



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 542 OF 2009**

**IN THE MATTER OF THE ESTATE OF SYLVANUS JUMA OKECH (DECEASED)**

**RULING**

1. On 6<sup>th</sup> December 2011, GBM Kariuki J disposed of an application dated 15<sup>th</sup> January 2010 in the terms that the grant made on 17<sup>th</sup> September 2009 was revoked, a fresh one was to issue to Otieno Owiti, Francis Bernard Otieno and Grace Otieno Ongila and finally that the new administrators were to apply for confirmation of the grant made to them.

2. Curiously, on 16<sup>th</sup> January 2013 a Mr. Arthur from the law firm of Ochieng, Onyango, Kibet & Ohaga, Advocates, attended the court registry and obtained a date *ex parte* for the hearing of the same, that is the application dated 15<sup>th</sup> January 2010. The date given for hearing was 13<sup>th</sup> March 2013. The matter did not proceed then as the parties indicated that they were negotiating settlement out of court. The matter was mentioned several times until 1<sup>st</sup> July 2015 when the parties asked the court for leave to file distribution schedules. They thereafter made oral submissions based on the distribution schedules filed. The highlights were made on 2<sup>nd</sup> March 2016.

3. I have perused through the record before me, and I have not come across any application for confirmation of grant. That would mean that the parties did not comply with the order made by GBM Kariuki J. on 6<sup>th</sup> December 2011 directing them to file such application immediately. It would also mean that the schedules for distribution filed herein, and highlighted on 2<sup>nd</sup> March 2016, are hanging to the extent that they are not founded on a summons for confirmation of grant.

4. An estate can only be distributed upon grant of orders sought in an application for confirmation of the grant. This comes out clearly from the provisions of section 71 of the Law of Succession Act, Cap 160, Laws of Kenya, for it is the confirmation of the grant which empowers distribution of the capital assets. For avoidance of doubt, section 71(1) of the Act states as follows -

*‘After expiration of a period of six (6) months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower distribution of any capital assets.’*

5. In short there cannot be distribution without a confirmation of the grant. That then would mean parties should not be moving the court for distribution without first filing an application for confirmation of the grant.

6. Section 71 and Rule 40 of the Probate and Administration Rules do not make provision for filing of schedules of distribution; the practice of filing schedules has evolved as a tool for compliance with the requirements of the proviso to section 71(2) of the Act and the provision in Rule 40(4), of the Probate and Administration Rules which provide as follows –

*‘71(2)(2A) ... Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.’*

*‘40(4). Where the deceased has died wholly or partially intestate the applicant shall satisfy the*

*court that the identification and shares of all persons beneficially entitled to the estate have been ascertained and determined.'*

7. The approach that the parties hereto adopted to obtain orders on the distribution of the estate is not procedural. I cannot in the absence of a confirmation application grant any orders on the distribution schedules presented.

8. Consequently, I shall direct that the administrators herein comply with the directions given on 6<sup>th</sup> December 2011, by filing a summons for confirmation of the grant made to them. The court may thereafter determine the matter on the basis of the submissions on record.

9. The matter shall be mentioned on a date to be given at the delivery of this ruling, for compliance.

**DATED, SIGNED and DELIVERED at NAIROBI this 3<sup>RD</sup> DAY OF FEBRUARY, 2017.**

**W. MUSYOKA**

**JUDGE**