



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

IN THE MATTER OF THE ESTATE OF CROMWELL MKUNGUSI (DECEASED)

SUCCESSION CAUSE NO.126 OF 2005

RULING

1. The application for consideration is the summons of confirmation dated 8th July 2016 brought under Section 71 (3) and 73 of the Succession Act and Rule 40(2) of the Probate and Administration Rules. The applicant Sera Mwang'ombe one of the Executor of the deceased's will in testament seeks the confirmation of Grant of Probate with Will annexed granted to Robin Micho, Eva Mkungusi and Sera Mwang'ombe on the 30th of June 2015. She avers that the deceased was survived by the following;

- a. Belinda Mkaluma Mkungusi-daughter**
- b. Helen Mlale Mkungusi- daughter**
- c. Faith Mwhaki Ngugi-grand daughter**
- d. Ian Joseph Nganga**
- e. Betty Mkugusi (paid Kshs. 500,000) as per the Will**
- f. Gladwell Mkugusi**
- g. Eric Wanyoike - son**

2. That the deceased was survived by the following assets;

- i. Plot No. 3281 Voi town**
- ii. Plot No. 702, Taita Taveta**
- iii. Plot No. 728, Taita Taveta**
- iv. Shares Mkuki Ranch Limited**
- v. Shares in Kenya airways**
- vi. Shares in Kenya Ordinance Company**
- vii. Terminal dues at Department of Defence**

2. In her affidavit dated 8th July 2016 she avers that the deceased's will in testament had the following assets;

- i. Plot no. 3281 Voi town
- ii. Plot No. 702, Taita Taveta
- iii. Plot No. 728, Taita Taveta

iv. Shares in Kenya airways

v. Shares in Kenya Ordinance Company not known

3. That the estate had no liabilities of estate duty payable save for the legal fees and costs. She proposes the remainder of the deceased's estate be distributed as follows;

i. Kshs. 500,000 to Betty Mkugusi (already given)

ii. Kshs. 500,000 to Gladwell Mkungusi (already given)

iii. Equal share of the remainder of the estate of the remainder of the estate to Eva Wanyika Mkugusi, Belinda Mkaluma, Hellen Mkale, faith Mwhaki and Ian Joseph Nganga.

4. She avers further that Rose Wawuda Jonathan the deceased's mother passed on before the deceased. Further that Eric Wanyoike is deceased reason he is no included as part of the above list. That nothing has been realized from Mkuki Ranch as Betty Mkugusi has been getting Kshs. 20,000 every month from the tenants therein and that she should account for the income from the said Ranch. Further that the terminal dues were paid to Belinda Mkungusi and Betty Mkugusi. That payment to the beneficiaries can only be made from;

i. Plot no. 3281 Voi town

ii. Plot No. 702, Taita Taveta

iii. Plot No. 728, Taita Taveta

iv. Shares in Kenya airways

v. Shares in Kenya Ordinance Company

5. Betty Mkungusi a former wife of the deceased in opposition to the applicant's application dated 8th July 2016 avers in her affidavit dated the 12th of September 2017 that she received Kshs.500, 000 as a bequest from the deceased as per his will in testament and denied allegations that she received any monies from the tenants in Mkuki Ranch adding that it is indeed he estate of the decease that owes her. Further, she denied collecting the deceased's terminal dues. That upon her return to Kenya from the United States of America that she realized that the administrators were not doing their work and the estate was in a state of complete neglect necessitating her to make an application for revocation of the said grant and seeks surcharge of the administrators for wasting the deceased's estate. She seeks to be appointed together with her daughter as administrators of the deceased as they are both willing to be accountable to the court and the beneficiaries.

6. In her replying affidavit dated 12th September 2017, Belinda Mkaluma Mkungusia a daughter of the deceased seeks to adopt the affidavit of her mother Bett Mkugusi in opposition to the confirmation of grant and seeking to revoke the said grant and issuance of a new grant to her mother. She avers that the administrator has acted contrary to the law as it requires that in a case where there is a continuing trust there should be at least 2 administrator to administer the deceased's estate. That the grant of administration had been issued to Robin Micho, Sera Mwangombe and Eva Wanyika Mkugusi. That Eva Wanyika's whereabouts are unknown for over 7 years while Robin Micho is deceased. That when the matter was last in court the administrator failed to disclose to this court of the aforementioned and as such the same amounted to concealment of material fact. That the administrator has continued to administer the estate of the deceased solely despite there being a continuing trust. She avers that the administrator is undeserving of the orders sought for failing to proceed diligently with the administration of the estate. Further, that in her said application for confirmation has failed to attach certified documents of title of the assets surviving the deceased searches, acreage of the parcel for distribution or value since only the net estate of the deceased is distributed. Hence, the court cannot determine the true nature of the net estate or value of liabilities. Further that the administrator has failed to include shares in Mkuki Ranch Ltd. as part of the deceased's assets while in ELC no. 218 of 2014 she categorically states that the said Mkuki Ranch Ltd forms part of the deceased's assets. Further, stating that the deceased was the majority shareholder in Mkuki Ranch Ltd holding 22,250 shares, Newman Mwangombe - 1,000 shares, Hudson Mwadwaa-1,250 shares, Robin Micho – 250 shares and Rose Wawuda Jotham 250 shares. She urges the administrator to list the shares of the deceased in the said Mkuki Ranch Ltd which belonged to the deceased and available for distribution and further puts this court on notice of the pending issue before E.L.C No. 218 of 2014 in regards to Mkuki Ranch stating that distribution cannot take place before the same is resolved.

7. Parties made oral arguments. The protestor argues that the administrator has assumed that the estate is intestate while there is a Will on record. That the administrator in her actions is trying to rewrite the deceased's Will is which is not challenged. That the Mkuki ranch is not in the Will as the same belongs to many people hence it was not included in the will.

8. The respondent opposed the application. It was submitted that executors are officers of the court and the court has power to remove them. That the executors have been reckless and that there are squatters in the ranch and nothing has been done to remove them for over 10 years. That Section 152 on trusts should be read together with Section 76 of the Law of Succession Act. That a continuing trust arises if there is land in the estate. Adding that in objection proceedings one can file an affidavit.

9. The protestor has gone a lot to the matters pertaining to ownership and generation of income from Mkuki Farm and the matter before the E. L. C court. In this case, this court will avoid making any observations or comments on the matter as the same is before court and no final determination has been made. Further he protestor has disclosed that there is another E.L.C matter pending before the said court. She denied allegations that she and her mother received the deceased's allowances from the Department of Defence. That the court has to bring out the true beneficiary noting that Eva Wanyika and Hellen Mkale have been missing for over 7 years. She urged the court to revoke the grant so

issued to avoid further wasting of the deceased's estate.

DETERMINATION

10. The deceased to whom these succession proceedings relate died testate on 2/5/2004. Robin Micho, Sera Mwang'ombe and Eva Wanyika Mkungusi petitioned the court for grant of probate with will attached the same was granted by the court 15th April 2015. The said Will is not challenged and hence it was adopted as is by this court.

11. There is an application filed before this court on 8th June 2007 by Robin Machio one of the executors of the deceased's will, seeking that Eva Wanyika Mkungusi cease being one of the executors of the deceased's estate as she is not available or interested in administering the estate of the deceased. Betty Mkugusi filed an affidavit in support of the said application by Robin Machio. There is a public notice via the national newspaper in regards to the said application. The respondent Eva Wanyika Mkungusi was served via advertisement in the daily nation of 15th May 2008. There is also a letter dated 15/05/2008 from Sophia M. Kimani landlord to the premise occupied by Eva seeking payment of rent in arrears of 5 months and urging her to vacate from the said premises. From the foregoing, it is clear that despite the executors efforts to locate Eva Mkungusi her whereabouts are unknown. It is not in dispute that Robin Michio is deceased and this leaves only one surviving executor of the deceased's will. The Will notes down two grandchildren Faith Mwihaki and Ian Joseph Nganga who are said to be minors. Robin Micho, Sera Mwang'ombe and Eva Wanyika Mkungusi had petitioned for grant of probate. It is not disputed that Robin Micho is deceased. Eva Wanyika's whereabouts are unknown. That leaves Sera Mwangombe as the only executor of the deceased's estate. In the deceased's Will there two named grandchildren who are beneficiaries of the estate and as such it is crucial that there be at least two executors of the estate of the deceased. Betty Mkugusi is the deceased's former wife and has since gotten her Kshs.500, 000 bequest from the deceased as per his will in testament has no beneficiary gains to safeguard. That leaves Belinda Mkaluma Mkungusia a daughter to the deceased who has reached age of majority and also closest in degree to co-administer the deceased's estate.

12. Section 75A of the Law of Succession Act quoted by the objectors on continuing trusts which arises after confirmation of grant, "*(1) If, after confirmation of the grant of letters of administration at any time there is a continuing trust and only one surviving administrator, that administrator shall without delay apply to the court to appoint, subject to section 66, as administrators jointly with him not less than one or more than three persons as proposed by him, which failing as chosen by the court of its own motion.*" I find the same does not apply in this case as what is sought is a confirmation of the grant.

13. I find that the objector has not adduced any sufficient evidence before this court to prove that the grant of probate warrants revocation. There is the decision by Justice Muchelule dated 9th June 2016 the court found that there was no evidence of intermeddling and that it there was also no evidence to show that the respondent had either sold or misused the assets of the estate. The court in the said ordered the executors of the Will to apply for confirmation of the grant of probate and that alongside the application they file an affidavit of the estate as required by Section 83 (e) and (g) of the Act and that the respondent were at liberty to respond to the application and the inventory. The application dated 8th July 2016 was filed subsequent to the said ruling. Attached to it are the affidavits of Sera Mwangombe dated the 8th July 2016 and an affidavit showing an inventory of account of the administration of the estate dated the 8th of July 2016. I find the said affidavit of inventory rather vague and does not give a detailed account of the assets of the estate nor did their current status, for e.g. the size of the plots do they have any development, what are the number of shares in Kenya Airways and Shares in Kenya Ordinance Company. A proper detailed inventory shall be filled on the estate within 45 days from the date of this Ruling and the matter will be mentioned in court on the 17th of September 2018 before Justice Muchelule the Presiding Judge of Family division for further directions on the application for confirmation of grant. I decline to confirm the grant as sought as there has been partial compliance with the court's dated the 9th June 2018.

14. However, for purposes of effective administration of the deceased's estate I find it is necessary to appoint another co-administrator to aid in the winding up of the deceased's estate. I order that a fresh grant of probate be issued forthwith including **Belinda Mkaluma Mkungusia**, a daughter of the deceased as a co-administrator of the deceased's estate. Belinda too shall file an affidavit indicating any income she is receiving or has received from any asset of the estate, within 45 days from the date of this ruling.

15. The protestor has gone into details on matters pertaining to ownership and generation of income from Mkuki Farm and the matter before the E. L. C court. In this case this court will avoid making any comments on the matter as the same is before court and no final determination has been made. Costs shall be in the cause.

Dated, signed and delivered this **13th** day of **July 2018**.

R. E. OUGO

JUDGE

In the presence of;

.....**For the Applicant**

.....**For the Respondents**

MS. Charity Court Clerk