



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
SUCCESSION CAUSE NO. 1634 OF 2014
IN THE MATTER OF THE ESTATE OF GRACE NJERI KARIUKI (DECEASED)

RULING

1. The Application now before the Court is brought under a Certificate of Urgency filed on 16th January 2017. The Certificate was filed by the Advocate for the Administrators, Wachira Nderitu. In the Certificate it is said the matter is 'extremely urgent' for the following reasons:

(i) The Estate is heavily indebted in rates, other statutory dues as well as Bank loans. The Administrators have been negotiating to sell of one of the properties in the Estate, that is, L.R. No. 36/11/218. It is said they intend to use the proceeds of sale to 'enable them to settle the said debts'.

(ii) An agreement of sale was entered into on 27th May, 2016. It is said the intended buyer had not obtained the finance necessary to complete at that time.

(iii) Gulf African Bank Ltd has now agreed to finance the buyer for the full sum of the purchase price amounting to Kshs.45 Million.

(iv) It is said that therefore the Administrators need to confirm the Grant urgently to enable them to complete the sale.

2. The Application is supported by the Affidavit of Wachira Nderitu Advocate. The Affidavit states that the same Advocate is representing the Administrators in these proceedings as well as in the proposed sale of one of the Assets of the Estate being, L.R. No. 36/11/218. The Affidavit exhibits the following documents:

(a) Agreement of Sale between the Administrators and Ahmed Hussein Adan entered into on 27th May 2016. Setting the purchase price as KShs.45Million

(b) A letter from the Bank's Advocates dated 30th November 2016 said to be providing a professional undertaking to the Administrators on behalf of the Purchaser dated 30th November 2016

(c) Letter from the same Advocates pushing for completion of the sale transaction dated 13th January 2017

3. The Sale Agreement names the three Administrators as 'The Vendors'. It makes no mention of the

Estate nor their role as Administrators. The Property is described as LR. Number 36/11/218 (Pet No. 218) in Eastleigh Section II. The purchase price is set as Kshs.45,000,000/= . Clause 3.2 provides that ‘The Purchase Price shall be substantially or wholly financed by the Purchaser’s Bank (Gulf African Bank Ltd.) who shall be entitled to evaluate and approve the terms of the sale under this Agreement’. That it was to be subject to approval for financing by the Bank. That statement is inconsistent with the Certificate which suggests the that financing of the purchase by the Bank is fully in place. Clause 3.3 provides ‘Upon approval of the financing by the Purchaser’s Bank, parties agree that the purchase price or balance thereof shall be secured by a professional undertaking of counsel for the purchasers.

4. Underlying the Application is this succession cause, in which grant has not been confirmed. The Application seeks confirmation on the basis of the terms set out in this Application.

5. The details relating to the Succession Cause are that the Deceased, Grace Njeri Kariuki passed away on 25th March 2013. The Petition for Grant of Letters of Administration was filed on 9th June 2014 by the three administrators. The Letter from the Chief on the file is incomplete. The Letters of Administration were granted on 11th September 2015. There are other potential beneficiaries. The deceased was survived by 9 children 3 are Administrators and all 9 are Beneficiaries as follows:

- | | |
|-------------------------------|------------------|
| (1) George Njoroge Kariuki | Admin (son) |
| (2) Esther Wairimu Kariuki | Admin (daughter) |
| (3) Samuel Kamau Kariuki | Admin (son) |
| (4) Peter Ndiri Kariuki | Admin (son) |
| (5) Francis Muchina Kariuki | son |
| (6) Margaret Mumbi Kariuki | daughter |
| (7) Simon Gikura Kariuki | son |
| (8) Virginiah Muthoni Kariuki | daughter |
| (9) Joseph Njenga Kariuki | son |

6. The application for Confirmation of Grant lists 9 beneficiaries however it doesn’t provide their ages. Paragraph 4 lists assets of which 18 are real property. The Petition Listed the assets as follows:

ASSETS

- i. Eastleigh Plot No. 36/II/218 on 8th Street
- ii. Ruiru East Block 1/24 0.50 Ha in Ruiru Town
- iii. Nairobi/Block 110/6470.199 Ha Block 110-Thome
- iv. Komothai/Kibichoi/780 Homeland (Kibichoi)
- v. Juja/Juja East Block 1/516 0.89 Ha
- vi. Ruiru/Mugutha 1/5155 – 0.1272 Ha
- vii. Komothai/Kibichoi/T.4 plot in Kibichoi

vii. Ruiru/Ruiru East Block 4/T.1369 0.0800 Ha

ix. Mathare North No. 2/389 Nairobi

x. LR No. 26477 Nairobi Kasarani

xi. Nairobi/Block 104/258 Juja Road Nairobi

xii. Nairobi/Block 104/248 Juja Road Nairobi

SHARE CERTIFICATE

1. Kirimara Mumbi Witeithie Company Ltd Certificate No. 39

2. 1 share in GRARA Investments Co. Ltd.

3. Kiganjo location Ranching Company Ltd. Certificate No. 1534

4. Nyakinyua Investment Ltd. Certificate No. 5278

5. Mbo-1-Kamiti Farmers Company Ltd. Certificate No. 3680 – 2 shares

6. One (1) share represented by share certificate No. 16118 dated 27.11.77 in Thome Farmers No. 4 Limited

BANK ACCOUNTS

a. Family Bank – Four Way Towers Branch Account No. [particulars withheld]

b. Kenya Commercial Bank – Moi Avenue Branch Account No. [particulars withheld]

c.

d. Cooperative Bank – Stima Plaza Branch Account No. [particulars withheld]

e. Barclays Bank – Ruaraka Branch Account No. [particulars withheld]

f. KCB Savings Account No. [particulars withheld]

g.

ASSETS

Total estimated value – Kshs.5,000,000/= (Five Million Shillings)

LIABILITIES – Nil

7. The assets are listed in the Affidavit in support of the Summons for Confirmation of the Grant (paragraph 4). The property in question is by a long way the most valuable. The Affidavit in Support of the Petition lists the same properties and assets. The value attributed to the entire estate in that Affidavit is Kshs.5,000,000/= Five Million. Given that the same deponents, now assert the only one property in that list is worth about Kshs. 45,000,000/= suggests that the Estate is worth about 10 times as much as the original estimate.

8. As to financing, the Affidavit informs the Court that; the Bank has provided the finance and that there is a professional indemnity provided by the Purchasers by way of an appropriate letter attached to the

Affidavit in Support as part of 'WNT'. In fact what is described as 'Letter of professional indemnity' dated 30th November 2016 by Messrs Wamae & Allen Advocates to the Petitioner's Advocates, is a letter seeking the listed completion documents set out in condition B (a) to B (j) of the agreement. 'On our irrevocable and unconditional undertaking to pay your firm the sum of Kenya Shillings Forty Five Million (45,000,000/=) within 14 days of successful registration'. There is no undertaking per se to pay on behalf of the Buyer, nor are the terms set out in that letter. Further, it seems that the property is to be transferred AND registered in the name of the purchaser before a single cent is paid to the Estate. There seems to be no arrangement or requirement for the payment of a deposit in the Sale Agreement.

9. Clause 4 of the Agreement relates to the capacity of the vendors. It provides that the vendors are selling the property as legal and beneficial owners. It says; "*The vendors hereby confirm that they have jointly applied for confirmation of Grant of Letters of Administration with express application for approval and for endorsement of this sale and further confirm that all beneficiaries of the Estate of the deceased have consented to issuance of confirmed Grant and transfer of the property to the Purchaser*". The Agreement was signed on 27th May 2016. By that date there had been no summons for confirmation filed for this Estate and therefore the Administrators were not in a position to confirm as stated. Then followed the aforementioned letter of 30th November from Messrs Wamae and Allen requesting a certified copy of the confirmation of Grant. Again there was no application in existence at that point in time and so there was no Confirmation of Grant. In addition the completion date was defined in Clause 1 (a) as the later of 90 days from execution or 14 days from satisfaction of the last condition. Special condition B requires for various documents of title to be supplied to the purchaser's Advocates pending actual completion.

10. Warranty E (a) provides that the vendors are the registered legal and beneficial owners of the property by the virtue of Grant of Letters of Administration issued on 11th September 2015 in Nairobi High Court Succession Cause No 1634 of 2014. That statement cannot be true, whether in fact or in law. The Grant of Letters of Administration did not make the administrators does not make administrators registered owners and their lawyer/advocate would have known that at the very least. In addition, the administrators have agreed to deliver the property to the purchasers with vacant possession. That suggests that it may be or have been occupied and therefore tenanted or otherwise generating income. There is no mention of the beneficiaries of the estate, nor of the tenants/occupants, if any. There is no mention of the rental income in either the Petition, nor the Summons for confirmation. If it exists it would be an asset of the Estate.

11. The matter came before this Court on 1st February 2017. The Court directed that the Applicants file further documents including properly notarized consents from the absent beneficiaries as well as an offer letter from the Bank. That was done

12. The Offer Letter is dated 23rd August 2016. The amount offered by the Bank in total is Kshs.30,000,000/= (Kenya Shillings thirty million only). The purchase price is stated to be Kshs.45,000,000/= (Kenya Shillings forty five million only). Therefore it is patently obvious that the Bank will not finance the full sum of the purchase price. In the circumstances Clause 3.2 relating the Bank advancing the full purchase price incorrect when it was made and was also incorrect when the application was made. In addition, the statement made by the Advocates for the Administrators that '*M/s Gulf African Bank Ltd have now agreed to finance fully the said buyer and have accordingly instructed their Advocates Wamae & Allen Advocates to give the Administrators Lawyers an undertaking in respect of the whole of the said purchase price amounting to Kshs.45,000,000*' suggests a different state of affairs. That raises an inconsistency. However, there is no evidence before the Court that substantiates that statement. There is no evidence of the purported instructions nor of any advance payment of KShs.45,000,000/= (Kenya Shillings forty five million) to support the undertaking as it seems the Bank is only financing KShs 30,000,000/= (Kenya Shillings thirty million which is two thirds of the Purchase price.

Further the reason given for the need for an early sale is that there are substantial and significant debts. The Administrators have not referred to any debts whatsoever in their Affidavit. In addition there is no evidence showing when and how those debts arose and two whom they are owed. Therefore they have

not established that part of their case. The only debt that is mentioned in passing is the change and or mortgage with the Co-Operative bank. However the amount still due is Kshs.2,100,000/= (Kenya Shillings two million one hundred thousand only) according to the special condition A (i). Against a property worth Kshs.45 Million (Kenya Shillings forty five million) that is relatively very small. However, against an Estate valued at Kshs. 5,000,000/= (Kenya Shillings five million only) as put forward by the Administrators in the Petition, it could be substantial. However, from their own position now it is clear that the Petition mis-stated the value of the estate. The Petition listed the Liabilities as “Nil”. When and how have the liabilities arisen since 2015.

13. Paragraph 4 of the Affidavit in Support of the Certificate Of Urgency also sworn by the same Advocate depones ‘*THAT the administrators’ application for confirmation of the Grant herewith filed is therefore urgent and ought to be disposed of immediately to enable the completion of the said sale and settling of the outstanding estate debts*’. As stated there are no debts demonstrated nor quantified by the Administrators. Secondly, the administrators are already holding themselves out to be the sole legal and beneficial owners of the property as set out in the sale agreement. Thirdly, the Affidavit in support of the application at paragraph 4 (ix) states that ‘*Plot No. 36/II/218 Nairobi be transferred to the 3 administrators to sell as per agreement of sale dated 27th May 2016 and proceeds thereof distributed equally to all the beneficiaries less expenses and professional fees*’. Those three statements are inconsistent and misleading. The Court cannot decide at this stage whether that was deliberate. In any event if it is the intention and in the best interests of the estate and ALL the Beneficiaries to sell any of the properties, those sales can be completed without the need for transfer to and registration in the names of the administrators. There is no evidence before the Court that the said sale is in the best interest of the Estate and/or the Beneficiaries who are not Administrators.

14. The Administrators owe the Estate a duty of good faith. In addition, they have a duty to act in the best interests of the Estate. It would be very sad, and worse, if they were to hive off the most valuable assets of the estate for themselves and their own benefit.

15. The intended distribution also demonstrated an intention to transfer various assets to Grara Invesment Ltd. There is no explanation, in the Summmmons or the Affidavit as to whether that is in fact a limited company. There is no certificate of incorporation. Similarly, there is a void of information as to who owes that company and who operates it. In the circumstances the Court cannot sanction any such transfer that may be to the detriment of the remaining beneficiaries.

16. The Courts jurisdiction to confirm a grant is set out in Section 70 of the Law of Succession Act which provides:

“Whether or not there is a dispute as to the grant, every court shall have power, before making a grant of representation—

(a) examine any applicant on oath or affirmation; or

(b) call for further evidence as to the due execution or contents of the will or some other will, the making of an oral will, the rights of dependants and of persons claiming interests on intestacy, or any other matter which appears to require further investigation before a grant is made; or

(c) issue a special, citation to any person appearing to have reason to object to the application.”

17.The Orders the Court can make are set out in Section 71 which provides:

“1) After the expiration of a period of six 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 the distribution of any capital assets.

(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—

(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or

(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or

(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or

(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case: 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 such grant shall specify all such persons and their respective shares.

(2A) Where a continuing trust arises and there is only one surviving administrator, if the court confirms the grant, it shall, subject to section 66, appoint as administrators jointly with the surviving administrator not less than one or more than three persons as proposed by the surviving administrator which failing as chosen by the court of its own motion.

(3) The court may, on the application of the holder of a grant of representation, direct that such grant be confirmed before the expiration of six months from the date of the grant if it is satisfied—
(a) that there is no dependant, as defined by section 29, of the deceased or that the only dependants are of full age and consent to the application; (b) that it would be expedient in all circumstances of the case so to direct.

(4) Notwithstanding the provisions of this section and sections 72 and 73, where an applicant files, at the same time as the petition, summons for the immediate issue of a confirmed grant of representation the court may, if it is satisfied that—

(a) there is no dependant, as defined by section 29, of the deceased other than the petitioner;

(b) no estate duty is payable in respect of the estate; and

(c) it is just and equitable in all circumstances of the case, immediately issue a confirmed grant of representation.....”

18. For the reasons and inconsistencies set out about this Court is not satisfied as a consequence that the administrators will administer the estate according to the Law. The application is therefore dismissed. Administrators to pay their own costs. Under the Powers of granted to the Court it is further ordered and directed that:

(1) The Administrators do file and serve as each beneficiary:

a) A complete set of Estate Accounts listing all the assets real and personal and all income received as well as indebtedness from 11th September 2015 to the date hereof.

b) Formal valuations prepared by the Government valuer for each property in the Estate within 28 days.

Order accordingly,

FARAH S. M. AMIN

JUDGE

DATED 15TH day of MARCH, 2017.

SIGNED AND DELIVERED at NAIROBI this 15th Day of March 2017

In The Presence of :