

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 723 'A' OF 2005

IN THE MATTER OF THE ESTATE OF SAUL NYARERU BOSIRE (DECEASED)

RULING

1. The application for determination is a summons dated 23rd November 2010, and it seeks the following orders: -

- a. that the assets of the deceased be transferred to the beneficiaries as per the order of the court of 10th December 2008;
- b. that the Deputy Registrar of the court be directed to execute documents on behalf of Emily Senoi Nyareru, to facilitate transfer of the assets listed in the application; and
- c. that Emily Senoi Nyareru be ordered to account for the estate that she has disposed of.

2. The background to the matter is that grant herein was confirmed on 10th December 2008. The terms were that the estate be registered in the joint names of the administrators, the applicant and respondent herein, Esther Gachoki Nyareru and Emily Senoi Nyareru, in trust for all the children in equal shares. The children are now said to have come of age, necessitating that the assets be distributed amongst them. The respondent is said to have frustrated that effort by neglecting to execute the relevant documents. The respondent is also said to have disposed of some assets but failed to account for them.

3. There is a reply to the application by Emily Senoi Nyareru, through an affidavit sworn on 7th February 2011. She mentions that the deceased had prior to his death sold a portion of the property to five persons who are in occupation and who ought to be taken into account in the distribution. She mentions that before the burial of the deceased the property of the deceased had been distributed equally between the two houses and each of the houses were in possession of their respective portions. She argues that the certificate of confirmation of grant was irregular to the extent that it provided for distribution of the property amongst the children. She says she was allocated a tractor and a pick-up at the pre-burial meeting. She states that she is ready to have the property subdivided and distributed but between the widows to hold in trust for their respective children.

4. The applicant has filed a further affidavit, sworn on 18th March 2011, in reaction to the reply by the respondent. She asserts that the respondent consented to the confirmation of the grant in the terms of the certificate that was issued on 10th December 2008. She concedes that the deceased had sold portions of the land to some individuals, but adds that the portions were duly transferred and title deeds issued. She avers that there are three persons who however entered the land after the deceased died, and asserts that they are trespassers who are not entitled to the land. She adds that there was also a portion that she and the respondent sold. She states that the alleged pre-burial distribution was something that the respondent was imposing on her.

5. I have perused the record and noted that the grant herein was confirmed on 10th December 2008. There are two certificates of confirmation of grant on record, in different terms, distributing different sets of assets and all purportedly executed by the same Judge. The two certificates appear to have been procured on different dates although they bear the same date.

6. The certificate that appears earliest in the record disposes of five (5) assets, namely Matutu Settlement Scheme/605, tractor KYL 695, KAD 008W, Barclays Bank Sotik Branch A/C No. 03-075-1337132 and

KCB Kisii Branch A/C No. 251520224. The estate was to be registered in the names of the administrators/widows in trust for their children in equal shares. The assets distributed under this certificate are those listed in paragraph 5 of the affidavit of the administrators sworn in support of the application for confirmation of the grant. The certificate however does not confirm with the proposal in the said paragraph that the two widows hold the property for their own and in trust for their children in equal shares.

7. The certificate that appears to be the latest in time distributes eight (8) assets, namely Matutu Settlement Scheme/602, Matutu Settlement Scheme/604, Barclays Bank Sotik Branch A/C No. 03-075-1337132, KCB Kisii Branch A/C No. 251520224, Pick-up KAD 807W, tractor KWM 283 and trailer, timber 47, 000 feet and Scooter timber cutter. According to this certificate the said assets are to be registered in the names of the two widows on their own behalf and in trust for the other beneficiaries in equal shares. This certificate does not conform with the application for confirmation of grant dated 10th December 2008, as it lists assets that were not in the schedule at paragraph 5 of the affidavit in support of the confirmation application and it omits some of the assets listed in that paragraph. The assets named as Matutu Settlement Scheme/602, Matutu Settlement Scheme/604, Barclays Bank Sotik Branch A/C No. 03-075-1337132, KCB Kisii Branch A/C No. 251520224, Pick-up KAD 807W, tractor KWM 283 and trailer, timber 47, 000 feet and Scooter timber cutter were not listed in the confirmation application. The following assets listed in the said application are not listed in the second certificate of confirmation of grant, that is to say Matutu Settlement Scheme/605, tractor KYL 695 and KAD 008W.

8. The grant on record was confirmed on an application dated 2nd October 2008. Paragraph 5 of its supporting affidavit proposed distribution of Matutu Settlement Scheme/605, tractor KYL 695, KAD 008W, Barclays Bank Sotik Branch A/C No. 03-075-1337132 and KCB Kisii Branch A/C No. 251520224, in the terms that the assets were to be registered in the names of the administrators for their own behalf and in trust for all the children in equal shares. The minute of the orders made on 10th December 2008 confirming the grant directed that the estate be distributed as per paragraph 5 of the affidavit in support. Consequently, the assets distributed by that order are those in paragraph 5, being Matutu Settlement Scheme/605, tractor KYL 695, KAD 008W, Barclays Bank Sotik Branch A/C No. 03-075-1337132 and KCB Kisii Branch A/C No. 251520224.

9. I have carefully perused through the record. I have not come across any application for rectification of the certificate of confirmation of grant to distribute Matutu Settlement Scheme/602, Matutu Settlement Scheme/604, Pick-up KAD 807W, tractor KWM 283 and trailer, timber 47, 000 feet and Scooter timber cutter. I have equally not come across any order by this court tinkering with the order made on 10th December 2008.

10. The assets listed in the second certificate of confirmation of grant, the one I have described in paragraph 7 hereabove, conform with the schedule of assets in the applicant's application dated 23rd November 2010. It would appear too that the said certificate was procured after the said application was filed in court going by the order that the documents appear in the court file. It would appear too that the said certificate is a forgery contrived to suit the case of the applicant as per the application dated 23rd November 2010. It is not a true extract of the order that was granted by the court on 10th December 2008. The assets it purports to distribute were not even listed in the affidavit sworn on 13th October in an unknown year in support of the petition lodged herein on 29th March 2005.

11. The application dated 23rd November 2010 is clearly founded on documents that are forged. It cannot be proper for the court to grant the orders sought for it has not ordered distribution of all the assets listed in that application. The said application is for dismissal and it is hereby dismissed, with costs to the respondent.

12. I note that the bulk of the estate comprises of property situated within either Kisii County or Nyamira County. The applicant and the respondent also have their addresses at Nyansiongo, and they are therefore based within either Kisii County or Nyamira County. None of the assets of the estate are situate within Nairobi County. Consequently, I shall, on my own motion, order that the matter be transferred to the High

Court of Kenya at Kisii for final disposal. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 20TH DAY OF JANUARY, 2017.

W. MUSYOKA

JUDGE