



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS – FAMILY DIVISION
SUCCESSION CAUSE NO. 1047 OF 2015
IN THE MATTER OF THE ESTATE OF EVANSON JOSHUA NGIBUINI (DECEASED)

BETWEEN

ISAIAH NGIBUINI.....APPLICANT

AND

HUMPHREY MWANIKI NGIBUINI.....1ST RESPONDENT

DR. JOHN KABIRU2ND RESPONDENT

EVANS JWC NGIBUINI3RD RESPONDENTS

RULING

INTRODUCTION

The deceased, Evanson Joshua Ngibuini died on 6th May, 2012 at M.P Shah Hospital.

The Respondents were proposed administrators and they filed petition for grant of letters of administration intestate to the deceased's estate with consents of all beneficiaries. The petition listed beneficiaries of the deceased's estate as follows;

Two widows survive the deceased namely,

Mrs. Gladwell Mwigoiya Ngibuini of the 1st House and the children of the 1st House include; Humphrey Mwaniki, Samuel Mureithi, Rosemary Mumbi, Catherine Wanjiku, Alex Kabiru, Patricia Wandai, Christine Wangari and Emily Ngima,

Mrs. Faith Wairimu Ngibuini of the 2nd House and children of the of the 2nd House are; Moffat Mwaniki, Elvis Njogu (deceased), Perpetua Gathigia, Millicent Gathoni, Esther Wandia, Susan Wanjiku, Evans J.W.C Ngibuini and Isaiah Ngari.

The Grant of Letters of Administration was issued on 11th December 2013 to the 1st Respondent,

Humphrey Mwaniki Ngibuini, the 2nd Respondent, Dr. John Kabiru and the 3rd Respondent, Evans J.W.C Ngibuini. Subsequently, they filed a Summons for Confirmation of the Confirmation of the said Grant on 27th November 2014. On 4th December, 2014, Isaiah Ngari Ngibuini (hereafter 'the Applicant') and Esther Wandia Wahome, filed a Notice of Appointment of Advocates indicating that they had appointed the firm of Mathaiya Baru and Associates to act on their behalf in the present matter.

It is uncontested that after the deceased's demise, the families met decisions were made pertaining to the deceased's Estate including *inter alia*, engaging the services of Mr. Wamae, the deceased's Advocate to enable them pursue the Grant of Letters of Administration, and the opening of a joint account to cater for the deceased's income from his real estate. The families in that regard agreed to opening an account at Equity Bank with representatives of both Houses being signatories namely, Humphrey Mwaniki, Alex Kabiru, from the 1st House, and Evans J.W.C Ngibuini, from the 2nd House.

On 19th January 2015, Isaiah Ngibuini (hereafter 'the Applicant'), filed a Chamber Summons Application dated 16th January 2015, the subject of this Ruling, and he seeks the following orders:

1. ...

2. That this Honourable Court be pleased to order the substitution and/or replacement of all administrators herein.

3. That this Honourable Court be pleased to compel the administrators to produce accounts and financial statements over the Estate of the deceased.

4. That this Honourable Court be pleased to issue an order of temporary injunction restraining the administrators herein, their agents, servants, employees, assignees or anybody claiming under or in their names from carrying out any maintenance work, repairs, renovations, building, constructing and renting any premises building and/or land in regard to the Estate of the deceased.

5. That all accounts operated by the administrators for and on behalf of the deceased's Estate are frozen.

6. That costs be paid by the Respondents.

THE APPLICANT'S CASE

In his Affidavit in support sworn on 16th January 2015, the Applicant asserted that he is one of the beneficiaries and he had been duly authorized by his sister, Esther Wandia Wahome to swear the Affidavit on her behalf.

It was his contention that the deceased's Estate is going to waste due to the negligence of the Respondents and that they have unlawfully withdrawn money from the bank and misused it on expenses which have not been agreed upon and even without the knowledge or mandate of all or some of the beneficiaries.

That no financial statements, accounts or audited financial reports on expenditure over the deceased's Estate have been released and/or tabled for scrutiny by the beneficiaries and in addition, the Respondents have behaved in a biased manner by failing to release funds for medical expenses for their (the Applicant's) old and ailing mother, who is one of the beneficiaries, but have been quick to release the same for their stepmother.

The Applicant averred further that there is no bank signatory to represent their house while their stepmother's house has all the signatories and hence, they are not aware of what is happening financially in regard to the deceased's Estate.

According to the Applicant, the 2nd Administrator, their uncle, is inactive and ailing and so his contribution is minimal, and the 3rd Administrator has sought the legal services of an advocate and hence that demonstrates that the three administrators are disjointed. In the Applicant's view therefore, the 2nd and 3rd Administrator do not know what activities are being undertaken to administer the Estate and the 1st Administrator resides in Tanzania and as such, he is unable to efficiently care, protect and administer the Estate.

In the affidavit of protest by the Applicant filed on 9th December 2014, he objected to the confirmation of grant because all beneficiaries did not meet to discuss and decide how the estate would be distributed. The beneficiaries did not agree on the proposed mode of distribution. The List of assets that comprise of the deceased's estate did not tally. More so a number of assets as enumerated in his affidavit were left out and not listed for distribution.

For the foregoing reasons, the Applicant argued that the deceased's Estate is being wasted and hence the Court ought to intervene by granting the orders sought herein.

THE RESPONSE

THE 1ST RESPONDENT'S CASE

In response to the Application, the Respondents filed two sets of Affidavits namely, one sworn by the 1st Respondent, Humphrey Mwaniki Ngibuini, on 24th March 2016. He deposed that since the present Application was served upon them, they have been desirous of solving the matters arising herein amicably and in that regard, he convened a meeting which was held at their advocate's office and Rosemary Mumbi, Alex Kabiru, Patricia Wandai, and Christine Wangari and the Applicants, Esther Wandia and Isaiah Ngari were present.

Accordingly, that the purpose of the meeting was to work out the way forward taking into account the developments that followed the filing on 27th November 2014 of the Application for Confirmation of Letters of Administration. That the Applicants, assisted by their advocates, adduced their grievances and after lengthy discussions, a settlement was reached on the terms which were immediately stated in a letter addressed by the family advocate, Wamae and Allen advocates, dated 3rd March 2015.

That the settlement reached was that the current administrators do continue in office; as advised by Equity Bank, the existing bank account to which income from the Estate had previously been credited and out of which authorized payments had been made, be closed forthwith and a new bank account be opened, the whole of the deceased intestate Estate be valued by a qualified valuer to be appointed by the parties' advocate, the net Estate be shared equally by the two houses, and the present Application be withdrawn with no orders as to cost.

It was his deposition further that pursuant to the aforesaid, the Administrators have performed their duties as stated in the letter and furthermore, the Applicants' advocates were asked to confirm the contents therein with or without amendments, but they never responded and instead filed the present Application despite the fact that most of what the Applicants were asking for was granted in the aforesaid settlement and they have benefitted accordingly.

For the foregoing reasons, it was his position that the present Application is misconceived and an abuse of the court process, no law has been invoked nor have credible facts been stated that could justify ordering the removal of the Administrators and that the present Application has been compromised by the said settlement and hence, the same cannot be proceeded with, without causing injustice and prejudice to the Administrators and other heirs of the Estate.

It was his final deposition that by opting to proceed with the present Application after entering the said settlement and benefitting from what was agreed therein, the Applicant is abusing the Court process.

In his Affidavit, Alex Kabiru Ngibuini asserted that he was swearing the same on his own behalf and on behalf of Moffat Mwaniki, Rosemary Mumbi, Patricia Wandia and Christine Wangari, who he claimed are also beneficiaries to the deceased's Estate. Mr. Alex Kibiru Ngibuini reiterated the earlier depositions by the 1st Respondent and asserted further that the present Application is unmerited and ought to be dismissed with costs.

THE 3RD RESPONDENT'S CASE

Evans JWC Ngibuini, the 3rd Respondent, in his Affidavit sworn on 30th October 2015, narrated events that occurred after the deceased's demise until the time the administrators to his Estate were nominated.

It was his assertion that the administrators have never held any joint meeting to deliberate, guide, consider, adjudicate on any dispute, consult family members on any matter relating the administration of the Estate or even issue joint instruction to the family lawyer.

That the administration of the Estate herein has been taken over by the 1st Respondent, whose actions are guided by purported minutes of meetings he convenes as 'chairman', attended and consented to by a few family members mainly from their 1st House, which is contrary to the requirement that all family members must consent or authorise others to consent on their behalf.

The 3rd Respondent posited that he was in full support of the Applicant's protest in regard to the confirmation of Grant and denied having authorised the 1st Respondent to swear an Affidavit on his behalf, for the Summons for Confirmation of Grant, as no meeting has ever been held to the Administrators to that effect and that the full list of assets needs to be fully determined, agreed upon by all beneficiaries and if not, the Court ought to determine the contentious issues.

According to the 3rd Respondent, the issue of distribution of the assets is a moot point as the deceased had clearly expressed his wishes as to the mode of distribution and the alleged meeting at the advocate's office is a nullity since the advocate knew of the deceased's wishes. In any event, the participants did not represent all family members especially the 2nd widow is legally not capable of making binding decisions and any agreement made thereof on the purported distribution and consent by all family members is grossly misleading.

The 3rd Respondent alleged that the family lawyer has ceased to be neutral and has been taking instructions solely from the 1st Respondent purporting to be the wishes of all family members. Further, that the operation of the family account has been confined to the 1st Respondent and Alex Kabiru, both from the 1st House, yet, the latter is not even an Administrator. Accordingly, that withdrawals made by them are inherently a nullity and illegal.

The 3rd Respondent urged the Court to grant orders directing that the financial conduct of the Administrators be subjected to an independent audit so as to assure all beneficiaries that the transactions have been above board and further, that the Administrators be released from their duties as they have failed. It was his further prayer that the Court appoints independent and neutral persons as trustees due to partisan interests, apparent avarice, non-cohesion and general mistrust amongst the beneficiaries, and also to safeguard the interests of their mother.

He further urged that the Court appoints Administrators to be installed immediately to manage and preserve the Estate and the children of the deceased pursue a hands-off engagement with the assets of the Estate and continue what they were doing before the demise of the deceased.

ISSUES

- 1. Have the Respondents who were appointed administrators and obtained grant of letters of administration complied with their statutory duty under section 83 of L.S.A. Cap 160?**

2. Is the Summons for confirmation of grant filed on 27th November 2014 confirmed and or
3. The Protest filed on 5th December 2014 upheld?
4. Is the consent settlement of dispute attached to the 1st Respondent's affidavit valid, legal and regular consent to be adopted as an order of the Court?
5. Are the 2 widows entitled to reasonable monthly payments to facilitate medical care and sustenance?

DETERMINATION

Based on the Parties' respective pleadings, it follows that the key issue for determination is whether the orders sought in the present Application ought to issue. At the core of the Application is the question of substitution of the Administrators and the ordering of an audit of accounts and presentation of the same to the Court for scrutiny by the beneficiaries to the deceased's Estate.

In that regard, **Section 76 (d)** of the **Law of Succession Act** gives this Court the powers to annul or revoke a grant on the grounds stipulated therein. The **Section** provides that:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

(i) To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) To proceed diligently with the administration of the estate; or

(iii) To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular.

The Respondents have been accused of various issues regarding the administration of the estate. In a nutshell, they have not acted in concert and jointly in pursuance of preserving the estate, settling liabilities of the estate and processing confirmation of the grant. It is on record that the 1st Respondent has been administering the estate unilaterally as the 2nd Administrator is ailing from ill health and 3rd Respondent has been side lined. The 1st Respondent has been running the show to the exclusion of the 2 other administrators. He opened an account with one Alex Kabiru, (he is not one of the administrators) his brother and they are both from the 1st house. They have collected rent receivables from the properties that comprise of the deceased's estate. They have withdrawn money from the bank and have not accounted to the beneficiaries of the deceased's estate. He has called and presided over family meetings as Chairman. He has taken decisions over the estate without agreement of all beneficiaries. The summons for confirmation did not have all beneficiaries consents and all the deceased's assets were not included.

These issues have not been substantially controverted. Instead a family meeting was held to discuss and resolve the matter amicably and a consent was filed in Court. The administrators are legally held accountable to hold the deceased's estate and account to the beneficiaries and the Court. This Court from the facts presented is not satisfied that the administrators have diligently administered the estate. The fact that they have not been able to work together in harmony with a view to being transparent and accountable in administering the estate convinces this Court, that they cannot facilitate the fair equitable and just distribution of the deceased's estate.

In **IN RE ESTATE OF DAVID KYULI KAINDI (DECEASED), SUCCESSION CAUSE NO. 3403 OF**

2005, it was pointed out that:

“[18] The most potent remedy in the hands of a beneficiary is that of calling personal representatives to account. Beneficiaries who are not personal representatives have no control over the estate. The property of the deceased does not vest in them. They have no power over it; neither do they have any obligations with respect to it. When aggrieved by the manner the estate is being run their remedy lies in seeking accounts from the personal representatives, and, in extreme cases of maladministration and misconduct by the personal representatives, in applying for revocation of the grant.

[19] The obligation to account is tied up with the fact that personal representatives are also trustees. They are defined as such in the Trustee Act, Cap 167, Laws of Kenya, at Section 2. This is so as property belonging to another vests in them in their capacity as personal representatives, and they hold the same for the benefit of others – beneficiaries, heirs, dependants, survivors, creditors, among others. They stand in a fiduciary position in relation to the property and the beneficiaries. As they hold the property for the benefit of others or on behalf of others – they stand to account to the persons for whose benefit or on whose behalf they hold the property. It is an equitable duty and a statutory obligation.”

Despite the beneficiaries seeking from the administrators /respondents accounts and financial statements over their handling of the estate, the Respondents have made no attempt to disclose and account for the funds in the family account or even discuss and agree on the list of assets. Therefore the only alternative open to the beneficiaries is to apply to have the administrators removed and other administrators appointed to administer the deceased's estate. It is for these reasons that the Court *suo moto* revokes the grant of 11th December 2013.

The summons for confirmation of grant filed on 27th November 2014 is not confirmed at this stage. **Section 71 of law of Succession Act** prescribes that;

Provided that, in case 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

Where the estate involves beneficiaries from a polygamous home, then the estate shall be subject to distribution by the **Section 40 of Law of Succession Act 160**. In both instances, all beneficiaries shall discuss and agree on the list of beneficiaries, list of assets, proposed mode of distribution and attach their written consents. In the instant case, the Applicant through the affidavit of protest has raised issues with regard to misuse and wastage of the estate, monies withdrawn and spent without accountability and various beneficiaries especially of the 2nd House are deprived of their beneficial interest to the deceased's estate. Finally, the assets that comprise of the deceased's estate, have left out a list of assets as enumerated in the affidavit of protest.

This Court is bound to hear and determine the protest before confirmation of grant the protest as per **Rule 40 (8) of Probate and Administration Rules**. During the oral hearing the Applicant through learned Counsel stated in detail particulars of the protest. These issues have not been controverted by evidence to confirm that the summons for confirmation was pursuant to all beneficiaries agreeing to the proposed mode of distribution. Therefore the Applicant's protest is upheld. The new administrators shall engage all beneficiaries to discuss and agree on the mode of distribution. The new administrators shall pursue inclusion of the various assets alleged to be part of the deceased's estate that have been left out.

The 1st Respondent filed affidavit on 15th April 2016 and stated that they held a family meeting at the advocate's office and agreed on Consent as settlement of dispute;

The Consent is as follows;

The list of assets in the summons for confirmation shall be amended to include the assets that have been left out.

The current administrators stay in office and the Applicant Isaiah Ngari is added as a trustee for the 2nd family.

The Account in Equity Bank shall be closed and a new account shall be opened in the names of Humphrey Mwaniki (1st Respondent and administrator) Alex Kabiru (beneficiary from 1st House) Perpetua Gathigia and Esther Wandia from the 2nd House as signatories.

Qualified valuer shall value the estate appointed jointly by advocates of the parties

The net estate shall be shared equally between both houses

The instant application shall be withdrawn with no orders as to costs.

At the outset, the said Consent was not reached in the presence of all beneficiaries and as a result of consents of all beneficiaries. Secondly, parties and/or their respective advocates do not sign the Consent. Thirdly, the consent seeks to oust the jurisdiction of the Court to hear and determine the protest by the Applicant and confirm the grant in terms of **Rule 40 of the Probate and Administration rules and Section 71 of the Law of Succession Act**. The parties have to comply with the law to have the grant confirmed to facilitate the distribution of the estate.

Fourthly, with regard to contents of the Consent, it is not the decision of all beneficiaries that administrators remain in office as clearly some of the beneficiaries came to Court and pursued an application to remove administrators. It was intimated to Court and from the protest and subsequent applications, they have not been instrumental but detrimental to administration of the estate. The Court notes from the record that the 2nd house had chosen the Applicant Isaiah Ngubuini and Perpetua Gathigia as signatories to the new account; yet the Consent shows different names.

The proposed signatories to the account are not administrators so who will be held accountable to the beneficiaries and the court on the assets that comprise of the deceased's estate? It is curious to note that the list of assets is not agreed, how can the beneficiaries determine what comprises of the whole to be divided between 2 houses? There are funds from the rental properties that are deposited in the joint account whose withdrawals have not been disclosed to beneficiaries, accounts presented as required by

Section 83 (h) of the Law of Succession Act which stipulates that:

Personal representatives shall have the following duties-

(h) to produce to the Court, if required by the Court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.

How will the beneficiaries discuss and agree on the mode of distribution before the list of assets is disclosed and agreed? What constitutes the half that each house is entitled to? The consent is vague on assets income and mode of distribution. Legally the consent cannot override the requirements of **Section 71 of Law of Succession Act**. For these reasons the Consent annexed to the 1st Respondent and supported by Alex Kabiru cannot be adopted as an order of this Court.

Finally, the Court noted that the widows of the deceased who in law and fact ought to enjoy life interest have not been adequately considered and supported. It is on record that the 2nd widow is ailing and requires constant medical attention. Yet she has not been provided with any funds from the estate. The 1st widow whose sons have operated the family account seem to have taken care of her. Unfortunately due

to age and illness it is prudent that administrators are appointed from their respective homes and adequate provision made for each of the widows.

DISPOSITION

Based on the Court's reasoning above:

- (1) The grant issued on 11th December 2013 is revoked and annulled under Section 76(d) ii & iii of Law of Succession Act Cap 160.**
- (2) The 1st Respondent Humphrey Mwaniki Ngubuini and Alex Kabiru signatories to the earlier account where the rent receivables were deposited to file accounts and financial statement within 60 days from today.**
- (3) A new fresh grant is issued under Section 66 of Law of Succession Act appointing as administrators Samuel Mureithi and Rosemary Mumbi as administrators from the 1st house. Perpetua Gathigia and Isaiah Ngari as administrators from the 2nd House.**
- (4) The administrators to carry out duties under Section 83 of Law of Succession Act Cap 160 gather and collect the assets that are not included in summons for confirmation, pay liabilities of the estate, collect and deposit rent receivables, consult discuss and agree amongst all beneficiaries on proposed mode of distribution and obtain written consents;**
- (5) The new administrators to open an account to deposit the rent receivables. Pay out maintenance and utility bills, provide each of the 2 widows reasonable and equal amount of funds for medical expenses and sustenance at Ksh 40,000/- each monthly.**
- (6) Beneficiaries and advocates to amicably appoint qualified valuer to value assets that comprise of the deceased's estate.**
- (7) The beneficiaries to agree on list of assets and agree on the proposed mode of distribution before filing amended summons for confirmation of grant.**
- (8) Any aggrieved party is at liberty to apply**
- (9) Let each Party bear its own costs.**

READ AND SIGNED IN OPEN COURT AT NAIROBI THIS 6th OCTOBER 2016.

M. W. MUIGAI

JUDGE