



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO. 597 OF 2010

In the Matter of the Estate of M' Rukungania Alias Ringera Kungania (Deceased)

SOLOMON BUNDI RINTARI.....PETITIONER

Versus

M' KIAMBATI M' RINGERA.....1ST OBJECTOR

M' MBIJIWE M' RINGERA.....2ND OBJECTOR

RULING

[1] Before me is a Summons brought pursuant to rules 49, 63 (1) and 73 of the Probate and Administration Rules, and Order 45 of the Civil Procedure Rules in which the Applicant seeks the following orders:

1.spent

2. ***That the orders of this Honourable court granted on 19th May 2015 Confirming Grant of Letters of Administration to the Petitioner herein be reviewed, revoked, annulled, vacated and or set aside.***

3. ***The court be pleased to cancel all entries made in the register of Kiirua/Kiirua/205 made pursuant to the confirmation made on 19th May 2015 and the same to revert to the name of the deceased M' Ringera M' Nkungania.***

4. ***That the orders granted on 19th May 2015 be stayed pending the hearing and determination of this application.***

5. ***In the alternative the court to order inhibition orders in respect of parcel Kiirua/Kiirua/205 and any resultant numbers pending hearing and determination of this application and this case.***

6. ***That costs of this application be provided for.***

7.

[2] The said application is premised on the following grounds:

1. ***That the hearing notice informing the objectors counsel on record that the application dated 8th December 2014 was scheduled for hearing on 19th May 2015 was received extremely late and***

under protest on the 18th day of May 2015 at 2:30 PM.

2. That the objectors in the cause are deceased and counsel on record informed this honourable court vide a letter dated 13 March 2015, that they required time within which to get proper further instructions from the objectors legal representatives.

3. That this honourable court had ordered that the distribution of the estate of the deceased be done by way of viva voce evidence.

4. That there was on record yet another application dated 15th august 2012 also seeking confirmation of grant which said application was not disposed of or withdrawn.

5. That the interest of the objectors and their estate will be seriously prejudiced if the orders sought are not granted.

6. That no prejudice will be occasioned if the orders sought are granted.

[3] The Objectors Counsel deposed that she was served with the hearing notice informing that the Petitioner's application dated 8TH December 2014 was scheduled for hearing on 19th May 2015, extremely late on 18th day of May 2015 at 2:30PM and that due to the extremely short notice, was unable to adjust her diary and appear before court on 19th day of May 2015. She averred further that she also tried to contact her client but in vain due to shortness of time. She made further averments; that Counsel for the Petitioner was not honest to inform the court that he had served only few hours before the hearing date when the Petitioner was clearly aware that this honourable court had ordered and directed that the determination and distribution of the deceased estate shall be done by way of oral evidence. Again, she deposed that the Petitioner in disregard of these directions by the court went ahead to list his application for confirmation without calling for oral testimony.

Respondent launched his salvo

[4] The application was opposed via a Replying Affidavit sworn by the Petitioner. The Petitioner deposed *inter alia* that on 5th November 2014, the honourable court was informed of the demise of the 1st Objector by his advocate whereupon the court directed; (1) the said advocate to file an application for substitution; and (2) the Petitioner to file fresh application for confirmation of grant and distribution of the estate. Pursuant to those directions, the Petitioner filed application for confirmation dated 8th December 2014 in which he distributed 2.80 acres to the 1st Objector's wife Kangai M' Kiambati- which was even more than the other beneficiaries taking all facts into account. The Petitioner further contended that this application is an abuse of the court process as it was not supported by any beneficiary and that counsel seemed to be litigating without any instructions by anybody.

Submissions

[5] When the matter came up for hearing on 2nd December 2015, it was agreed that the instant application be disposed of by way of written submissions. The Petitioner made submissions and amplified the averments I have already stated above. He emphasized that the Objector herein is yet to comply with the directions of the court issued on 5th November 2014, to the effect that she files an application for substitution of her deceased husband. And that the previous applications had been disregarded because they were overtaken by events. He also stressed that this application is incompetent for two reasons; (1) it is supported by affidavit of counsel for the 1st Objector who is deceased;(2) the said counsel had not filed any notice of appointment by the legal representative of the deceased objector; and (3) no person has been issued with a limited grant as representative of the deceased Objector. He also challenged the application for lacking in merit as it did not challenge the distribution which was very fair in the circumstances.

[6] On the other hand, it was submitted for the 2nd Objector that there was no dispute that the 1st Objector

had died and that the only big mistake that occurred was that the advocate for the Petitioner filed an application for Confirmation secretly and served the same a day prior to the hearing and that as such they were not able to attend court to air their protest; counsel stated that at all times they were representing the 2nd Objector.

DETERMINATION

Mistake of counsel

[7] Upon careful consideration of this application and the rival submissions by the parties, I take the following view of the matter. Given the arguments I have heard in this matter I am careful to embark on an examination of some crucial events in this case. First, it is not in dispute that, on 19th November 2013 the court directed that this matter be disposed of by way of *viva voce* evidence. The court further directed that a date be taken in the registry in the following year. It is further not in dispute that on 5th November 2014 the court was informed that the 1st Objector had died whereupon the court directed the parties to file a fresh scheme of distribution and also granted the 1st objector's advocate time to substitute the deceased Objector. When the matter came up for mention on 9th December 2014, Mr. Muthamia for the Petitioner intimated to court that they had not filed a scheme of distribution and requested for more time to do so. However, there was no appearance for the Objector and so the matter was stood over generally.

[8] Notably, as at 18th July 2016 the Advocate for the Objector had not complied with the orders made by Makau J on 5th November 2014 and none of the parties had listed down the matter for oral hearing as directed by court on 19th November 2013. I will revisit this failure later. Even though counsel for the Objector intimated to court that she needed more time to get proper and further instructions from the Objectors legal representatives; she neither revealed the identities of the alleged legal representatives nor applied for substitution of the 1st Objector as was directed by the court on 5th November 2014. Again, no reasons were given as to why this had not been done.

[9] There are other impudent incidents which took place: The Advocate for the Objector was not in court on both 9th December 2014 and 19th May 2015 when the grant was confirmed. Similarly the Advocate for the Objector was not in court on 2nd September 2015 for the hearing of her application but nevertheless the court ordered that the application be heard on 9th September 2015. Again, on that date, the Advocate for the Objector came late and the court indulged her; it directed that the matter be heard on 5th October 2015. On a further mention of the case on 2nd December 2015, again Counsel for the Objector was absent but the court still directed that; (1) the parties to file and serve submissions within 21 days; (2) the order be served upon the Advocate for the Objector; and (3) the matter to be mentioned on 16th March 2016. On 16th March 2016, the court was informed that the Advocate for the Objector was yet to file submissions; nonetheless, the court allowed her 14 days to file the submissions.

[10] With tremendous respect, the foregoing portend only one thing; that, despite magnanimous and numerous indulgencies extended to counsel by the equitable hand of the court, counsel for the Objector was not keen in prosecuting this matter on behalf of the client. Also, from the record, the contention by the Objector's Advocate that the application for confirmation was filed secretly is certainly not true as she was fully aware of the summons for confirmation herein and also that it had been listed for hearing on 19th May 2015; notice of hearing had been received by her office albeit under protest due to short notice. In these circumstances, I wonder whether counsel could not have embraced the practice of holding brief in such important matter noting the delay she has caused in this case. Accordingly, it is in order for the court to register its great deprecation of the manner counsel for the objector has conducted these proceedings. To say the least, the delay caused by counsel for the Objector is huge and is not received well by this court.

But is it still possible to do justice?

[11] The above notwithstanding, is it still possible to do justice to the parties in these proceedings? I find one issue to be of fundamental significance in the dispensation of justice; i.e. service of hearing Notice. Here I will borrow from the general rules of procedure on ***Service, Hearing and Consequences of Non-attendance*** as provided for in Order 5 and 12 of the Civil Procedure Rules. See also Rules 63 and 65(5) of the Probate and Administration Rules. Where the notice of hearing is not served in sufficient time for the defendant to attend court, the court has unfettered discretion to set aside or vary any order or proceeding undertaken in such circumstances. I am aware of the unpleasant events herein and I have expressed my deprecation of the way counsel for the Objector has handled these proceedings. I am also acutely aware that sometimes parties will be left to bear mistakes of their counsel, but in others it may not be appropriate to so let. In this case, the notice of hearing of confirmation proceedings was not served in sufficient time for the 2nd Objector and his counsel to attend court for the hearing of confirmation application. I consider confirmation proceedings to be critical aspect of administration of estates of deceased persons and that is why Rule 41 of the Probate and Administration Rules has provided for very elaborate and strict procedure to be followed during the hearing of application for confirmation. Therefore, as I have stated above, any order made upon hearing of application for confirmation may be set aside or varied if notice of hearing thereto was not served in sufficient time to enable the protestor or objector to attend court. See also the discretion of the court under Order 12 rule 7 of the Civil Procedure Rules on ***Hearing and Consequences of Non-attendance***. Coming back to this case, the notice of hearing of confirmation application was served upon the firm of M/S KAUME & CO ADVOCATES on 15th May 2015 at 2.30; the notice was received under protest. On this, see the affidavit of service filed on 18th May 2015. Although, perhaps it may have made a difference had counsel for the Objector engaged the services of holding brief, the echoes of justice are ringing louder and louder that I should serve substantive justice by recognizing that service of the hearing notice herein did not permit sufficient time for the Objector to attend court for the hearing of application for confirmation. But despite that legal reality, I remind myself that I should not allow the Objectors and their counsel to temporize this case any further, thus, I must fashion appropriate orders in the circumstances of this case. Accordingly, issue the following specific findings and orders:-

- (1) I only stay any further implementation of the confirmed grant herein for only 14 days.
- (2) I direct the Objector to file and serve his mode of distribution within 10 days of today which failing the order of stay herein shall lapse and administration of the estate shall proceed as per the confirmed grant.
- (3) I make myself clear that; I have neither set aside the confirmation nor ordered cancellation of the any or all entries made in the register of Kiirua/Kiirua/205 made pursuant to the confirmation made on 19th May 2015, or reversion of the estate property into the name of the deceased M' Ringera M' Nkungania. But, if the Objector complies with the directions herein, I may consider setting aside the confirmation of grant made on 19th May 2015 with all the attendant consequences, and, then, determine distribution of the estate on the basis of the modes of distribution filed by the Objector and the petitioner.
- (4) The above directions supersede those that had been issued on 19th November, 2013.

For clarity, I must state that the above orders have been issued purely in the interest of justice but at the same time, to prevent abuse of the process of the court by the Objectors and their counsel. It is so ordered.

Dated, signed and delivered in court at Meru this 7th day of September, 2016.

F. GIKONYO

JUDGE

In the presence of:

Mr. Muthamia advocate for petitioner

Mr.Kaume advocate for objector

F. GIKONYO

JUDGE