



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

P&A CAUSE NO. 932 OF 2012

IN THE ESTATE OF THE LATE NICKSON MALA KITHYOMA (DCD)

MARY NDINDA KITHYOMA1ST PETITIONER/APPLICANT

VERSUS

RUTH MUTIO KIOKO2ND PETITIONER/RESPONDENT

RULING

1. The 1st Petitioner/Applicant has filed an Application dated 15/2/2017 seeking the following prayers:-

(i) That the court does summon the legal officer from the Public Trustee Nairobi or the officer in charge of the file of the deceased herein NICHOLAS MALA KITHYOMA to appear in court and account for the proceeds of the estate received from Civil Servant Group Accident Cover.

(ii) That all documents used by the 2nd Petitioner herein to acquire funds from the Civil Servant Group Accident Cover be availed in court for authentication.

(iii) That the grant of letters of administration intestate made on 11th day of December, 2012 to Ruth Mutio Kioko and herself and confirmed on 29/07/2013 be amended to include proceeds from Civil Servant Group Accident Cover.

(iv) That the costs of the application be paid by the Respondent.

2. The application is supported by the affidavit of the 1st Petitioner/ Applicant sworn on even date and further by grounds on the face thereof. The Applicant's case is that the 2nd Petitioner concealed the existence of savings from the Civil Services Group Accident Cover which belonged to the deceased amounting to **Kshs.4 million** which was disbursed through the Public Trustee. It is further the Applicant's case that the 2nd Petitioner has proceeded to acquire and/or withdraw a portion of the said monies to the exclusion of the Applicant despite the fact that she has equal rights. The Applicant now wants the Public Trustee to account for all the proceeds of the estate of the deceased emanating from the Civil Servant Group Accident Cover. The Applicant also seeks that the Respondent do avail the documents used in acquiring the funds from the Civil Servant Group Accident Cover for perusal by the Court. Finally it was the Applicant's case that her interests have not been taken care of in the said grant yet she was a dependant of the deceased prior to his death.

3. The Application was strenuously opposed by the 2nd Petitioner/Respondent who raised several objections to the Application *inter alia*: that the estate was distributed with finality on 26/07/2013 and a certificate of confirmation of grant issued; that the Applicant was not a dependant of the deceased but was given a token on humanitarian grounds; that the 2nd Petitioners and her son are the only lawful beneficiaries of the deceased solely entitled to inherit everything in terms of Section 35(1) of the law of Succession Act; that the proceeds from the Civil Servant Group Accident Cover were strictly meant and intended for the deceased's widow and child as they were the only dependants.

4. The Application was canvassed by way of written submission. Learned counsel for the 1st Petitioner/Applicant first submitted that this court has jurisdiction to grant the orders sought since it is empowered by Section 47 of the Succession Act and that an order for accounts is legitimate and is backed by Section 83 of the same Act. It was further submitted that the Petitioners herein had jointly petitioned for letters of grant of probate as administrators and beneficiaries which were indicated expressly on the petition documents (P&A 5 forms) and that the said grant was subsequently confirmed on 26/07/2013 after the Petitioners had agreed on the distribution of the estate which then comprised of a **motor vehicle** and a **bank account at Kenya Commercial Bank**. However in view of the discovery of new assets namely Kshs.4,093,344/= from the Civil Servant Group Accident Cover, the same ought to be included as part of the assets of the deceased and redistributed according to the ratio earlier agreed upon since the same was not distributed by this Honourable court. It was submitted that the Respondent has illegally misappropriated the said sum to the detriment of the Applicant. It was submitted that the Respondent has illegally misappropriated the said sum to the detriment of the Applicant. It was also submitted that the Applicant was a dependant of the deceased

since she was being maintained by the deceased who was her only son and was thus covered by Section 29 of the Law of Succession Act and evidenced by the fact that she was allocated ¼ of the assets during the confirmation of grant.

Finally, Learned Counsel for the Applicant submitted that the Respondent being an administrator should render an account of how she managed the proceeds from the Civil Servant Group Accident Cover as per the provisions of Section 83 of the Law of Succession Act and relied on the case of in **Re Estate of Teresia Wanjiru Thuo (deceased) [2016] eKLR** where it was held that where more than one administrator is appointed then all of them are expected to administer the estate jointly in consultation with each other.

5. Learned Counsel for the 2nd Administrator/Respondent submitted that the Application is an abuse of the court process since the Applicant was not a dependant of the deceased who left behind the 2nd Administrator and one child. It was submitted that even though the Applicant was not a dependant, the Respondent gave her a token in the form of a ¼ share of money in a certain bank as per the certificate of confirmation of grant and this was despite the clear provisions of Section 35 of the Law of Succession Act. It was also submitted that the Applicant is actuated by malice and caprice and is out to frustrate the Respondent for no apparent reason. It was further submitted that the provisions relied upon by the Applicant do not donate power to this court to grant the prayers sought and hence the application should be dismissed with costs. The counsel sought reliance in the case of **Estate of Joshua Orwa Ojodeh (deceased) [2014] eKLR**.

6. I have considered the application as well as the rival affidavits. I have also considered the submissions of learned counsels. There are certain issues which appear not to be in dispute. Firstly, both the Petitioners herein had jointly petitioned for letters of probate and that they together with the child of the deceased were named as dependants of the deceased vide forms P&A5. Secondly, during the confirmation of grant all the said three dependants were allocated their shares of the assets as captured in the certificate of confirmed grant. Up to that stage everything seemed to end happily for both petitioners until the Applicant discovered a new asset belonging to the deceased in the form of compensation pursuant to the Civil Servant Group Accident Cover which apparently was being administered by the Public Trustee. Thirdly the 2nd Petitioner/Respondent confirms the existence of the said new asset vide paragraph 11 of her replying affidavit but maintains that the said monies amounting to Kshs.4,093,344/- should solely be given to the Respondent and her child because they were the only dependants of the deceased. Fourthly, the said new asset forms part of the estate even though the same had not been captured and distributed by the court. Fifthly there is no dispute regarding the distribution of the two assets vide the confirmation issued on 26/07/2013. That being the position, I find the following issues necessary for determination namely:

(i) Whether the court has jurisdiction to entertain the Applicant's Application.

(ii) Whether the Applicant was a dependant of the deceased and entitled to benefit under the estate.

(iii) Whether an order for accounts should issue to both the Public Trustee and the Respondent over the administration of the new asset namely Kshs.4,093,344/- being compensation under the Civil Servant Group Accident Cover.

(iv) Whether the confirmed grant issued on 26/07/2013 should be rectified to include the proceeds from the Civil Servant Group Accident Cover.

7. As regards the first issue, I note that the Applicant's application is predicated upon Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules which mainly deal with the aspect of revocation and/or annulment of grants. However, a cursory look at the application reveals that the prayers being sought are not related at all to revocation or annulment of grant. It is thus clear that the provisions cited by the Applicant are not related to the prayers sought. She has relied on wrong provisions. Can the court at this stage find the application as defective and proceed to strike it out? I am reluctant to do so on the ground that this being a succession matter involving members of one family the court must do substantive justice and overlook defects which do not cause any prejudice. This is so because despite the wrong provisions cited, the Applicant's prayers and affidavits in support are succinctly clear as to what reliefs she is seeking. Again, Article 159 (2) (d) of the Constitution mandates the courts to do substantive justice and not to pay regard to procedural technicalities. Further Rule 73 of the Probate and Administration Rules provides that the court has inherent powers to make such orders as may be necessary for the ends of justice to prevent abuse of the court process. I am also guided by the provisions of Section 47 of the Law of Succession Act which grants the High Court wide and unlimited jurisdiction to make any orders necessary for the ends of justice to be met as follows:-

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders as may be expedient.”

Even though the Applicant has cited wrong provisions of the law in support of her application, I find that she has disclosed that indeed there is a dispute between her and her co-petitioner over the distribution of the assets of the deceased. The dispute appears to be one under the Law of Succession Act and which warrants this court to consider the same and make a determination thereon. Consequently, I find that this court has jurisdiction to entertain the Applicant's application.

8. As regards the second issue, I note that the Applicant has described herself as the mother of the deceased herein and that the deceased was her only child and who supported her prior to his demise. Learned counsel for the Applicant has sought reliance on Section 29 of the Law of Succession Act and maintained that the Applicant is a dependant and ought to have a share of the estate of the deceased. On the other hand counsel for the Respondent relied on Section 35 of the said Act and submitted that the Applicant does not fall within the ambit of a dependant and therefore she should not inherit the assets of the deceased since the only surviving beneficiaries are the 2nd Administrator/Respondent and her child.

Section 29 of the Law of succession Act defines a dependant as follows:-

“For the purposes of this part, dependant means:-

(a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death.

(b) Such of the deceased's parents, step parents, grand- parents, grand children, step children, children shown the deceased had taken into his family as his own, brothers and sisters, and half- brothers and half- sisters, as were being maintained by the deceased immediately prior to his death.

Section 35 of the Law of Succession Act appears to favour the Respondent by virtue of being the surviving spouse plus her child and who are entitled to the estate of the deceased. The same provides as follows:

“35(1) Subject to the provision of Section 40, where an intestate has left one surviving spouse and a child or children the surviving spouse shall be entitled to:-

(a) The personal and household effects of the deceased absolutely; and

(b) A life interest in the whole residue of the net intestate estate provided that, if the surviving spouse is a widow, that interest shall determine upon her remarriage to any person.

(2).....

(3).....

(4).....

(5) Subject to the provisions of Section 41 and 42 and subject to any appointment or award made under this Section, the whole residue of the net intestate estate shall on the death, or in the case of a widow, remarriage of the surviving spouse, devolve upon the surviving child if there be only one, or be equally divided among the surviving children.”

From the above provision, it is clear that the Applicant's chances are slim in view of the fact that there is a surviving spouse and child. The only avenue for the Applicant might be through Section 26 of the Law of Succession Act where reasonable provision may be obtained if the Applicant proves that she was a dependant and being maintained by the deceased prior to his death. The same provides as follows:-

“26. Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provision of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law is not such as to make reasonable provision for that dependant order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.”

A perusal of the initial forms P&A5 reveals that the Applicant and Respondent jointly petitioned for letters of probate. The Applicant herein is listed as a dependant alongside the Respondent and the child. Both parties herein agreed on the distribution as per the certificate of confirmation of grant where the Applicant is allocated a quarter (¼) share just like the Respondent while the minor was allocated a half. I find the conduct of the Respondent in allowing the Applicant to be a joint administrator as well as a beneficiary is clear proof that the Applicant had been maintained by the deceased prior to his death. The Applicant has disclosed that the deceased was her only child upon whom she relied for support. The Respondent was aware of those circumstances and did not object to her being made a dependant. I am therefore unable to agree with the Respondent's assertion that she only gave the Applicant a token. Indeed the shares of both Applicant and Respondent appear equal (¼). Had the Respondent intended otherwise then she could have allowed her to have less than herself but she did not do so implying that both had agreed to have equal shares. Had the Applicant not been considered as a dependant, this court could have ordered that such reasonable provision be made for her out of the deceased's net estate. I find that the Applicant has established that she had been maintained by the deceased prior to his death.

In African customs most parents especially the elderly ones rely heavily on their children for support and upkeep and hence the Applicant's circumstances are not different. Her claim that she had been a dependant must be accepted. The Respondent all along has treated her as such going by the fact of involving her as a co-administrator as well as a beneficiary. Hence the Respondent's turn around and denying that the Applicant is a beneficiary smacks of malice against the old lady. It seems the Respondent has now viewed the Applicant as an albatross around her neck and wants her out of the estate of the deceased. This amounts to literally throwing the Applicant under the bus and which is quite unfair and unfortunate bearing in mind that the two had petitioned for letters of probate and conducted the confirmation of grant peacefully and without any acrimony. I am satisfied that the Applicant was a dependant of the deceased and entitled to benefit under the estate.

9. As regards the third issue, it has transpired that there is a new asset which had not been captured during the confirmation of grant. The new asset comprises of a sum of Kshs.4,093,344/- being compensation to the deceased and which is under the Civil Servant Group Accident Cover. The Applicant wants this money distributed by the court just like the others while the Respondent maintains that she and her son are to benefit out of the said monies. The Respondent vide paragraph 11 of her replying affidavit admits that the said monies were strictly meant for her and her son and not any other person. This then implies that the existence of the money is not in doubt and that the Respondent seems to suggest that she has already accessed the money in the absence of the Applicant who is a joint administrator.

One of the major tasks required of administrators managing estates of deceased persons is the rendering of accounts. This is a statutory duty from which no derogation should arise. The issue of rendering accounts is captured in Section 83 of the Law of Succession Act. Some of the salient provisions thereof regarding the duties of personal representatives are as follows:-

(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.

(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 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 upto the date of the account.”

From the above provisions, it is clear that the Applicant and Respondent as joint administrators were expected to administer the estate and to render accounts as and when required. The Applicant has urged this court to compel the Respondent to render accounts and to shed light on the whereabouts of the compensation monies. She has also sought for an order that the Public Trustee be ordered to render an account over the said compensation monies. As the monies were not distributed by the court, I find the Applicants request merited. Hence the Public Trustee and the Respondent must render accounts regarding the proceeds from the Civil Servant Group Accident Cover as the same should form part of the estate of the deceased. The Respondent who appears to grumble over being pestered and followed around by the Applicant over the new asset must understand that both of them were required to jointly administer the estate as it is a joint effort of the two of them and ought to consult now and then until the administration is completed. Once the accounts are rendered this court will then be in a position to give directions on how the new asset would be distributed.

10. As regards the fourth issue and in view of the above observations, the discovery of the new asset namely compensation monies from the Civil Servant Group Accident Cover, makes it imperative that the confirmed grant issued on the 26/07/2013 ought to be rectified so as to reflect the new property once the accounts have been rendered as sought in prayer (1) and (2) of the application dated 15/2/2017.

11. In the result I find merit in the Applicant’s application dated 15/2/2017. The same is allowed in terms of prayers (1), (2) and (3) thereof. The Public Trustee Nairobi and the Respondent are hereby ordered to render accounts relating to the compensation awarded to the deceased vide the Civil Servant Group Accident Cover within (30) days. As parties are members of one family, I order that each do meet their own costs.

Orders accordingly.

Dated and delivered at Machakos 8th this day of October, 2019.

D. K. Kemei

Judge