



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
SUCCESSION CAUSE NO. 3310 of 2014
IN THE MATTER OF THE ESTATE OF JOHN MUTURI THUMI (DECEASED)
R U L I N G

1. This Matter relates to the Estate of John Muturi Thumi (deceased). The Deceased passed away on 17th October 2007 at Nairobi Hospital. He was survived by the following family members:

- (1) Beatrice Wambui Muturi (widow)
- (2) Peter Thumi Muturi (son)
- (3) Nancy Waithira Muturi (daughter)
- (4) Francis Mwangi Muturi (son)
- (5) James Muigai Magana (son)
- (6) Andrew Maina Muturi (son)
- (7) Daniel Ngengi Muturi (son)
- (8) Elizabeth Mumbi Muturi (daughter)

That is confirmed by the Letter from the Chief for Kiganjo Division Gatundu South District dated 28th November 2011. The date of death recorded in the Certificate of death No 223207 as on 7th February 2008

2. The first four family members listed above, obtained and served a citation to accept or refuse letters of administration upon James Muigai Magana. That was filed on 15th December 2014. It is said to have been served but there is no return of service. Instead the Petitioner's Advocates wrote to the Deputy Registrar stating that the Citation and the Affidavit in Support were served upon James Muigai Magana. He entered appearance through the firm of Amuga & Co Advocates but did not file a response. The Letter is dated 26th March 2015.

3. As a consequence of the lack of response the Petitioners filed their Petition on 27th March 2015. The attached Consent to Grant of Administration was dated 18th May 2015 and is signed by all the family members except James Muigai Magana. The Petitioners are Beatrice Wambui Muturi (widow), Peter Thumi Muturi (son), Nancy Waithira Muturi (daughter), Francis Mwangi Muturi (son). The Affidavit in

Support of the Petition is said to have been sworn on 11th December 2014.

4. The Petition was gazetted on 14th August 2015. The Grant of Letters of Administration Intestate was issued on 22nd September 2015 by Hon Lady Justice Ougo. Neither objection nor protest having been filed. The Citee James Muigai Magana did not participate in the proceedings until 11th August 2016 when there was a Notice of Appointment of Advocates filed on his behalf. He had appointed Messrs Amuga & Company Advocates.

5. On 21st November 2016 th Petitioner/Administrators filed Summons for Confirmation of Grant. The Summons states that it is grounded upon the joint Affidavit of the 4 Administrators. The Summons sets out a Schedule. The Affidavit in Support repeats the same schedule. The Affidavit does not inform the Court who are the dependants/beneficiaries of the Deceased. It does not state categorically that apart from the persons named, there are no other dependants. In the circumstances, it lacks the necessary certainty.

6. The Schedule of Distribution is set out in paragraph 3 of the Affidavit. It states "THAT the identification and shares of all persons beneficially entitled to the said estate have been ascertained and determined as set out there. The Schedule lists two properties 50% of LR No 209/4351/2/Dennis Pritt Road, Nairobi and 50% of LR No 209/3527/3 Park Road Nairobi which are intended to vest in Ladbroke Holdings (K) Limited. As the name suggests that is not a natural person and therefore cannot be an heir or dependant of the deceased. It is not a creditor. The Affidavit does not explain that the other 50% is held by the Widow as tenant in common. The reason for naming a company as beneficiary is not explained. The Affidavit provides absolutely no information about the company, its objects whatsoever. The Affidavit does not exhibit a Certificate of Incorporation, however there appears at Exhibit B1 a copy of a a Letter from the Office of the Registrar of Companies containing a list of the names of director/shareholders obtained from the returns dated 11th May 2015. It seems that the eight beneficiaries were intended to be shareholders. The CR-12 is not exhibited. The evidence provided suggests that the Company was incorporated very shortly before the Petition, if not after. The remainder of the Schedule sets out various shares for various assets. There is no explanation as to how those shares were calculated and allocated as suggested. There is no explanation as to what steps were taken to ensure parity between the beneficiaries. It appears that a significant proportion of the properties in Nairobi that could have a commercial user are to vest in the widow. Further the properties are to be held by the Administrators in trust for the other beneficiaries. There is no explanation as to why the adult beneficiaries should not hold their own properties. The Schedule of Assets contains only immovable property.

6. The Consent to Confirmation of Grant is signed by all the Beneficiaries except James Muigai Magana

7. The Application came before the Court for Hearing on 25th January 2017. The absence of any immovable property was noted. The explanation was that there was a Bank Account which was a joint account. The Petitioners were directed attend for cross examination on the existence of any bank accounts that the Deceased may have held before his death. Instead of complying with the Order, the First Administrator, Beatrice Wambui Muturi filed an affidavit stating that she was informed by Barclays Bank that the account of Mr John Muturi Thumi account No [...], Market Branch was closed. The Letter provides little assistance. It simply states that the deceased is a client of the Bank and that the account was closed. it attaches a "cheque leave" which is omitted from the Exhibit. The Letter also contains a disclaimer which makes it of no evidential value whatsoever. The impression created is that there was a bank account. It may or may not have been a joint account. In any event it was closed after the demise of the deceased. That suggests it was not frozen on the death of the account holder as would be expected. That gives rise to concerns relating to the dissipation of any funds that may have been in the account at the time of death. If that was the case, the Schedule of Assets is incomplete.

8. On 25th April 2017 the matter was re-listed for hearing. Neither James Muigai Magana nor his Advocates attended. Mr Shah said he was holding brief for Mr Amuga. The submission was that the Citee wishes to withdraw. In the context of confirmation of a grant, that submission does not make sense. From what does he wish to withdraw? The Beneficiary was given a opportunity to attend Court. He did not. It was said he had refused to signify his consent but that he is an equal shareholder in the

assets same as his siblings. It is difficult to see the basis on which that submission is made as there is not evidence of how the shares were calculated and allocated.

9. The Courts jurisdiction to confirm a grant and the Orders the Court can make are set out in **Section 71** of the **Law of Succession Act** 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....”*

10. For the reasons set out above together with the shortcomings of the application, in particular the fact that one beneficiary has not been included in the decision making the Court is not satisfied that the administration is being properly conducted. Further, the position and incorporation of a company is not explained in the Supporting Affidavit and gives rise to concerns about a re-distribution under the guise of company assets. In the circumstances the Court is not satisfied that it is just and equitable in the circumstances of this case to confirm the grant. The Court similarly takes the view that this is not the type of application that could be remedied by amendment or more time. It is fundamentally flawed.

11. The Application is therefore dismissed. The costs to be paid by the Administrators and not the Estate.

Order accordingly,

FARAH S. M. AMIN

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12th day of July 2017

In the Presence of :

Court Assistant: Patrick Mwangi

Applicants: Mr Kamunde