



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 50 OF 2011

IN THE MATTER OF THE ESTATE OF BARDSLEY ZEPHANIA MSAGHA (DECEASED)

MARTN MSAFARI MSAGHA APPLICANT

VERSUS

DOROTHY MKAWANA MSAGHA RESPONDENT

RULING

1. Bardsley Zephania Msagha, (“the Deceased”) herein died testate on 29.11.10 at the Nairobi Hospital. In his Will dated 4.2.94, the Deceased appointed his widow Dorothy Mkawana Msagha (“the Respondent”) as the executrix thereof. The Respondent filed a petition for a grant of probate of written will on 17.2.11. She stated that the Deceased was survived by herself, his mother, 3 sons and 4 daughters. He also left several properties. Grant of Probate (“the Grant”) was issued to the Respondent on 16.6.11. The Grant was confirmed on 9.3.12 and the estate of the Deceased was to be distributed as per the Will.

2. By an application dated 19.9.17 (“the 1st Application”), Martin Msafari Msagha (“the Applicant”) a son of the Deceased and step son of the Respondent seeks the following:

1. THAT the Respondent of the Estate to produce in Court a full and accurate inventory Account (sic) of all dealings therewith up to the date of the Account.

2. THAT the Respondent to distribute the estate to the Beneficiaries all the money acquired in Shares, Rent and Assets.

3. THAT costs of this Application be in the cause.

3. The Applicant avers that the Grant though confirmed on 9.3.13 the Respondent has failed to distribute the estate and has also not produced accounts as required by law. The Applicant further asserts that as a result of this failure on the part of the Respondent, he and his siblings were living in destitution and as beggars in the streets of Mombasa. All income from the estate has been going to the Respondent. The Applicant further claims that the following properties belonging to the estate were omitted from the proceedings herein:

i) House along Lahar Wadhar Street, Majengo Stadium leased to a school.

ii) Management of Integrated Service Limited in Ruaraka, Nairobi where deceased was a shareholder.

iii) A house in Mtwapa, Mombasa.

iv) A vehicle.

4. The Applicant prayed that the estate be distributed amongst the children of the Deceased.

5. The Respondent opposes the Application by her Replying Affidavit sworn on 14.11.17. She avers that the Deceased in his Will indicated that all his properties be registered in her name. She further states that despite the acrimonious relationship between the Applicant and the Deceased, upon completion of his education, he was given the house built by the Deceased on his father’s land. The Applicant has been collecting rent from some of the houses built by the Deceased on his father’s plots. The Respondent further states that proceedings relating to the estate of the Deceased’s father in Succession Cause No. 59 of 2004 are still pending before this Court. She denied that the Applicant and his sister Faith Zhige are living as beggars. She further denies that the Applicant and his sister were dependent upon the Deceased. That in fact the Applicant and the Deceased were not on talking terms prior to his demise. The Applicant neither participated nor attend his own father’s funeral. She listed all the properties known to her at the time of filing the petition and is unaware of the properties listed in the Application herein. She denies collecting any rent from the properties built by the Deceased on his father’s plots which rents are being

collected by the Applicant and the Administrators of the estate of the Deceased's father. The properties in the estate were to be registered in the Respondent's name to prevent intermeddling by the Applicant and further to cater for her needs and cater for the education of the Deceased's children which she has done and all have completed their college education.

6. By a Summons dated 18.12.17, ("the 2nd Application") Martin Msafari Msagha, the Applicant seeks the following:

1. That the grant of probate made to Dorothy Mkwana Msagha on 16th day of June 2011 and confirmed on 12th day of March 2012 be revoked.

2. That the administration of the said estate be handed over to the Public Trustee of the Republic of Kenya at Mombasa to administer to the heirs.

3. That DOLYPHINE KULOLA MSAGHA be made a beneficiary of the estate of BARDSLEY ZEPHANIA MSAGHA, being the first wife to the deceased.

4. That the following properties be made part of the estate:

a) The two Swahili houses without land on Plot No. 10, Barsheba, Kisauni, behind Benkey Estate (sic).

b) A Company at Ruaraka namely: Integrated Service Limited

c) Matrimonial home in Mtwapa.

d) Two motor vehicles

i) Mitsubishi Pajero

ii) Honda Exterior

5. That the Respondent be compelled to release a sum of Kshs. 6,000,000 from the estate for medical expenses of DOLYPHINE KULOLA MSAGHA.

6. That costs of this application be provided for.

7. This 2nd Application is premised on the grounds therein and on the facts contained in the Applicant's undated Supporting Affidavit. The Applicant avers that the proceedings to obtain the Grant were defective in substance. There was non-disclosure of the fact that the Deceased was a polygamous man and that Dolyphine Kulola Msagha (Dolyphine), who is the Applicant's mother, was dependent on the Deceased and survived him. According to the Applicant, Dolyphine as the surviving 1st widow is entitled to a life interest in the estate of the Deceased and has the strongest claim to the matrimonial home in Mtwapa. Dolyphine has been diagnosed with neoplastic disease and is bed ridden and wheelchair bound. She requires Kshs. 5,000,000/= for treatment and upkeep. The Applicant further claims that the Respondent has sold the Deceased's shares from various companies in the sum of Kshs. 39,371.106/=. She has also collected rent totalling to the sum of Kshs. 37,936,000/= from various properties forming part of the estate of the Deceased. In spite various requests from the family and the local chief and district officer, the Respondent has failed to distribute the estate of the Deceased.

8. The Respondent in her Affidavit sworn on 16.1.18 denies that the Deceased was a polygamous man or that Dolyphine is a surviving widow. The Deceased and Dolyphine were married in 1982. She however deserted him in 1985 and left all her children including the Applicant with the Deceased. The marriage was dissolved on 7.3.06 on account of Dolyphine's desertion. Decree nisi was made absolute on 26.9.06. Dolyphine married another man in Mwatate with whom she had a daughter now an adult. The Respondent sympathises with Dolyphine but asserts that she has no claim over the Deceased's estate. On the sale of shares, the Respondent confirms that she did sell the same but at Kshs. 2,769,790/= and not Kshs. 37,371,106/= as alleged by the Applicant. She also denies allegations of collecting rents from the properties. She asserts that the Swahili houses in Beersheba belong to her and not the estate. The deceased did not own a house in Buxton but was a tenant. Plots 4163 and 4079 are both undeveloped and no rental income is derived therefrom. Although the house on Plot No. 2161, Shanzu Settlement Scheme was built by the Respondent and the Deceased, the rent therefrom is collected by the administrators of the estate of Javan Kitogho Mwakiwo, the Deceased's father. The Plot is in the name of Javan Kitogho Mwakiwo. The house in Mtwapa belongs to the Respondent and not to the estate. She denies receiving any summons from the chief as alleged. She prayed that the Application be dismissed with costs.

9. In a further Affidavit, the Applicant denies that his mother Dolyphine deserted the Deceased. According to him, Dolyphine was married to the Deceased in 1978 and they lived together in Mombasa until 1985 when she went to live in their house in Mwatate. It is not true that Dolyphine was married to another man. Dolyphine and the Deceased had 3 children including himself. The Applicant asserts that the Executrix moved in with the Deceased in 1987 while he was still married to Dolyphine therefore he was a polygamous man. He further states that the decrees nisi and absolute were obtained without notice to Dolyphine. Further that the Deceased continued to maintain Dolyphine even after the divorce by giving the Applicant cheques for her maintenance. He reiterated that Dolyphine as the first wife had a beneficial interest in the estate of the deceased. The Applicant further reiterates that his father's shares were worth more than 39,742,235.30 as per the exhibited statement from Dyer and Blair Investments Bank Ltd which shows transactions from January 2006 to January 2011. The Deceased also had a Ugandan account with Dyer and Blair Investments Bank Ltd and the shares traded were more than Ushs. 231,459,425/= according to a statement from 21.12.06 to 20.6.07. The properties in the name of the Executrix were purchased by funds from the Deceased as the Executrix has never worked at any time to raise such funds. He further insists that the house in Buxton belonged to the Deceased and the Executrix failed to include it as part of the estate.

10. The parties filed written submissions as directed by the Court. I have carefully considered the Application and the rival affidavits and submissions. For convenience, I will consider the prayers in both applications together without separating them.

Prayer for production of inventory and accounts

11. Section 83 of the Law of Succession Act stipulates the duties of personal representatives. One of the duties includes completing administration of the estate and to produce to the Court a full and accurate account of the completed administration. Section 83(g) and (h) provide:

“Personal representatives shall have the following duties—

(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;”

12. The Applicant is aggrieved that the Respondent has not distributed the estate nor produced accounts since the Grant was confirmed. He now seeks an order that the Respondent distributes the estate and produces a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith. The Respondent for her part has submitted that she is ready to do so within such reasonable time as the Court may direct. It is not disputed that the Respondent has not produced accounts over 5 years after the confirmation of the Grant. This is an inordinately long period of time. The Court does however note her willingness to comply with the requirement in this regard and it is only fair that she be given an opportunity to do so.

Prayer for distribution to the Beneficiaries of all the money acquired in Shares, Rent and Assets

13. The Applicant claims that the Respondent has sold the Deceased’s shares from various companies in the sum of Kshs. 39,371,106/=. She has also collected rent totalling to the sum of Kshs. 37,936,000/= from various properties forming part of the estate of the Deceased. The Respondent asserts that she sold shares for Kshs. 2,769,790/=. She also denied that she received the kind of rents that the Applicant alleges.

14. The Applicant contends that due to the Respondent’s failure to distribute the estate, he and his siblings have been left destitute. The Respondent while denying this allegation submitted that the Deceased in his Will which remains unchallenged bequeathed all his property to her. But did he really? She further argues that distribution of the estate will be contrary to the wishes of the Deceased. To determine this issue, it is necessary to look at the wording in the Will of the Deceased:

“I, Bardsley Zephaniah Msagha alias Bazil Zephaniah Javan Msagha ... do solemnly declare my wife, Mrs Dorothy Mkawana Msagha ID No. 31987126/1164973/64 the sole executor and trustee of my entire estate in the event of my death.” (emphasis added).

15. From the foregoing, it is clear that the Deceased did not bequeath his estate to the Respondent nor did he make any specific bequest to any other beneficiary. He simply appointed the Respondent as executrix and trustee. Her role as executrix and trustee is governed by the provisions of Sections 82 and 83 of the Act. It is upon the production of the accounts that it shall be established whether the Respondent has complied with her obligations under the law. The amount of proceeds of rent and sale of shares will also be determined after the inventory and accounts have been filed by the Respondent.

Prayer for revocation of the Grant and issuance of Grant to Public Trustee

16. The law relating to revocation of grants is found in Section 76(b) of the Law of Succession Act which provides:

“ 76 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.”

17. The grounds upon which the Applicant seeks revocation of the Grant are that firstly, the proceedings were defective in substance in that the Respondent did not disclose that the Deceased was survived by Dolyphine his first wife. The Respondent claimed that Dolyphine deserted the Deceased and married another man with whom she had a daughter. No evidence was however laid before the Court to support this claim. I have looked at the documents exhibited by the parties. The marriage certificate exhibited by the Applicant shows that the Deceased and Dolyphine married on 31.12.82 at the Registrar's Office in Mombasa. The Respondent produced decrees nisi and absolute issued on 26.4.04 and 26.9.06 respectively thus confirming that the marriage between the Deceased and Dolyphine was indeed dissolved. The Respondent has also exhibited a marriage certificate between her and the Deceased showing that the marriage was solemnised on 27.12.06 at ACK St. Johns Buxton.

18. From the foregoing, it is clear that at the date of his demise, the Deceased was not married to Dolyphine but was married to the Respondent. The claim by the Applicant that the Deceased was polygamous because the Respondent moved in with him in 1987 while the Deceased was married to Dolyphine does not in my view hold water. Even if proof of this fact was produced to the Court, the mere act of moving in with the Deceased does not constitute a marriage. Further the documents produced do confirm that the Deceased's subsequent marriage to the Respondent was contracted after the dissolution of his marriage to Dolyphine. It is my view that the Respondent was under no legal obligation to list Dolyphine as one of the persons surviving the Deceased. The Court does note that the Respondent listed Dolyphine's children including the Applicant, and rightly so, as persons surviving the Deceased. I am satisfied that the Respondent disclosed all persons surviving the Deceased. The prayer for revocation on this ground therefore fails.

19. Failure to produce to the Court, within the time prescribed, any such inventory or account of administration as is required by the provisions of Section 83 of the Act is one of the grounds for revocation of grant. However due notice must be given to the holder of a grant who then fails without reasonable cause to comply with the aforesaid requirement. The Applicant submits that the Respondent failed to produce an inventory of the estate and accurate account of her dealings therewith after due notice. It is argued that the letters from the Chief of Chawia Location and District Officer Mwatate Division bringing her attention the concerns of the beneficiaries over her administration of the estate amount to due notice. To the Applicant, the argument that only a Court order to the Respondent to discharge her duties would be deemed to be due notice is a narrow interpretation of Section 76(d) of the Act. I have looked at the letters. Two letters dated 11.2.14 and 29.8.12 are addressed to the District Officer Mwatate Division and another letters dated 18.9.12 and 25.9.12 are addressed to the OCS Wundanyi Police Station and two by the chief of Chawia location. There is another letter dated 29.8.12 but the addressees are not indicated. The last letter is dated 19.9.12 in which the OCS Wundanyi Police Station directed the Respondent to avail herself at the chief of Chawia on 25.9.12 to settle a dispute with the bearers of the letter. The Court has no way of knowing who the bearers of the letters were. The above letters cannot in any way be said to be due notice to the Respondent as contemplated in Section 76(d) of the Act. In any event, due notice must be issued within and not outside the proceedings herein. Nothing has been placed before me to show that due notice had been given to the Respondent to produce such inventory or account of administration as is required by Section 83 of the Act. For the foregoing reasons, this ground also fails.

20. Having considered the submissions in respect of the prayer for revocation of the Grant, I find and hold that none of the grounds for revocation of grant which are statutory have been shown to obtain in the matter before me. Consequently the prayer fails and having so failed, it follows that the prayer for appointment of the Public Trustee in place of the Respondent also fails.

21. Prayer for inclusion of the listed assets as part of the estate

The Applicant seeks that the following assets be included as part of the estate:

- 2 Swahili houses without land on Plot No. 10, Barsheba, Kisauni behind Benkey estate.
- Integrated Service Limited a company at Ruaraka.
- Matrimonial home in Mtwapa.
- Motor vehicles, Mitsubishi Pajero and Honda Exterior.

22. The Respondent states that the 2 Swahili houses belong to her as she bought the same as evidenced by the exhibited agreement for sale. The house in Mtwapa is also registered in her name and a copy of title No. CR 28798 was exhibited. She is not aware of the other properties. The Applicant in a bid to controvert the claim by the Respondent asserts that it was the Deceased who bought the properties in the Respondent's name. According to him the Respondent was not engaged in any gainful employment to enable her raise funds for the purchase of the said properties. The aforesaid agreement and the title are in the name of the Respondent. The same cannot therefore belong the estate of the Deceased. I find the assertion by the Applicant that the Respondent could not have had the funds to purchase the properties rather weak. Further the certificate of marriage between the Respondent and the Deceased indicated that she was a businesswoman at the time of the marriage. As regards the other properties, nothing was placed before me to draw the conclusion that the same belong to the Deceased and should be included in the estate.

Prayer that Dolyphine be made a beneficiary of the estate and Kshs. 6,000,000/= be released to her for medical care and upkeep

23. The Applicant seeks recognition of his mother Dolyphine as a beneficiary of the estate as the first wife of the Deceased. Dolyphine suffers neoplastic disease and is bed ridden and wheelchair bound. The Applicant therefore seeks the release from the estate of the sum of Kshs. 6,000,000/= for her medical treatment and upkeep. In support of this prayer, it was submitted for the Applicant that even a former wife is deemed a dependant and is entitled to provision from the estate. Section 29 of the Act defines dependant as follows:

“29. Meaning of dependant

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) ...”

24. It is not disputed that the marriage between the Deceased and Dolyphine was dissolved in 2006. Although the Applicant states that Dolyphine had no notice of the same he did not support this claim by any evidence. Dolyphine did not herself swear an affidavit to that effect. The fact therefore remains that the said marriage is no more. Under Section 29 of the Act however, Dolyphine as a former wife of the Deceased is deemed to be a dependant and in fact need not prove dependency. Former wives are entitled under Section 26 of the Act to apply for provision either themselves or through someone else as Dolyphine has done through her son, the Applicant. This entitlement however is not absolute. Section 30 of the Act places a limitation as follows:

“30. Limitation of time

No application under this Part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by [section 71](#).”

25. The Grant was confirmed on 9.3.12. The present Application for provision ought to have been brought before confirmation. This Application brought over 5 years after confirmation is time barred and appears to be an afterthought. The Court has no jurisdiction to extend time for making an application for reasonable provision. The Application having been filed out of time cannot therefore be allowed.

26. Having evaluated all the material before me, I do find and hold that the Applications dated 19.9.17 and 18.12.17 lack merit save for the prayer for production of accounts. I therefore make the following orders:

- a) The Respondent shall within 60 days of the date hereof 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;
- b) The matter will be mentioned on 6.6.18 for compliance and for directions.
- c) This being a family matter, each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 6th day of April 2018

M. THANDE

JUDGE

In the presence of: -

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

..... **for the Respondent**

..... **Court Assistant**