



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**PROBATE AND ADMINISTRATION CAUSE NO. 254 OF 2007**

**JOEL RUGUT .....1<sup>ST</sup> PETITIONER**

**MILKA RUGUT..... 2<sup>ND</sup> PETITIONER**

**VERSUS**

**PHILEMON KIPTANUI SITIENEI..... APPLICANT**

**RULING**

The applicant submitted an application for revocation of grant on 26<sup>th</sup> September 2019.

**APPLICANT'S CASE**

The applicant filed his submissions on 3<sup>rd</sup> October 2019. He submitted that he is seeking to reopen the proceedings as he has shown that he was not aware of the occurrences that led to the filing and closure of this matter hence the interests of other beneficiaries were not catered for.

The inherent power of the court to set aside orders closing the matter during the judicial service week were discussed in *Re Estate of Mbithi Nzuki [2015] eKLR*. In his affidavit the applicant has shown that the other beneficiaries were not aware of the notice issued under *Section 73* of the *Law of Succession Act* and thus the applicant was a beneficiary to the estate who did not consent to the administration of the estate. The failure to move the court for revocation of the grant was not deliberate.

After reopening the proceedings, the petitioners will not be persons suitable to be reissued with the grant for the following reasons;

- a) They failed to respond to the courts' notice under *Section 73* of the *Act* that led to the revocation of the grant issued in their favour and led to the closure of this matter.
- b) They failed to appear in court and defend their suitability to administer the estate.
- c) They have failed to render an account of the Estate during the tenure of their administration.
- d) They have failed to answer questions as to how they obtained the consent of the applicant and other beneficiaries who have since indicated that they were not aware of the succession cause herein as per annexures PKS-3 & 11.
- e) Their acts and omissions above meet the threshold for revocation of a grant under *Section 76* of the *Succession Act*.

The prayers are interlinked with a prayer for filing a further affidavit to show the true assets and liabilities of the deceased's estate. Annexure PKS-8 shows that the petitioners were not truthful in their depositions and left out commercial property belonging to the deceased. A new affidavit should be sworn by the applicant or any other person appointed as administrator to bring to the court's notice the true definition of the property in these proceedings.

To finally determine the rights of the beneficiaries and the obligations of the petitioners during their tenure as administrators a prayer of rendering of a probate account is necessary considering they administered the estate for 12 years and received a substantial amount of the estate's income without distributing it to the beneficiaries or accounting for the same. They cited *Section 83* of the *Act* and submitted that the matter closed before they could declare if they undertook their duties.

As per annexure PKS-1 the applicants have shown that the petitioners charged the property known as Eldoret Municipality Block 1/163 but the income from those transactions have never been accounted for.

The application is well founded as it seeks to ensure full administration of the deceased's estate is undertaken and each beneficiary granted the opportunity to be heard and have the estate administered to its logical conclusion.

## **RESPONDENT'S CASE**

The respondents did not file any submissions or any response to the application.

## **ISSUES FOR DETERMINATION**

- a) Whether the court should reopen the proceedings in this cause.
- b) Whether the court should appoint the applicant as the administrator of the estate
- c) Whether the applicant should be granted leave to file a further affidavit in support of the petition for letters of administration intestate
- d) Whether the petitioners should file a proper probate account relating to their tenure as administrators
- e) Whether the court should give directions on the legal distribution of the deceased's estate

## **WHETHER THE COURT SHOULD REOPEN PROCEEDINGS IN THIS CAUSE**

The applicant who claims to be a beneficiary to the estate claims that he was

not aware of the proceedings in the cause. They provided evidence of the steps they took after discovering that the succession proceedings had been conducted as annexures PKS 3,6 and 11. The respondent has not provided any proof that the applicant was aware of the proceedings in any way whatsoever. The court should therefore reopen the proceedings in the interest of justice. In the case of *Kimani v McConnell (1966) EA 547* the court held;

**“In light of all the facts and the circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms imposed.”**

## **WHETHER THE COURT SHOULD APPOINT THE APPLICANT AS ADMINISTRATOR**

The petitioners did not respond to the notice to confirm the grant under *Section 73* of the *Act*. Further, the petitioners did not appear in court to defend their suitability to administer the estate of the deceased. They have not rendered an account as to the tenure of their administration of the estate. They have also not provided any response on how they acquired the consent of the applicant or other beneficiaries.

*Section 76* of the *Law of Succession Act* provides;

**A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—**

- (a) that the proceedings to obtain the grant were defective in substance;
  - (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
  - (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
  - (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—
    - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow;
- or**
- (ii) to proceed diligently with the administration of the estate; or
  - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
  - (e) that the grant has become useless and inoperative through subsequent circumstances.

The petitioners left out material description of the commercial property owned by the deceased as evidenced by annexure PKS-1(a) and (b). The affidavit in support of the petition annexed as PKS-8 does not contain the full description of the properties. The grant should be revoked and the applicant appointed as administrator, after which a further affidavit should be filed to show the assets and liabilities of the estate.

**WHETHER THE PETITIONER SHOULD FILE A PROBATE ACCOUNT RELATING TO THEIR TENURE AS ADMINISTRATORS**

*Section 83(h) of the Law of Succession Act* provides;

**Personal representatives shall have the following duties—**

**(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;**

The petitioner did not provide any accounts of the administration of the estate in response to the application. I find that they should provide the same as it is their duty as administrators.

**WHETHER THE COURT SHOULD GIVE DIRECTIONS ON DISTRIBUTION OF THE ESTATE**

Given that there is no proper account of the assets and the income collected from the estate, such need be met by the former petitioners before the applicants can be given a period within which to agree on a mode of distribution of the assets as the new petitioners.

I however note that as per the consent annexed as PKS-12 (c) there is one signature missing on the consent to taking out of the grant by the applicant. That notwithstanding, given that the application is unopposed, I find that the applicant has met the requirements for the application.

In the premises the applicant is appointed the administrator and the petitioners ordered to render an account of the income from the estate. A further affidavit should also be sworn listing the assets and liabilities of the estate. The beneficiaries are to agree on a mode of distribution after all the information has been provided.

The application is merited and is therefore allowed as prayed.

Cost be in the cause.

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 16<sup>th</sup> day of December, 2019.**

In the absence of:-

Mr. Kimaru for the Respondent

And presence of Miss Kogo holding brief for Mr. Lan'gat for the Applicant

Ms Abigael - Court clerk