



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1493 OF 2003

**IN THE MATTER OF THE ESTATE OF HARUN KIVINDYO ISAI ALIAS KIVINDYO ISAI
(DECEASED)**

GRACE NYAMBURA KIVINDYO1ST APPLICANT

MARIE MUTHONI KIVINDYO.....2ND APPLICANT

-VS-

STEPHEN WAMBUA KIVINDYORESPONDENT

RULING

1. There are two applications for determination in this ruling. The application dated 11th September 2014 which was amended on the 15th of January 2015 and the application dated 26th January 2015. The application dated 15th January 2015 is brought under section 83(a) and (i), Section 82(c) of the Law of Succession Act and section 1A of the Civil Procedure Act. The applicants seek the following orders;

That Grace Nyambura Kivindyo be removed as an administrator for the estate of Kivindyo Isai and or be replaced by any other of the 9 beneficiaries to the estate for the purposes of giving effect to orders of distribution made on 17th March 2014. And in the alternative

That the signature of Stephen Wambua Kivindyo be authorized to execute any document that requires execution to give effect to this court's order of 17th March 2014.

The signature of Stephen Wambua Kivindyo be sufficient for the purposes of executing all/or any document required to be signed to give effect to this court's orders of 17th March 2014.

2. The application is grounded on grounds that;

The deceased died on 19th January 2002. Stephen Wambua Kivindyo and Grace Nyambura Kivindyo were granted letters of administration on 17th March 2014 and the court finally distributed the said estate on 17th March 2014 with the consent of all parties. The administrators have great mistrust for each other and consequently none of the orders given by this court have been implemented. That there are nine other beneficiaries to the estate two of whom should be appointed as administrators of the deceased's estate To give effect of the orders of 17th March 2014. The same is reiterated in the supporting affidavit sworn by Veronica Kivindyo a beneficiary of the estate of Kivindyo.

3. In opposition to the said application Nyambura Kavindyo filed a replying affidavit dated 26th January 2015. She avers that she had no issue with her children in so far as administration of the estate was concerned nor had she any problem with her co-administrator being substituted with one or two of his siblings as he has demonstrated his contempt for her. She added that the co-administrator is hell bent on having the property in issue **L.R. No. 36/11/66** being registered in his name instead of it being registered for him in trust of his fellow siblings. She avers that the application is full of falsehood as at no time did he discuss the sale of **L. R. 209/233/6** Kyethivo house with her and that he had received the 10% proceeds as an individual and not on behalf of the estate of the deceased. That the co-administrator has taken every available opportunity to blame her for his short comings and has also incited his other siblings as he has also directed all efforts and attention to the sale of Kyethivo house and cannot allude any impropriety on her part.
4. The respondent further filed the application dated 26th January 2015. She seeks the following orders;

The certificate of confirmation issued to Grace Nyambura Kivindyo and Stephen Kivindyo is rectified pursuant to Rule 43(1) in the following terms;

That the name of administrator Grace Kivindyo be rectified to read Nyambura Kivindyo as per her Identity card; that the name of Grace Nyambura in regards to the category of motor vehicles and shares to be sold and be distributed to the beneficiaries be hereby substituted with the name of her son Peter Isai Kivindyo; that an order be issued directing the director of Urban Planning Nairobi City County to carry out subdivision of **Plot No.209/233/6** to enable each of the deceased's houses to get their respective half share; that half of the deceased's share in **L. R. 219/32(IR 95115)** be registered in the names of Marie Muthoni Kivindyo herein being an inheritance from her father. That the administrator appointed to the estate of Vishnu Sharma be summoned by an order of the Court to account for the sum of Kshs.4, 605,000/- belonging to the estate and held by the said firm, whose principal has since passed on and that the deceased's share in Kyanzavi being no. 214 be included as part of his beneficiaries and that the balances in the deceased's account No. **[Particulars withheld]** with Kenya Commercial Bank be ascertained and shared equally amongst the beneficiaries.

5. The application is supported by the affidavit of Nyambura Kivindyo. She states that the deceased had 5 properties in Nairobi that were to be divided between his 2 households and none of the beneficiaries opposed the same. Whilst the 5th property **L.R. No. 209/233/6**, Kyethivo house was to be sold and the sale proceeds shared between the 11 units, the said order was issued by Justice Kimaru despite her protest that she contributed to the construction of the same adding that the deceased constructed 2 units on the said premises and she has been collecting rent on behalf of her side. That she had obtained consent, that the said property is capable of being subdivided and that the call by the 2nd house that the property be sold is cruel and aimed at causing her pain as the income she generates from the same is used for her family's upkeep adding that Kshs.4.605,000/- had been received by the said firm on behalf of the beneficiaries of the deceased's estate and as such the same should be included in the deceased's estate for purposes of distribution.
6. There is also another affidavit in support of the said application dated 26th January 2014 sworn by Marie Muthoni Kivindyo, Nyambura's daughter. She avers that she did not attend court during confirmation as she was unwell adding that all her steps sisters were given properties by her late father and she was given ½ share in **L.R. 219/32** where she has built rental houses and that the said allocation was not taken into consideration during confirmation and it was ordered that the said property be sold and the proceeds be shared equally among the beneficiaries adding that the half where she has built rental houses should go to solely to her.
7. The application came up for hearing on 9th March 2015, Mr. Mutua Mboya for the applicant Stephen Kivindyo submitted that the applicant is seeking substitution of the administrator as she has refused to execute documents to enable the estate to be distributed and urge that she be

removed and replaced by someone else. They further added that they were not seeking variation of the distribution as ordered by the court only that she has refused to give consent to the authority given to her by the court. This they claim is an obstacle to the distribution of the estate thus denying the beneficiaries their rights. They argue that the applicants seek to alter the court's order. According to her one of the properties was to be sold but the 1st administrator wants to share the sale proceeds with a few beneficiaries. That they got a buyer for Kshs. 100 million but they stated that the property was not for sale. The buyer had already paid 10% for the property and she was given the parklands house and Kshs. 250,000/- but she refused to accept them.

8. The respondent argues that the deceased had 2 wives. The 1st wife was deceased and the house is represented by Stephen Kivindyo and the 2nd administrator is the 2nd wife to the deceased. Though the confirmation went on smoothly issues arose when it came to **L. R. 209/233/6**. She stated that when they went to court they were informed that the deceased had 6 properties no. 3, 4, 5 and 6 No 1B and 4 did not have an issue as each house had been given a house and the problem arose when it came to house no.6 as they did not know if the same could be divided into two and she had been collecting rent for half of the house. That its 14 years since Nyambura went to seek that the same be divided into two. In relation to **L. R. 209/233/6** they received 10% of the sale price. It was further submitted that the lady is old and she derived income from that property. She denies being a hindrance to the distribution of the estate adding that the property was left to the 2nd administrator by her late husband and they have never benefited from it. They submitted that during confirmation Marie was unwell and she had sworn an affidavit to that effect. That the 1st wife had 2 daughters Veronica and Josephine while Nyambura had only one daughter and her interest was not taken care of. That she had put up temporary rental houses and urged the court to allow their submissions as prayed. That there was an advocate of the deceased who has since passed on but he held Kshs. 4,605,000/- and sought a court order that the said sum be shared by those left out in Kyanzovi Farmers adding that the said funds be included in the deceased's estate plus the amounts held in the deceased's bank accounts so that the sums may be distributed amongst all the beneficiaries.
9. The applicants in reply argue that the eldest wife died recently very poor and all that was not available to her. They argued that Justice Kimaru carefully considered the issue of selling the house and monies be distributed to the 11 beneficiaries and the order is still in effect. That there is only one mother and no other families hence it cannot be said that it be distributed among the two families. They added that they had no problem with sharing the funds in the KCB account and the shares in Kyanzovi but the respondent is a problem and they want her replaced.
10. The application by Stephen seeks substitution of the co-administrator Nyambura as she has failed to participate and carry out her duties to finalize the distribution of the estate of the deceased. From the averments by both the administrators it appears that they have no problem with the administration of the deceased's estate and the main issue revolves around the distribution of property no. **L.R. 209/233/6** Kyethivo house. The applicant argues that Grace Nyambura has refused to execute documents for sale of the said house. Grace on the other hand denies this in her replying affidavit and via her application dated 26th January 2015 she seeks an order directing the Director of Urban Planning to carry out subdivision of **L.R. 209/233/6** into two so that each house can get its own share. A perusal of the order by Justice Kimaru he had held that, "**Plot 209/233/6** Kyethivo house shall be ***sold and proceeds distributed equally between the 11 beneficiaries (grace Nyambura had been given 1st option to purchase). Parties to agree upon a valuer to carry out valuation in 30 days.*** It is not in dispute that the deceased was polygamous and had two houses hence his estate devolved under Section 40 of the Law of succession Act (Cap 160). Which provides that, "(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children." Grace Nyambura had 3 children adding herself makes 4 units while the late Marrietta had 7 children which makes 7 units. Grace argues that since the said property can be subdivided

each house can get half a share of the said property. I find that this would not be fair as the two houses do not have equal units. Secondly the other units in her house that is her son Kivindyo and Mary have not consented to this. From Justice Kimaru's order Grace Nyambura had requested to be given 1st option to purchase the said property. I find that if she wants to keep the said house or part of the property she can pay the purchase price as valued by the valuer less her 1/11 share she would have gotten had the said property been sold alternatively she can obtain consent from the other beneficiaries to have the said property subdivided into two with her house paying the difference of the ½ share to the second house. This needs to be done within 45 days failure to which the applicant/co-administrator Stephen Kivindyo will proceed with the sale of the said property and the proceeds shared equally among the 11 beneficiaries. In such eventuality and in the interest of all parties concerned Grace Nyambura's son Peter Isai Kivindyo will act as a signatory to sign the necessary documents to facilitate the sale of the said property **L.R. 209/233/6** and final distribution of the same.

11. Grace also seeks that ½ of **L.R. 219/32(IR 95115)** be given to her daughter Marie Muthoni as per the deceased's wishes. From the said court order by Justice Kimaru he held that, **"1/4 share of L.R. 219/32 (IR95115) be sold and shared equally between the beneficiaries."** From the said order it is not clear who was to get the remaining ¾ of **L.R. 219/32(IR 95115)**. On this I find that all the beneficiaries should discuss and agree on the distribution of the same.
12. On the issue raised by Grace Nyambura in her application of Kshs.4,605,000/- said to be held by the firm of the late V. Sharma on behalf of the estate I find that in most cases the said monies are held in the client account and the same do not form part of the estate of the late advocate. Is the said Law firm an ongoing concern? If so the applicant can serve the said partners of the firm with the said application and have them respond to the queries raised appropriately.
13. The deceased's share in Kyanzovi being no. 214 and the sums in be balances in the deceased's account No. **[Particulars withheld]** with Kenya commercial Bank shall be ascertained and shared equally amongst the beneficiaries.
14. I find no reason to disallow her request to have her name substituted to reflect the names as they appear in her identity card. The applicant's name can also be substituted with her son Peter Isai Kivindyo in the sharing out of the sale proceeds of motor vehicle and shares that were to be sold.
15. In regards to Stephen's application. I find that once the above issues are resolved the co-administrator will comply with this order issued failure to which the applicant will volunteer. No orders as to costs. It is so ordered

Dated, signed and delivered this 4th day of June 2015.

R. E. OUGO

JUDGE

In the presence of:

.....1st Applicant

.....2nd Applicant

.....Respondent

.....Court Clerk