c) Whether Alice breached her duties as a personal representative

17. Under **section 82** of the Law of Succession Act personal representatives shall not sell any immovable property before confirmation of the grant. **Section 83** provides that personal representatives shall have the following duties:-

(a) to provide and pay out of the estate of the deceased, the expense of a reasonable funeral for him;

(b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;

(c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);

(d) to ascertain and pay, out of the estate of the deceased, all his debts;

(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 there from, 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 matter 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.

18. It was the objector's case that Alice had breached the fiduciary duties of executors which demand that they act honestly and do not permit conflicts to emerge between their own interests and those of the estate. In **Rupal Shah & another (supra)** the applicants raised the issue of conflict of interest, where the respondent therein (a brother of the deceased and co-executor) laid a claim against the deceased's estate by claiming that the 1,000,000.00 dollars, worth of shares held by the deceased for State Bank of India, belonged to the deceased's mother. The court found him unsuitable to be a co-executor of the deceased's estate. The facts of **Rupal Shah & another (supra)** can be differentiated from this case as Alice has not laid claim in the deceased property. In fact Alice argues that according to the meeting held by the beneficiaries with the exception of Rose Oigara, Ratemo and Margaret Ratemo it was reported that parcel 139 was sold for Kshs 30,000,000/- and the proceeds shared equally by all the three owners. In the said meeting it was agreed that Kshs 500,000/- be used to offset burial expenses and Kshs 9,500,000/- to be shared amongst Peris Nyaondo's children following the spirit of the deceased's will. Alice in her affidavit dated 9th August 2018 stated that the net amount from the proceeds of the sale was deposited in the deceased bank account. I have also noted that parcel 139 remains the subject of ELC No. 302 of 2016 and will not comment further on the issue.

19. I recognize that all the beneficiaries with the exception of Ratemo consented to Alice being an administrator of the deceased's estate. The petitioner in its submission urged this court to use its discretion under section 66 of the Law of Succession Act in appointing the executor the said section only applies to intestate succession.

20. As regards to an account of all dealings of the deceased estate after his death, an administrator is required to avail an account from the date of the grant within six months of issuance of grant (*see section 83 (e) of the Law of Succession Act*). In this matter the court is yet to issue grant and will only make an order of accounts once grant has been issued.

21. The deceased's will is so detailed and I advise and urge the parties to abide by the contents of the will. The will in part reads as follows;

"It is my sincere hope that each member of the entire family would author and comply with whatever has been indicated in this WILL document without any condition. In case of any problem arising out of this WILL document it should be settled amicably with the assistance of my two wives, two sons (Charles Ratemo and Martin Oigara) or (Isaac Onyangore and Judson Nyambane) and any Three of my five brothers and not the court of law.

My two wives (Peris Nyambati and Alice Nyambati) plus the above sons will also be the administrators of my ESTATE"

22. I note that the other sons mentioned in the will as administrators **Martin Oigara, Isaac Onyangore** and **Judson Nyambane**, have not applied to be administrators. The will indicates that they are to be administrators/executors of the deceased's estate. They are at liberty to indicate their desire to be administrators as willed by the deceased. In order to have this succession cause determined a grant shall be issued to Alice and Ratemo.

23. In conclusion, I find that the answer to petition and cross-petition herein has some merit and is allowed in part. I hereby make the following orders;

(a) A grant shall now issue forthwith to **Alice Kerubo Nyambati** and **Charles Ratemo Nyambati** to be executors of the estate of the deceased **Samson Nyambati Nyamweya** and they shall carry out the duties under **Section 82 and 83** of the **Law of Succession Act**.

(b) The executors of the estate are restrained from disposing any of the immovable properties forming part of the estate until confirmation of grant.

(c) **Alice Kerubo Nyambati** and **Charles Ratemo Nyambati**, the executors jointly are ordered to render a joint account of the status of the estate in compliance with **Section 83(e)** of the Law of Succession Act within (60) sixty days hereof.

(d) Parties shall take a mention date in court to confirm compliance.

(e) This being a family matter there shall be no orders as to cost.

Dated, signed and delivered at Kisii this 12th day of July 2019.

R.E. OUGO

JUDGE

In the presence of;

Mr. Ombati h/b for Mr. Nyamu

For the Petitioner

Mr. Ndungu h/b for Dr. Kuria Kamau For the Objector

Ms. Rael

Court clerk