



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 386 of 2008

IN THE MATTER OF THE ESTATE OF JOSEPH OTIENO OONGA

BERNARD OTIENO OONGA.....APPLICANT

VERSUS

CARREN ANYANGO OPIYO

R O O.....RESPONDENTS

RULING

1. The background of this matter is that Joseph Otiemo Oonga (the Deceased) died intestate on 25.5.08 at the Coast General Hospital. The record indicates that the deceased was survived by 2 widows, 7 sons and 4 daughters. A grant of letters of administration (the Grant) was on 21.7.09 issued to Carren Anyango Opiyo (Carren) and Bernard Otiemo Oonga (Bernard), respectively one of the widows and one of the sons of the deceased. The Grant was confirmed on 14.5.10. The Court however notes that the shares of the beneficiaries were not indicated in the certificate of confirmation of grant dated 25.5.10. There have subsequently been a number of applications in the cause herein which have been heard and determined by this Court.

2. By an application dated 5.12.18, Carren sought that the certificate of confirmation of grant be rectified to indicate all the assets of the deceased, the share of each beneficiary and that the estate be distributed. She further sought an order that Bernard do account for funds deposited in his personal account no. 0100***** at Stanbic Bank. Carren avers that as a result of the estate not being distributed, all school going beneficiaries of the estate have dropped out of school. Carren has herself been rendered destitute and is being hosted by friends as she cannot afford to pay rent and for her upkeep. She accused Bernard of diverting estate funds to his personal account in Stanbic Bank without her authority as a co-administrator or the consent of the other beneficiaries. She therefore prayed that the estate be distributed and that Bernard be ordered to account for all the funds he has collected on behalf of the estate and not deposited in the joint account of the estate of the deceased no. 012***** at National Bank. She further prayed that funds be released to the school going beneficiaries to enable them continue with their education.

3. By consent dated 30.1.19 and duly signed by the parties' advocates the Court did order the release of Kshs. 145,000/=, Kshs. 60,000/= and 60,000/= being college fees, 6 months' rent and upkeep for R O O, one of the beneficiaries of the estate.

4. On 15.2.19 however, Bernard through another firm of advocates filed a replying affidavit sworn on 13.2.19 opposing Carren's Application. He also filed 2 applications of even date. In his replying affidavit, Bernard claimed that Carren is not a widow of the deceased as she was married to the late Sila Opiyo Akinyi (Sila) with whom she bore children. For this reason Carren did not place sand in the grave of the deceased as required of widows by custom. She has also never visited the deceased's rural home and has never performed the Luo ritual of 'returning to the grave'. Upon the demise of Sila in September 2016, Carren and her children attended his burial thus confirming that she was his wife. The other beneficiaries have resolved that Carren be removed as an administrator of the estate of the deceased. The concealment of this material fact and misrepresentation is sufficient to warrant Carren's removal by the Court as an administrator and beneficiary of the estate of the deceased.

5. Bernard further accused Carren of refusing to work with him as a co-administrator. He states that Carren is responsible for devaluing the estate of the deceased by removing a packaging machine from one of the properties of the estate and abandoning the same in a yard thus causing it to be destroyed beyond repair. Carren has refused to execute a lease agreement which would have safeguarded the interests of the estate and the beneficiaries. The estate owes the Mombasa County Government Kshs. 7,905,225/= in rates arrears as at January 2019. Further, Carren has received Kshs. 1,200,000/= as rent from the estate which she has applied to her own use. She has also incited one Mr. Nassir, a tenant not to pay rent as directed by the Court and has arrears of Kshs. 1.4 million. Further, despite the lapse of 6 months from date of the Grant and numerous pleas from Bernard, Carren has refused to account for the estate or to produce to the Court a full account and inventory of assets and liabilities thereof and remains evasive. She has not disclosed that she is in possession of many original titles of the estate which he released to her.

6. Bernard further averred that in May 2012 and July 2013, Carren entered into a lease with Woodtex and Etrand Limited and Mr. Nassir

for warehouse number MN/VI/4014 and 4015 without his knowledge and consent as co-administrator. She has continued to receive rents and has not accounted for the same. In October 2015, Bernard obtained a Court order for the lease to be drawn afresh and for Carren to render accounts and to grant access to the properties. Bernard instructed his advocates to draw the lease but Carren did not avail herself to sign the same. Bernard says that upon demand, Mr. Nassir paid to Bernard's advocates Kshs. 100,000/= of the arrears. After deducting their legal fees of Kshs. 81,000/= the balance of Kshs. 19,000/= was paid to Bernard's account in Stanbic Bank. He sent this amount to his aging mother.

7. In response to the allegations Carren in her supplementary affidavit sworn on 4.3.19 denied the allegations by Bernard. She reiterated the contents of her affidavit in support of her application and further stated that she complied with the Court order of 2015 and filed accounts as directed.

8. In his first application, Bernard seeks the setting aside of the consent order of 30.1.19. In the alternative, that the amounts released to R O O (R) the 2nd Respondent form part of her share in the estate. Bernard claims that he was not notified that Carren's application was scheduled for hearing on 30.1.19. His previous advocates recorded the consent without his instructions and without the involvement of other beneficiaries. The consent order is against the interest of the estate of the deceased and unless it is varied or set aside, the other beneficiaries of the estate will continue to be prejudiced. Other beneficiaries of the estate are in dire need of assistance and have been prejudiced by the consent order. L O has a terminal disease. K O O and C M O are in need of school fees and upkeep while Petronala Joseph Otieno the widow of the deceased is aging and requires upkeep. Further, the estate is in jeopardy due to outstanding rates arrears of Kshs. 7.4 million. It is therefore in the interest of justice that the consent order be set aside and that all beneficiaries be given an opportunity to be heard.

9. In her replying affidavit sworn on 4.3.19, Carren stated that had the order not been given, R would have lost her chance at law school for the 3rd year running. As administrators, she and Bernard had failed R by not providing funds for her education. Carren went on to accuse Bernard of being a stumbling block to the administration of the estate occasioning the beneficiaries to drop out of school. That had family meetings held earlier been adhered to, there would be no rates arrears as part of the income was to be applied to payment thereof without interfering with the education of the school going beneficiaries. She urged that the estate be distributed to all beneficiaries and that Bernard do account for all funds he has received from the estate and not deposited in the joint account of the estate.

10. In his 2nd application, Bernard seeks that Carren be removed as an administrator of the estate of the deceased and that R or any other person be appointed in her place. He also prays that Carren and F O be removed as a beneficiaries of the estate of the deceased. Additionally, Bernard prays that Carren do account for the rents she has received from the estate of the deceased. He further prays that Carren do produce all the original title deeds, share certificates and any other part of the estate that was released to her by Lumatete Muchai & Company advocates. He further seeks that the Swahili house in Port Reitz be excluded from the estate of the deceased. The grounds are similar to Bernard's averments in his replying affidavit in opposition to Carren's Application. He claims that Carren is not a wife of the deceased and was married to Sila. Further that she has not rendered an account to the Court as is required of administrators. She has remained elusive and has not worked together with Bernard. He further claims that Swahili House in Port Reitz belongs to Thomas Otieno Oonga and not to the deceased. Further that F O though assisted by the deceased was not a beneficiary of his estate. Carren has received rents from the estate of the deceased which she has not accounted for. He urged the Court to allow the application.

11. Carren opposed this second application by her Replying affidavit sworn on 4.3.19. She denied the allegations made by Bernard. In particular, she stated that she married the deceased in 1985 when Bernard was still in school. Her marriage to Sila was annulled under Luo Customary law. She denied not availing herself to do the work of administrator but claims that she feared for her life having been threatened by Bernard and another beneficiary. Both administrators swore an affidavit confirming the assets of the estate of the deceased. At family meetings on 27.10.11 and 11.2.13, all assets of the estate were listed together with the monthly collection and a monthly budget drawn. She acknowledges being in possession of the documents released to her by the advocate and is willing to deposit the same in Court if so directed. Bernard is opposed to her and her children and has denied her funds for upkeep. He now heaps blame on her for non-performance or improper administration of the estate.

12. I have given due consideration to the Applications and rival affidavits, submissions and the authorities cited.

13. Carren's application seeks that the certificate of confirmation of grant dated 25.5.10 be rectified to show all assets and the respective share of each beneficiary. She further seeks that the estate be distributed to all beneficiaries. Additionally, Carren prays that Bernard renders accounts of his dealings with the estate.

14. The Grant was issued to both Bernard and Carren on 21.7.09 and was confirmed on 14.5.10. The Court however notes the certificate of confirmation of grant dated 25.5.10 does not contain the shares of all persons beneficially entitled to the estate of the deceased as required by the proviso to Section 71(2) of the Law of Succession Act which states:

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 such grant shall specify all such persons and their respective shares.

15. This omission is perhaps what has led to the current state of affairs of the estate remaining undistributed 9 years after confirmation of the grant. The ascertainment of the shares of each beneficiary is critical if the distribution of the estate is to progress.

16. On the prayer that Bernard renders accounts, it is noted that the Grant was issued to both Carren and Bernard. As administrators, both are required by law to act together. Additionally, they are required to collect in and complete distribution of the estate within 6 months of the date of confirmation of the Grant. It is clear that the 2 administrators have been acting at cross purposes. Each administrator seems to be collecting rent from the assets of the estate without the involvement of the other and without accounting for the same. They are now engaged in levelling accusations and counter accusations against each other. The net result is that both the estate and the beneficiaries have suffered as a consequence of the conduct of the administrators. There also appears to be a dispute as to the assets of the estate of the deceased. In order to establish the true status of the estate, it is necessary that both administrators render accounts and indicate the assets of the estate which they have collected in as part of their duties as administrators.

17. Bernard's 1st application seeks variation and setting aside of the order of 30.1.19. The law relating review of orders is set out in Order 45 of the Civil Procedure Rules as follows:

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

18. By dint of Rule 63 of the Probate and Administration Rules, Order 45 of the Civil Rules is applicable herein being a succession matter. Rule 63(1) provides:

Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

19. The order of 30.1.19 was given by consent of the parties. The consent was duly signed by the respective counsel for Bernard and Carren. The law on variation of a consent judgment or order is now settled. **The Court of Appeal's holding in Flora Wasike v. Destimo Wamboko (1982 -1988)1 KAR 625 and Brooke Bond Liebig v. Mallya 1975 E.A. 266 was to the effect that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside. The grounds for setting aside a consent order would include fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts.**

20. In the case of Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited [2015] eKLR, the Court of Appeal while considering an application to set aside a consent judgment had this to say:

Consequently, the variation of a consent judgment at the instance of counsel's conduct can only succeed due to the general factors that would vary an agreement. This Court adopted the judgment of Harris J. R in the case Kenya Commercial Bank Ltd v. Specialised Engineering Co. Ltd (1982)KLR P. 485 and held that:

“A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the Policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.

In the same case the Court further held that:

“An advocate has general authority to compromise on behalf of his client as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding”.

21. In the instant case, the consent of 30.1.19 was duly signed by counsel for both Bernard and Carren. It is noted that at the time the consent was recorded, Bernard had not changed advocates. Indeed Bernard submitted that the said advocate had authority to represent him. He however says that counsel did not have instructions to record the said consent. My finding however is that the said advocate had general authority to compromise on Bernard's behalf as long as he was acting bona fide and not contrary to express negative direction. Bernard has not demonstrated any fraud on the part of his erstwhile counsel, nor has he proffered any proof that his erstwhile counsel acted *mal fides* and contrary to any express negative direction. In the absence of proof of fraud or any express negative direction, the order remains binding on all parties. Consequently Bernard's first application dated 13.2.19 for setting aside the consent order of 30.1.19 is hereby dismissed.

22. Bernard in his 2nd application seeks that Carren be removed as an administrator of the estate of the deceased and that R or any other person be appointed in her place. It was submitted for Bernard that Carren was not a widow of the deceased and that she has wasted the estate of the deceased by abandoning and destroying a packaging machine belonging to the estate. In spite of receiving Kshs. 1.2 million from the estate, she has caused the accrual of rates arrears on a property of the estate to the tune of Kshs. 7.9 million. In a word, she is not fit to be an administrator.

23. The Law of Succession Act does not envisage removal of an administrator in the manner proposed by Bernard. When for whatever reason a party seeks to have an administrator of an estate of a deceased person stripped of that role, such party must apply through summons, for the revocation of the grant issued to the administrator. It is trite law that where an established statutory procedure for redress of any grievance exists, a party must strictly follow the same in order to be deserving of any relief sought. This was the holding in Speaker of the National Assembly v James Njenga Karume [1992] eKLR where the Court of Appeal stated:

In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.

24. A clear procedure has been set out in Section 76 of the law of Succession Act and Rule 44 of the Probate and Administration Rules for the revocation of a grant of representation. These are the provisions under which the Bernard ought to have moved the Court for revocation of the Grant issued to him and Carren. Such an application for revocation can then only be heard after all beneficiaries of the estate have been served and given an opportunity to respond thereto. The appointment of any other person as an administrator must also be with the consent of all other beneficiaries. In short, the prayers sought by Bernard cannot be granted.

25. This is an old matter which needs to be concluded expeditiously. In exercise of the Court's inherent powers, I make the following orders which are necessary for the ends of justice:

- i) The Application dated 13.2.19 seeking the setting aside of the order of 30.1.19 is hereby dismissed.
- ii) The Application dated 13.2.19 seeking the removal of Carren as an administrator of the estate of the deceased is hereby dismissed.
- iii) Bernard Otieno Oonga and Carren Anyango Opiyo shall each each within 60 days, that is to say by 20.11.19, 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 from 21.7.09 up to the date of the account.
- iv) The accounts to be produced shall be in affidavit form, supported by appropriate documentation.
- v) Bernard Otieno Oonga and Carren Anyango Opiyo shall each file a list of assets and beneficiaries of the estate of the deceased as well as a mode of distribution within 60 days, that is to say by 20.11.19.
- vi) Mention on 27.11.19 to confirm compliance and for directions.
- vii) Costs shall be in the cause.

DATED, SIGNED and DELIVERED in MOMBASA this 20th day of September 2019

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondents**

..... **Court Assistant**