



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 18 OF 2019

IN THE MATTER OF THE ESTATE OF PETER MUIA NDUNDA (DECEASED)

ZUENA NGANDO KABABU.....OBJECTOR/APPLICANT

VERSUS

LITHER PETER MUIA.....1ST RESPONDENT/PETITIONER

ROSE PETER MUIA.....2ND RESPONDENT/PETITIONER

RULING

1. This succession cause has been in the courts since 2004, when the petitioners petitioned for grant of letters of administration intestate on 17th September, 2004. Summons for confirmation of grant were filed on 18th November, 2005 and the Objectors filed a summons for revocation of grant on 21st April, 2005 seeking that the grant issued to the petitioners be revoked which application was dismissed. The objector lodged an appeal in the court of appeal the court and vide judgement delivered on 20th December, 2017, the court revoked the grant that was issued on 15th October, 2004 and directed that the matter be referred to the high court for issuance of letters of administration and distribution of the estate to include the objector and her children. The applicant through her advocates filed the present application dated 29.5.2019 under Section 45 and 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules seeking the following substantive orders:

a. That the grant of administration do issue and the representation be effected in terms of the order that was issued in Civil Appeal No 10 of 2017.

b. That pending the hearing and determination of the summons and distribution of the estate, the 1st and 2nd petitioners be restrained from intermeddling with the deceased's properties namely Machakos Town/ Block 11/78 and 247; Machakos Town Block 1/94 and 269; Plot No. 3 and 21 Mukuni and any other property of the deceased.

c. That the 1st and 2nd petitioners be ordered to deposit in court the proceeds of sale of Lukenya Plot 371 and 191; Motor Vehicle KAA 456Z and any other property belonging to the estate.

d. That the 1st and 2nd Respondents be ordered immediately to deposit in court the rents and any other income collected or accruing on behalf of the deceased's estate on the premises situated on Machakos Town/ Block 11/78 and 247; Machakos Town Block 1/94 and 269; Plot Numbers 3 and 21 Mukuni and any other property of the deceased.

2. The main grounds for this application as stated in a supporting affidavit thumb printed by the applicant on 29th May, 2019, were that the Court of appeal revoked the grant issued to the 1st and 2nd petitioners as per the judgement annexed to the affidavit. Further, that the deceased left a vast estate and the 1st and 2nd petitioners listed few assets, that was Machakos Town/ Block 11/78 and 247; Machakos Town Block 1/94 and 269 and left out Plot Numbers 3 and 21 Mukuni and therefore it is fair and just that the orders sought be granted. The applicant averred that she had never been served with a citation.

3. The petitioners in response filed a replying affidavit sworn on 20th June, 2019 where the 1st petitioner deposed inter alia: that the application is frivolous, vexatious: the applicant has not named any of the would be administrators to be appointed; there is no evidence to support the allegations that some of the properties belonged to the deceased; there is no evidence to support the allegation that there was sale of the properties disputed and that there is no basis for the grant of the orders sought.

4. The application was canvassed orally. Learned counsel for the applicant submitted that the application seeks to preserve the estate of the deceased as per paragraph 3 of the summons and that the petitioners had sold the properties of the deceased hence they ought to be ordered to

deposit the proceeds of the sale and the estate of the deceased ought to be protected. Learned counsel for the petitioners submitted that since the revocation of the grant, the petitioners ought to apply for a fresh grant and the process of appointment of an administrator is in progress and that no evidence has been tendered to show that the properties had been sold; no search had been presented before the court. The objector's counsel in rejoinder submitted that there is nothing to prevent the court from issuing orders for preservation of the estate of the deceased as parties canvass other rival issues since no prejudice will be suffered by the petitioners.

5. Having considered the pleadings and the rival submissions, the issues to be addressed are as follows:

- a) **Whether the petitioners intermeddled in the estate of the late Peter Muia Ndunda by illegally selling off his various properties.**
- b) **Whether the objector is entitled to the orders sought**
- c) **What remedies are available to the parties**

6. It is a cardinal principle of law all civil cases under Section 107(1) of the Evidence Act that whosoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts are in existence. It is further a cardinal principle of law that in civil suits all evidence is proved on a balance of probabilities. See the cases of **Miller V Minister of Pensions [1947] 2 All.E.R 372**

7. In view of the above issues and of matters pertaining to this suit, I am inclined to make some general statements of law which will become applicable later in this ruling. The first statement is the question of intermeddling. Section 45 of the Law of Succession Act CAP 160 bears a description of such a person and states as follows:

“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”.

8. An inter-meddler becomes an executor **de son tort**. By virtue of the revocation of the grant vide judgement of the Court of Appeal, there was as of 20th December, 2017 no administrator of the estate of the late Peter Muia Ndunda. With regard to the first issue, counsel for the applicant stated that the petitioners sold off properties of the deceased; learned counsel for the petitioners submitted that there was no such evidence, there was no search annexed and as such the applicant was not entitled to the orders sought. The applicant listed Machakos Town/Block 11/78 and 247; Machakos Town Block 1/94 and 269; Plot NO 3 and 21 Mukuni and any other property of the deceased and there is no evidence that the title deeds have changed names, that anyone has purchased the properties from the petitioners, hence the applicant merely alleged that the petitioners sold the land but had no proof. In that regard the court is unable to make a finding as to whether the petitioners did engage in actions that amount to intermeddling. There is no sufficient evidence that can compel the court to make a finding with respect to prayer 3 of the application. I further find that the prayers 4 and 5 in the application must fail.

9. By lodging this application and seeking prayer 2, the applicant sought to compel the court to issue a grant in terms of the order in Civil Appeal No. 10 of 2017. If this Court were to allow this prayer, it would be blessing a disregard of Section 51, 67 and 68 of the Law of Succession Act that provides for the procedure for applying for a grant. Indeed the Court of Appeal in its judgement directed that the matter be referred back to the High Court for purposes of issuance of letters of administration and subsequent distribution of the deceased's estate to include the applicant herein and her children. This then requires the parties herein to proceed and lodge the requisite application for letters of grant as directed. It is upon the issuance of grant that further substantive orders can be made as by then the court would have been appraised of the nature and extend of the deceased's estate. Therefore I decline to grant the said prayer and advise the applicant to make a formal application for grant as per the Law of Succession Act.

10. Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules enjoin the court to exercise inherent jurisdiction to make orders as are necessary to meet the ends of justice. Upon analysing the facts on record, I find and hold that the application fails and is dismissed with no orders as to costs. To that extend I issue the following orders namely:

- a) ***The family do sit down and agree on the mode of distribution of the estate as well as the persons to be appointed as administrators of the estate***
- b) ***The parties after fulfilling (a) above do file a fresh application for grant in respect of the estate of the deceased and indicate all the properties of the deceased.***
- c) ***If no action is taken by the parties herein within the next sixty (60) days this court will proceed to appoint the administrators so as to fast track this old matter.***

It is so ordered.

Dated and delivered at **Machakos** this **19th** day of **September, 2019**.

D.K. Kemei

Judge