



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 475 OF 2012**

**IN THE MATTER OF THE ESTATE OF ZKM DECEASED**

**NNM .....APPLICANT**

**VERSUS**

**MNM alias MNF.....1<sup>ST</sup> INTENDED RESPONDENT**

**MMK .....2<sup>ND</sup> INTENDED RESPONDENT**

**MS .....3<sup>RD</sup> INTENDED RESPONDENT**

**R U L I N G**

1. The late ZKM died on the 12<sup>th</sup> of March 2001. Her sister NK petitioned this court for Grant of letters of Administration as two of the three children of the deceased live in Germany and England respectively, whereas the third who is the applicant herein, at the time the Petition was filed was said not to have reached the age of majority. N obtained consent of all the deceased children namely MNM, ANM and NNM.

2. A grant was accordingly issued to NM on the 5<sup>th</sup> of September, 2012. However as fate would have it, the administrator as appointed died on the 13<sup>th</sup> of October, 2012 barely a month after issuance of the grant.

3. NNM has filed two applications. In the first application dated 4<sup>th</sup> February 2013, she sought to amend and/or rectify the grant so that she may be the next administrator. In the second application dated 21<sup>st</sup> February 2018, she sought for several orders; firstly to have the application consolidated with the one of 4<sup>th</sup> February, 2013, secondly, for the Applicant to be appointed the sole administrator, thirdly to enjoin MN alias MNF, MMK and MS as 1<sup>st</sup> - 3<sup>rd</sup> Respondents, and lastly, an order requiring the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to release all documents to the applicant.

4. The 1<sup>st</sup> application was predicated on grounds that the administrator had since died and there was need to substitute the deceased to enable the applicant preserve the estate which had been invaded by squatters.

5. The second application was supported by the applicant's affidavit where inter alia she deposed that she had learnt from the 1<sup>st</sup> and 2<sup>nd</sup> respondents that the only asset of the Estate, Plot No. [particulars withheld] Bulbul Shopping Centre had been sold to 3<sup>rd</sup> Respondent, and that on doing a search it was discovered that the property now has a new number Plot [particulars withheld] and bears the names of the 3<sup>rd</sup> Respondent as the owner.

6. All the 3 named respondents responded to the applications before court as follows:

**1<sup>st</sup> Respondent:**

She filed Grounds of opposition dated 10<sup>th</sup> September 2018 to the effect that Badia & Co. Advocates are not properly on record, that Miss Badia Advocate had at some point acted for all beneficiaries and therefore her acting for one against the other creates a conflict of interest. Further the death of NK who was a sole administrator revoked the grant and therefore there is no grant as such to amend/and or rectify, and the applicant is estopped from complaining as all the beneficiaries decided jointly to sell the property subject matter.

7. The 2<sup>nd</sup> Respondent filed a replying affidavit where he denied having disposed of or intermeddling with the asset of the estate, further, he confirmed not being a beneficiary and lays no claim in the said estate.

8. As regards the 3<sup>rd</sup> Respondent a notice of Preliminary Objection dated 11<sup>th</sup> June 2018 was filed, together with a replying affidavit. The Preliminary Objection was to the effect that the Applicant has no *locus standi*. In the replying affidavit, the 3<sup>rd</sup> Respondent contends that the Applicant was aware the property subject matter was sold for Kshs.4,500,000 and all the beneficiaries being so aware benefited from the proceeds, he annexed copies of payments from the 1<sup>st</sup> Respondent to the Applicant. He averred further that he was innocent party.

9. The Applicant filed rejoinders to the affidavits and objections on 30<sup>th</sup> August, 2018 and 11<sup>th</sup> September, 2018

10. From the onset I must decry the lengthy responses, rejoinders and several authorities cited, most totally unrelated to the issues currently before court. The same have been of little or no assistance in the determination of the issues herein.

11. The issues before court raised in the application dated 4<sup>th</sup> February 2013 and 21<sup>st</sup> February, 2018 and the responses thereto are as follows

**i. Whether or not to bar F. A. Badia advocate from representing the Applicant in these proceedings?**

**ii. Whether the applicant has *locus standi* to file the application?**

**iii. Whether to amend and/or rectify the grant issued to NK on the 5<sup>th</sup> of September, 2012 and to substitute her with the applicant as the sole administrator?**

**iv. Whether or not to enjoin the respondents in the suit and demand documents from them?**

**12. Should counsel F. A. Badia act for the Applicant?**

The allegation is that F. A. Badia advocate acted for all beneficiaries at some point. In her affidavit of 15<sup>th</sup> September 2018 F. A. Badia denied having received any instructions to act for the 1<sup>st</sup> Respondent. Secondly, she denied that her previous employer Maina Nyangena & Co. Advocates received such instructions. She put the 1<sup>st</sup> Respondent to strict proof thereof. In support of her assertion she produced an email dating back to 9<sup>th</sup> August 2012 which is explicit that instructions were from NK and NM. The above was not refuted.

13. In my view the mere fact that the 1<sup>st</sup> Respondent received copies of correspondence between counsel and her instructing client per se did not make the 1<sup>st</sup> respondent a client. In the absence of any evidence to prove client/advocate relationship the court declines to bar F. A. Badia advocate from representing the applicant as no conflict of interest has been exhibited.

**14. Does the Applicant have *locus standi*?**

**Part V and Section 66 of the Law of Succession Act Cap 160 of the Laws of Kenya** are clear on who should be given priority in the administration of an intestate estate. As a child of the deceased the Applicant ranks as any of her siblings in priority in obtaining grant of representation. The preliminary objection is therefore unfounded and must be dismissed.

**15. Whether to amend and/or rectify the grant issued to NK on the 5<sup>th</sup> of September, 2012 and to substitute her with the applicant as the sole administrator?**

The grant issued on the 5<sup>th</sup> of September, 2012 became “useless and inoperative” with the demise of the deceased administrator. **Section 76(e)** of the Law of Succession (supra) and requires that in such circumstances the grant be revoked.

16. The grant issued to Naima had not been confirmed and was limited for purposes of collecting and preserving the estate. Under the law there is still unfinished business of distributing the estate and therefore a new administrator ought to be appointed.

17. The Mode of getting a new administrator cannot be through an application to amend and/or rectify the grant issued to the deceased. The Applicant ought to have moved the court for revocation of the earlier grant and for a ‘*grant de Bonis administratis*’ (often referred to as ‘*grant de Bonis non*’).

18. There are conflicting decisions though of courts of equal status, some allowing substitution on an application, others declining substitution and requiring that an application be made for ‘*grant de Bonis non*’.

19. The deceased died on the 12<sup>th</sup> of March, 2001; 17 years ago! Naima the administrator died on the 13<sup>th</sup> of October, 2012; six years ago. There is need not only to preserve the estate but to bring this matter to a closure. Further their allegations of intermeddling and/or sale of the property that belongs to the estate.

20. Ordinarily, I would align myself with the decisions that require that where a sole administrator dies there is need to file an application for revocation and for grant de bonis non.

However as always, each case has to be decided on its on merit. I am of the considered opinion that justice in this case will not be achieved if the court were to insist on such an application to be filed. In this instance to insist for another application for ‘*grant de bonin non*’ ‘be filed would be to elevate mere procedure and technicalities at the expense of just and fair administration of justice.

The Kenyan Constitution in, **Article 159 (2)(b)(d)** states:

“(2) in exercising judicial authority, the court and tribunals shall be guided by the following principles;

a. Justice shall not be delayed

(d) Justice shall be administered without undue regard to procedural technicalities; and ...”

Rule 73 of the Probate and Administration rules provide that nothing in the Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

In an Indian case where the executor had died having applied for probate but before confirmation **Shambu Prasad Agarwal & ors vs Bhol Ram Agarwal (2000) 9 SCC 714** the Supreme Court while agreeing that a sole executor cannot be substituted and it cannot be disputed that heirs ought to petition for grant of administration and having regard to the time that had lapsed, held that the interest of justice would require that the proceedings should come to an end as early as possible and the appeal should not be rejected on what was regarded as being a ‘highly technical ground’.

21. It is not in dispute that the other children of the deceased stay overseas. There has been mention of Ahmed (son) in Germany and him having issues though no proof of the same was placed before court, and the 1<sup>st</sup> Respondent being a resident of the United Kingdom, the applicant happens to be the only child of the deceased domiciled and resident in Kenya.

In the circumstances of this case it is only prudent and reasonable therefore that the court appoints NNM as the administrator of the estate and issues her with a *grant de Bonis administratis (grant de Bonis non)* accordingly.

22. The court further restrains any of the parties herein named from interfering and or in any way transferring, alienating or dealing with the Plot No. 89/ or Plot [particulars withheld] Shopping Centre until further orders of this court.

23. The Administrator be at liberty to make any further application to collect and preserve the estate and/or apply for confirmation of the grant forthwith.

**DATED, SIGNED and DELIVERED at NAIROBI this 15<sup>th</sup> DAY November, 2018.**

.....

**ALI-ARONI**

**JUDGE**