



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
SUCCESSION CAUSE NO. 319 OF 2015

IN THE MATTER OF THE ESTATE OF GIBSON KINUKA NDUNDA (DECEASED)

RAEL MUTUNGE.....APPLICANT/OBJECTOR

VERSUS

JEDIDAH MATHEMBO NDUNDA.....RESPONDENT/PETITIONER

R U L I N G

1. The Objector/Applicant filed summons dated the **20th day of April, 2016** seeking to be included as an Administratrix of the Estate of **Gibson Kinuka Ndunda** (Deceased) and the Court to endorse the schedule of distribution as set out by the supporting affidavit.
2. The application is premised on grounds that by the Court's ruling delivered on the **16th December, 2015** the Respondent/Petitioner, the Administratrix of the Estate of the Deceased was directed to file a schedule of distribution of the Estate of the Deceased within sixty (60) days thereof; The Respondent has failed, refused and/or neglected to abide by the direction of the court; and the Objector intends to have the Deceased's Estate distributed as ordered by the Court.
3. In an affidavit in support of the application, the Applicant reiterated what is stated in the grounds on the body of the application and deposed further that the Deceased's Estate be divided equally among the two (2) households with each household holding an equal share in all properties. Further, she listed the properties forming the Estate of the Deceased.
4. In response, the Respondent deposed that she was dissatisfied with the ruling of the Court, she intends to file an appeal in the Court of Appeal and she has filed an application seeking leave to appeal out of time. That the application came up for hearing but was adjourned following the absence of Counsel for the Applicant; The Objector and her children are intermeddling with the Estate by selling portions of land to third parties who are putting up permanent structures on the portions despite the schedule of distribution in tandem with the Court order having been determined to establish how the Estate shall be distributed between the two (2) households.
5. Further, she averred that if she proceeds to file the schedule of distribution in tandem with the Court order, her intended appeal will be rendered nugatory since the Objector will proceed to dispose of the assets of the Estate before the intended appeal is heard and determined. So far the Applicant and her children have entered into agreements with third parties to dispose of parcels:

a) Kisasi/Kimuuni/720

b) Kisasi/Kimuuni/103

c) Kisasi/Kimuuni/796

And even if the Objector is to be appointed as an administrator there must be consent of all beneficiaries of the Estate which has not been attached to the application.

6. The application was canvassed by way of written submissions which I have taken into consideration. The application has been sought pursuant to the provisions of **Rules 49 and 73** of the **Probate and Administration Rules** that provide thus:

“49. A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit.

73. Nothing in these 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.”

7. This is a matter where a limited grant of Letters of Administration *ad colligenda bona* were made to the Respondent herein on **18th May, 2009**. When the Applicant learnt of the same she filed an application to have them revoked on the **24th July, 2009** on the ground that the grant was obtained fraudulently by deliberate concealment from Court of the particulars of all assets and dependants of the Deceased.

8. On **26th June, 2009** summons were filed against the Applicant for purportedly intermeddling with the Estate of the Deceased as she was in occupation of some of the properties where she was collecting rent. Thereafter summons for revocation of the grant were withdrawn on condition that the Petitioner files summons for confirmation of the grant. Consequently, a grant of Letters of Administration intestate was issued to the Respondent on **7th November, 2011**.

9. On **20th May, 2013** instead of the Respondent pursuing the issue of confirmation of the grant, she filed an application seeking issuance of restraining orders against the Applicant from intermeddling with the Estate of the Deceased and even entering the home of the Deceased. On determining the matter the Court directed the parties to fix a hearing date for the application for confirmation of the grant within a set timeline.

10. Parties having been heard this Court reached a finding that the Deceased having been polygamous the Deceased's Estate was to be divided equally amongst his children pursuant to the provisions of **Section 40** of the **Law of Succession Act**; and their mothers were to be added as units to each household. The first household consisted of Eight (8) members while the second household consisted of Six (6) members. Since some assets had been left out per the allegation of the Applicant herein and the actual area of most of the properties listed had not been divulged this Court could not ascertain respective dentures of shares for each beneficiary.

11. This Court directed the Administratrix of the Estate to file a schedule of distribution of the Estate within sixty days. The ruling having been dated the **16th day of December, 2015** the 60 days lapsed in **February, 2016**. The Respondent disregarded the order.

12. It is now stated that she intends to appeal against the ruling of the Court. The order of the Court subsists todate as no stay order has been granted.

13. The intestate herein having been polygamous each house should have been represented in the administration of the Estate (**Also see Re Kahugi Gituro (Deceased) (2016) eKLR**).

14. The Applicant herein has asked this court to divide properties listed in paragraphs of the supporting affidavit equally amongst the two (2) houses. This court was unable to confirm the grant because the area of the properties listed had not been disclosed. There was no indication of respective identities and shares that each beneficiary was entitled to as required by **Section 71** of the **Law of Succession Act**. In any case the proposal by the Applicant deviates from what she had proposed in her protest namely that she takes possession of all properties in the rural area namely **Katwala** and **Mbitini**.

15. From the foregoing I proceed to order as follows:

i) The Applicant be and is hereby appointed as a Co-administratrix of the Estate of the Respondent herein.

ii) A fresh grant shall issue to include her name as such.

iii) Each Administratrix shall file a list of beneficiaries, their entitlement and acreage of assets mentioned as forming the Estate of the Deceased for purposes of confirmation of the grant within **60 days**.

iv) Mention on **16th May, 2017**.

v) Each party shall bear their own costs.

16. It is so ordered.

Dated, Signed and Delivered at Kitui this 14th day of February, 2017.

L. N. MUTENDE

JUDGE