



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 158 OF 2005

IN THE MATTER OF THE ESTATE OF THE LATE DICKSON KIHKA KIMANI (DECEASED)

RULING

1. Before court is the summons dated 24/7/2018. Vide this application Mary Kihika, one of the administrators of the estate herein (hereinafter the applicant) seeks orders;

1. Spent

2. **THAT** the parcel of land known as L.R. 209/69/23 be sold and the proceeds of the sale be applied as follows:

a) **One part thereof be applied to defray the costs of the valuation of the estate of the deceased.**

b) **One part be reserved for the running of the estate including education of the child of the deceased and to take care of the health requirement of the widows of the deceased as need arises.**

c) **The balance be deposited in a joint account in the names of the advocates to be operated only with the consent of the court.**

3. **THAT** the sale be conducted by and/or with the supervision of all counsels appearing for the parties herein.

4. **THAT** cost of the conveyance be defrayed from the sale of the said property and costs of this application be borne by the estate.

2. The application is based on grounds;

1. **THAT** the estate herein has neither been gathered nor valued. Consequently, the distribution of the estate is likely to be an exercise of conjecture and the court may not be able to effectively determine the dispute.

2. **THAT** the estate has no sufficient income to cater for the costs of the valuation of the estate. The parcel of land known as L.R. 209/69/23 is the only available property which could be sold to defray the costs of the valuation.

3. **THAT** it is only fair that the said property be sold and the valuation be undertaken for an effective administration and winding up of the estate.

and supported by the affidavit of the applicant sworn on 24/7/2018.

3. The gist of the applicant's case is that the estate herein has not been gathered or valued and the distribution of the same is likely to be based on conjecture hindering the court from effectively determining the dispute. The applicant singles out land known as LR 209/69/23 as the only available property which could be sold to defray costs of the necessary valuation.

4. It is averred that the estate has no income generating asset that could be relied upon to defray the costs.

5. The applicant proceeds to justify the appropriateness of the sale of LR No. 209/69/23 as opposed to any other asset by stating as follows;

i) The property known as SHANGILIA FARM is currently occupied by one of the administrators known as JANE WANJIRU. She has been in occupation of the property before and after the death of the deceased and a proposal to sell it or a portion thereof will

elicit controversy.

ii) The land in Marmanet measuring 314 acres of thereabout is occupied by ALICE MUKUHI KIHKA and she has been in occupation before and after the death of the deceased. Any suggestion to sell the property will clearly elicit controversy. The same position obtain for the property known as NJORO ROSLYN FARM which is currently occupied by MARGARET WAMBUI KIHKA.

iii) The parcel of land in Muthengera had been shared amongst all the widows and each of us had 13 acres or thereabout. Each of the widows has been using the land before and after the death of the deceased. Therefore none of the parties would be willing to offer the same for sale.

iv) There are several parcels of land in Engashura commonly known as ENGASHURA MATETE. The parcel of land or at least a portion thereof could be sold to get money to defray the costs of the valuation. However, the property was fraudulently transferred into the names of the Catholic Diocese of Nakuru. Therefore the property is not in the names of the deceased and there is a restriction put by the Director of Criminal Investigations.

6. It is the applicant's case that LR No. 209/69/23 is situate at Nairobi, it sits on a quarter of an acre and it is not capable of any subdivision. It is averred that ultimately that parcel will have to be sold.

7. The applicant seeks to have part of the proceeds from the envisaged sale used to meet the needs of the widows pending distribution.

8. The application found opposition from one of the administrators, Alice Mukuhi Kihika, who is not opposed to the sale of LR No. 209/69/23 but is opposed to the sale being conducted by or with the supervision of all counsel appearing for the parties.

9. She asserts that the sale should be conducted by the administrators and the administrators be at liberty to appoint their advocate(s). She adds that the proceeds should be used to collect the estate and to pay all the outstanding debts. Any excess balance should be deposited in a bank account to be opened in names of the administrators. That money should only be released to a beneficiary only on the orders of court on need basis.

10. I have considered the application and the opposition thereto.

The only issues for determination are;

1. Whether LR No. 209/69/23 should be sold to defray costs of valuation and collection of the estate.
2. For what use should any excess proceeds from the sale be put.
3. What should be the mode of sale to be adopted.

11. First some useful little history of the matter. The deceased herein died on 19th November 2004. The petition for letters of administration was lodged in court in 2005. 13 years down the line and after numerous court appearances, applications and counter applications, the finalization of this cause remains a mirage. Such is the sad state of affairs that obtains in this matter.

12. In these circumstances, it cannot be gainsaid that this court has the onerous duty to ensure that any step geared towards the realization of an end to this litigation is not only encouraged but fully embraced. That is the only way that justice can be ultimately served to the beneficiaries herein and whom I note are many as the deceased, credit to him, had a sizeable family.

13. **Section 83(c) of the Law of Succession Act (Cap 160) Laws of Kenya** provides;

“Section 83.

Personal representatives shall have the following duties—

(c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);...”

14. Personal representatives (administrators) are thus not expected to meet costs of administration from their own resources.

15. For an effective administration of the estate herein and in order that the court ultimately arrives at a fair distribution, it is necessary, nay, mandatory, that a valuation of the entire estate be carried out.

16. Such valuation is an exercise that attracts professional fees and other expenses.

17. In line with the provision at **Section 83(c) of the Law of Succession Act**, the administrators herein are duty bound to pay out of the estate of the deceased the expenses associated with valuation.

18. The evidence on record is that the estate does not hold any monies or income that can meet the expenses aforesaid.
19. The applicant is spot on, therefore, to suggest that the asset LR No. 209/69/23 be liquidated through a sale and the proceeds therefrom be utilized to meet the valuation expenses.
20. I have considered the justification for singling out this property for sale as opposed to any other. I am satisfied that the reasons advanced are not only plausible but practical.
21. LR No. 209/69/23 is a quarter acre plot in Nairobi. This land is not practically divisible in favour of the many beneficiaries. Indeed, in the larger scheme of things, the most probable edict would be that the property be sold and proceeds be shared out.
22. By its very nature and location, this is a property that is most likely to find a ready market and a decent price.
23. I note that there is no objection to the sale of the property. The only objections on record and which to me appear to be more of reservations is by administrator Alice Mukuhi Kihika who for reasons not elucidated is opposed to the sale being conducted by and or with the supervision of all counsel appearing for the parties.
24. The 1st administrator prefers the sale being conducted by the administrators who should be at liberty to appoint their advocate(s).
25. This objection is misconceived. This court has no powers to dictate which counsel represents a party. If the 1st administrator is unhappy with her advocate on record, she is at liberty to change counsel as she deems fit. She, however, cannot dictate to other parties which advocates to retain in any matter or a transaction of any nature.
26. I appreciate the need to ensure that the sale, if at all, is conducted above board. I am persuaded that this is possible with the supervision of the court, the respective advocates and the administrators of the estate herein.
27. For reasons above stated, I am satisfied that LR No. 209/69/23 should be sold.
28. As to the application of proceeds obtained from such sale, the collection and valuation of the estate take a central and pivotal position. Coming a close second is the payment of any known debts owed by the estate.
29. The prayer by the 1st administrator to have a blanket order to have part of the proceeds of the sale applied to meet the needs of the widows pending distribution is amorphous, wide and nebulous. I would agree with Alice Mukuhi Kihika that after the payment of the valuation expenses and known debts, the balance should be held in a bank account and any releases to any beneficiary should be through an order of court on a need by case basis.
30. So what is the appropriate mode of sale? I am disadvantaged in that neither the applicant nor any other party has made a proposal on a desired, effective and accountable mode of sale.
31. Considering all the circumstances of the case, I am persuaded that a sale by way of bids would be the most effective, above board and practical.
32. With the result that the summons dated 24/7/2018 is partially allowed and I make the following orders;

1. LR No. 209/69/23 shall be sold through a general invitation of bids with the sale being made to the highest bidder but with the seller reserving the right to reject any bid.

2. The sale shall be conducted by the administrators jointly guided by their respective advocates on record and with the supervision of the Deputy Registrar of this court.

3. The proceeds for the sale shall be utilized to defray the cost of the conveyance, valuation expenses and incidentals thereto and to pay off any known debts owed by the estate.

4. Any balance of the proceeds to be held in a joint account in the names of the advocates of the respective parties on record and any withdrawal therefrom shall only be by order of court upon application on a need by case basis.

5. Costs of the summons be in the cause.

Dated and Signed at Nakuru this 17th day of October, 2018.

A. K. NDUNG'U

JUDGE