



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO. 357 OF 2011
IN THE MATTER OF THE ESTATE OF FREDRICK KAGIO KINYUA (DECEASED)

ROSE WANJIRU KAGIO.....1ST OBJECTOR/APPLICANT

LILIAN WAKIURU KAGIO.....2ND OBJECTOR/APPLICANT

CECELIA WAHITO KAGIO.....3RD OBJECTOR/APPLICANT

VERSUS

ESTHER NJERI KAGIO.....RESPONDENT/ADMINISTRATOR

RULING

1. The deceased Fredrick Kagio Kinyua died intestate on 5th July 2010. He was survived by the following:

- a) Esther Njeri Kagio – widow (respondent) (administrator);
- b) Agnes Gathigia Kagio-daughter;
- c) Anne Wanjiku Njure-daughter;
- d) Rose Wanjiru Kagio- daughter (1st objector);
- e) Nancy Muthoni Kagio-daughter;
- f) Charles Kinyua Kagio-son;
- g) Cecilia Wahito Kagio-daughter (3rd objector);
- h) Jane Waithira Kagio –daughter;
- i) Stephen Mathuu Kagio-son;
- j) Lilian Wakiuru Kagio –daughter (2nd objector); and
- k) James Kabugu Kagio –son.

The grant of letters of administration intestate was made to the respondent on 15th July 2011. It is pending confirmation.

2. The applicant filed summons dated 17th February 2014 seeking the respondent to account for the estate and seeking for appointment of a managing agent. By the ruling made on 18th December 2015, the court directed the respondent to furnish accounts for the estate within 30

days of the date of the order failing which the grant was to stand revoked. In compliance with the said order, the respondent swore an affidavit on 15th January 2016 attaching the accounts.

3. On 20th July 2017 the objectors filed an application dated 18th July 2017 seeking to strike out the statements of accounts furnished by the respondent for lack of supporting documents/materials or in the alternative the respondent be called for cross-examination on the said statements of accounts. On 23rd October 2017 a consent order was reached requiring the respondent to furnish to the objectors all the documents/statements including bank statements, invoices, rent income receipts and all other documents relied on in the preparation of the financial statement for the period from July 2010 to 31st December 2015 annexed to her affidavit sworn and filed in court on 15th January 2017. In default the matter was to proceed for hearing.

4. On 21st February 2018 the objectors filed the present application dated 20th February 2018 under certificate of urgency seeking orders that:

a) the respondent by herself and/or her agents, employees and/or any other person whomsoever acting on her instruction be restrained from interfering with the objectors' right in the meantime to receive and collect rent from the two properties known as L.R. No. 36/1/164 (Wangera House) and L.R. No. 36/VII/267 (Mlango Kubwa) pending the hearing and determination of this application;

b) summons for confirmation of grant dated and filed in court on 12th February 2018 by the petitioner be struck out with costs; and

c) an amended grant of letters of administration intestate be issued to Rose Wanjiru Kagio and Lilian Wakiuru Kagio as the administratrixes of the estate of the deceased in place of the respondent pursuant to the order of the court made on 18th December 2015.

5. The application was based on the grounds that on 18th December 2015 the court ordered the respondent to render accounts of all income and rent collected on behalf of the estate within 30 days failure of which the grant of letters of administration made to her on 15th July 2011 was to stand revoked; that on 13th December 2017 the court declined an oral application by the respondent's advocate to withdraw a summons for confirmation of grant filed by her way back on 13th June 2012 and ordered that the petitioner be cross-examined on her affidavit filed in court on 15th January 2015 in which she attached some alleged financial statements of account of the estate; that in order to circumvent the order made on 13th December 2017 the respondent filed a notice of withdrawal of the said summons for confirmation initially filed on 13th June 2012 and filed in court a fresh summons for confirmation of grant dated 12th February 2018; that in an effort towards the finalization of this cause and owing to the financial hardship which the objectors were undergoing, it was mutually agreed in February 2014 that the deceased's seven daughters would collect rent of two properties known as L.R. No. 36/1/164 (Wangera House) and L.R. No. 36/VII/267 (Mlango Kubwa) to enable them meet their financial needs pending the finalization of the matter; that the objectors were apprehensive that the respondent may interfere with the said prevailing arrangements of them collecting rent of the said two properties; and that the summons for confirmation of grant were filed by the respondent without any consultations with the objectors and without obtaining their consents. The application was supported by the joint affidavit of Rose Wanjiru Kagio, Lilian Wakiuru Kagio and Cecilia Wahito Kagio dated 20th February 2018 and a further affidavit dated 8th March 2018.

6. The application was opposed by the respondent through her replying affidavit dated 5th March 2018. She stated that the respondent's objection to confirmation related to the suggested mode of distribution and not the accuracy of the inventory; that she filed estate accounts for the years 31st December 2010 to 31st December 2015 as ordered by the court; that the applicants had not exhibited any evidence that she had intermeddled or misappropriated any income collected; that the applicant had refused to account for the rent collected from L.R. No. 36/1/164 and L.R. No.36/VII/267 which are properties that form part of the estate of the deceased; that the objectors had been unreasonable at all times as they demanded accounts for properties that do not form part of the estate of the deceased; that as the widow of the deceased she was entitled to the whole estate and had out of good faith involved his children in the distribution but the objectors had always been uncooperative; and that seven out of the ten children of the deceased had consented to her proposed mode of distribution and the applicants were merely out to delay the process.

7. Parties filed their submissions which I have considered.

8. From the submissions of the parties, an agreement was reached February 2014 allowing the deceased's seven daughters to collect rent of two properties known as L.R. No. 36/1/164 (Wangera House) and L.R. No. 36/VII/267 (Mlango Kubwa) pending the finalization of the matter. The objectors now claim they are apprehensive that the respondent may interfere with the said prevailing arrangements of them collecting rent of the said two properties. There was, however, no evidence that the respondent or her agents have sought to interfere with the said arrangement. The summons for confirmation of grant filed on 12th February 2018 sought to have the matter confirmed in finality. I direct that the status quo of the properties be maintained pending the final distribution of the estate.

9. Regarding the prayer for an amended grant being made to Rose Wanjiru Kagio and Lilian Wakiuru Kagio, I note that under **section 66** of the **Law of Succession Act**, the respondent who is the widow of the deceased is ranked in a higher degree to objectors who are her children. There was further no cogent evidence to establish that the respondent was incapable of administering the estate. Unless it is established that the respondent has been wasting away the estate, or has breached her duties, her role as the administrator of the estate cannot be interfered with. Misunderstandings alone would not suffice.

10. The objectors further applied to strike out the application for confirmation which was dated and filed on 12th February 2018. What is, however, clear is that they are aggrieved by the proposed sharing of the estate. What is in the application is only a proposal. If the objectors do not like the proposal, the law allows them to swear affidavits in response making their own proposals. The court will then set down the matter for hearing so that each side can defend their proposal, and a decision is made on the matter regarding the distribution of the estate.

But more important, under **sections 71 and 83** of the **Law of Succession Act (Cap 160)** it is the duty of the respondent to apply for the confirmation of the grant that was issued to her. Infact, the application is late as it was supposed to be brought at the expiry of six months. The only enduring and responsible way to resolve the dispute regarding who gets what share in the estate is to confront the application for confirmation, hear it and reach a determination. This is an old matter.

11. Consequently, I direct the objectors to respond to the application for confirmation within 30 days from today. The matter shall be mentioned on **31st January 2019** for directions on the hearing of the application.

12. The application is consequently dismissed. I make no orders as to costs as this is a family matter.

DATED and SIGNED at NAIROBI this 10TH day of DECEMBER 2018

A.O. MUCHELULE

JUDGE