



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 567 OF 2017

IN THE MATTER OF THE ESTATE OF STEPHEN KEROSI MAKORI (DECEASED)

RULING

1. The deceased herein Stephen Kerosi Makori died intestate on 16th January 2017 leaving behind a number of assets among them land and motor vehicles. Subsequently, one Damaris Muthoni Kamau who claimed to be one of the deceased's wives together with Evans Ondieki a brother to the deceased, filed a citation of even date on 15th May 2017 citing Jackline Mokeira Mokaya, Collins Makori Kerosi, Cynthia Kemunto Kerosi and Maureen Kendi Kerosi seeking them to cause an appearance and accept or refuse letters of administration of all the estate of the deceased and show cause within 15 days why the same could not be granted to the said Damaris Muthoni Kamau and Evans Ondieki Makori.

2. However, the citors did petition for a full grant the same day the citation was filed before the 15 days given to the citees expired. In obedience to the citation, Jackline Mokeira Mokaya (widow) and her daughter Cynthia Kemunto Kerosi both citees petitioned the court for a full grant on 8th June 2017.

3. On 29th June 2017, Jackline filed a notice of motion seeking preservation of the estate by way of an injunction restraining any interference, disposal or alienation of the estate of the deceased which included motor vehicles and land which the applicant wanted to take control of and manage pending issuance of a full grant of letters of administration intestate. However, the court taking into account that none of them had locus standii to sue, delivered its ruling on 8th December 2017 thereby issuing preservatory orders in favour of the estate thus restraining any transfer, disposal and or alienation of any part of the estate assets pending acquisition of a full grant. The court then directed the assets to remain in their position or status preceding the filing of the application pending the appointment of an administrator or administratrix.

4. On 18th September 2017, one Jennifer Nzilani Kaleli filed a notice of motion as a next friend to her son Prince Mwendwa Kerosi wherein he also claimed to be a son to the deceased. The applicant merely sought to have her son recognized and be included as a beneficiary of the estate and a provision be made for him.

5. Meanwhile, on 16th April 2018, one Bancy Muthoni Kitheka and Maureen Kendi claiming to be wife and daughter to the deceased respectively filed objection to the making of the grant to Jackline Mokeira. They also petitioned for a special limited grant for purposes of making provision for payment of school fees for her two children Shantel Sadimu a biological child to the deceased and Shelynn Wanjiku a child over whom he assumed parental responsibility and was

ordered by the court to be paying 10,000/= maintenance per month.

6. Pending hearing of the objections for making of a grant to Jackline Mokeira and Cynthia Kemunto Kerosi by Bancy Muthoni Kiteheka and Maureen Kendi, Jackline Mokeira and Cynthia Kemunto Kerosi moved this court vide a notice of motion dated 19th December 2017 and filed the same day seeking:

(1) Spent.

(2) That the petition for letters of administration ad colligenda bona attached herewith dated 19th December 2017 be deemed admitted, heard and disposed with immediately.

(3) That the honourable court do issue an order directing the applicants to sue the 3rd parties interfering with the deceased's estate and not limited to Plot No. V6592 Embakasi Ranching Company Ltd.

(4) That the court do issue an order directing that school fees for Collins Kerosi Makori, Cynthia Kemunto Kerosi and Ronny Mokaya Kerosi be paid from the estate of the deceased.

7. Application is premised on grounds on the face of it and affidavit in support sworn on 19th December 2019 by Jackline Mokeira Mokaya

on her behalf and that of Cynthia Kemunto Kerosi.

8. In reply to the application, Damaris Muthoni filed a replying affidavit challenging the inclusion of the 2nd applicant Cynthia Kemunto (daughter to deceased) arguing that as a wife she ranks first in preference and has priority to petition for a grant of letters of administration before the daughter. She further claimed that she was the only wife to the deceased the 1st applicant having separated with him 15 years before he died. She also claimed for school fees and maintenance of all children without discrimination.

9. In response to the said application, Nancy Muthoni filed a replying affidavit sworn on 16th May 2018 on her own behalf and that of Kendi Mburugu opposing the application alleging that she should be included as an administrator being a wife to the deceased and that her children too ought to be provided for in terms of payment of school fees.

10. During the hearing, Mr. Nyakiangana for the applicant reiterated the averments contained in the affidavit in support of the application. Counsel urged the court to issue a grant of letters of administration ad colligenda for purposes of suing 3rd parties who are encroaching into the estate with the intention of alienating part of the estate.

11. Mr. Mwangi for Damaris Muthoni the citor reiterated the affidavit in reply to the application sworn by his client. Mr. Mwangi contended that there is nothing to preserve or collect as the only assets are land and motor vehicles which the court directed status quo be maintained and they be held by those using them prior to the death of the deceased. As regards issuance of a grant for purposes of suing, Mr. Mwangi asserted that there is no eminent danger of alienation of the estate to warrant the orders sought. Concerning payment of school fees, Mr. Mwangi stated that all children should be provided for.

12. Mr. Kamau for the 1st and 2nd objectors also reiterated contents of the replying affidavits sworn by the objectors.

13. I have considered the application herein, affidavit in support, replying affidavits and oral submissions by both counsels. Application for a limited grant of letters of administration ad colligenda bona for purposes of collecting and preservation of the estate is entrenched under rule 36 of the P and A rules which provides that:

“where owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration ad colligenda bona defunct of the estate of the deceased”.

14. In the instant case, the applicants are seeking to preserve and collect motor vehicles and land owned by the deceased. The court has already directed in its ruling dated 8th December 2017 that the motor vehicles in question were to continue being held by those using them or in whose custody they were before the deceased died pending issuance of a full grant. Equally, there is already an order preserving the estate against any interference, disposal or alienation of any land pending issuance of the full grant.

15. Accordingly, there are no special circumstances to justify the grant of the orders of a limited grant of letters of administration ad colligenda bona. There is no asset that is in a precarious state or at the risk of being wasted at the moment. To that extent, that order cannot issue as it is not necessary in the prevailing circumstances.

16. Concerning payment of school fees and an order directing the applicant to sue 3rd parties who are threatening to alienate or encroach to the estate, the same is only applicable under the 5th schedule Paragraph 14 & 18 (2) vide gazette notice No. 39 of 2002 which provides for special grants for special purposes.

17. For purpose of suing, a limited grant of letters of administration ad litem is specifically applied for. The application dated 19th December 2017 has not made any specific prayer for a grant of letters of administration ad litem for purposes of suing. The applicant is seeking for orders directing the applicant to sue. It is not for the court to direct parties to sue or not to sue. To sue or not to sue is at the discretion of an aggrieved party. If the applicant wants to sue anybody for interfering with any part of the deceased's estate, such person should move the court for a grant of letters of administration ad litem for purposes of suing, prosecuting or defending a suit under the 5th schedule Paragraph 14. That prayer has not been sought specifically. In paragraph 24 of the supporting affidavit, the applicant is seeking a grant of letters of administration ad colligenda bona for purposes of suing. This is not the position in law. Ad colligenda bona and grant ad litem are two different limited grants serving different purposes or interests(see Morjaria vs Abdalla(1984 KLR) 490). For the above stated reasons prayer 2 cannot issue.

18. Lastly, the applicant sought for an order directing that some money be provided for for purposes of paying school fees for the deceased's children. The applicant has not made any application for a special limited grant under the 5th schedule Paragraph 18(2) as amended by L.N No. 39 of 2009(See Re succession-Limited Grant(2000) 2 EA495.

19. The prayer for school fees has been made on the assumption that there is already a grant in place. Since there is no full grant in place, any request for school fees can only be done by issuing a special limited grant for purposes of accessing a specific bank account to withdraw a specific amount to meet educational expenses for the children.

20. The only party who has attempted to make an application for a special limited grant for purposes of paying school fees for the children out of the deceased's estate is Nancy Muthoni and Maureen Kendi. Their application is however pending and is not the subject of this ruling. For the above reasons stated, the application dated 19th December 2017 has not been proven to the required degree. Consequently, application is dismissed with no order as to costs.

21. For purposes of fast tracking this matter, the objections filed by Bancy and Maureen objecting to the making of the grant to Jackline Mokeira and Cynthia Kemunto should be set down for hearing to determine the beneficiaries and who is to be issued with a full grant. The petition filed by one Damaris Muthoni for a grant of representation together with citation before the citee would respond is inconsequential. The same cannot stand as the citation was complied with following the filing of a petition for a fresh grant by Jackline Mokeira and Cynthia as demanded of the citor one Damaris Muthoni. The only option available to her is to perhaps file an objection to the petition by Jackline Mokeira and Cynthia Kemunto.

Order accordingly.

SIGNED, DATED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF JULY, 2018.

J.N. ONYIEGO (JUDGE)

In the presence of:

M/S Kathungu H/B for Julius Nyakiangana.... Counsel for the Applicant/Petitioner

Mr. MwangiCounsel for the Respondent

Mr. BalalaCounsel for the intended Beneficiary

Edwin.....Court Assistant