



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 763 OF 1997

IN THE MATTER OF THE ESTATE OF PETER MUIGAI RUHIU DECEASED

RULING

One of the administrators of the estate of the deceased, that is to say Leah Wanjiru Muigai, seeks two alternate orders. Her application is dated 13th February 2012. She would like the grant made on 10th July 1997 rectified to remove the name of her co-administrator, Joseph Ruhiu Muigai, and, in the alternative, revocation of the said grant. She would also like the said second-administrator to account for the monies he has collected and received on behalf of the estate since his appointment.

The second-administrator is a son of the applicant. The grant made to them in 1997 was confirmed on 21st May 1999, and since then the estate has not been distributed to the beneficiaries due to what the applicant describes as lack of cooperation from the second-administrator. She specifically refers to hostility from her son which has made it impossible for both of them to discharge their duties as administrators. She also complains that he has been collecting rent from some of the assets without accounting her as co-administrator and to the beneficiaries.

The second-administrator has responded to these allegations through his affidavit sworn on 22nd March 2012. He accuses his mother of being malicious and peddling falsehoods. He explains that the reason the estate has not been distributed is that some of the assets were not available for distribution due to encumbrances. He avers that some of the assets are still not free for distribution for one reason or other. He says that two of the properties had been charged with a bank and that he managed to secure a discharge of the charge and has surrendered the title documents to the applicant, who has failed to get the said assets distributed to the beneficiaries. He explains that three other properties are the subject of court cases which are ongoing. On the accounts, he states that he is willing to render accounts of the moneys he has collected, but complains that the applicant has also collected rent in respect of the same premises and should also give an account of what she has collected.

To these averments by the second-administrator the applicant has filed a response through her affidavit sworn on 6th June 2012. She does not reply point by point to the issues raised by the second-administrator, instead she proposes a new mode of distribution of the estate, where the trust held by the administrators is to be terminated and the estate distributed individually to the beneficiaries. The second-administrator has not responded to the said affidavit.

Both sides have filed written submissions. The applicant, in her submissions, argues that the two administrators are not on good terms any more, and therefore they cannot at all transact administration business. The way out for her is for the second-administrator to be removed as administrator thereby leaving the applicant as sole administrator who should then thereafter proceed to distribute the estate in the manner proposed in her supplementary affidavit. The second-

administrator disputes this in his written submissions, saying that there is no proof of his lack of cooperation and reiterates the contents of his affidavit in reply.

I have perused through the record. I do confirm that grant herein was made on 10th July 1997 to the parties to the instant application. I confirm too that the grant was confirmed on 21st May 1999, with the entire estate, save for one property, being held in trust by the administrators for the benefit of the children, who should ultimately share the estate equally.

The application dated 13th February 2012 is premised on *Sections 74 and 94* of the Law of Succession Act, and rules 43, 44 and 73 of the Probate and Administration Rules. *Section 74* provides for rectification of errors by the court, while *Section 94* deals with neglect or misapplication of assets by personal representatives. I have carefully studied these two provisions and I see nothing in them which justifies the making of the instant application. *Section 74* envisages errors on the face of the certificate of grant relating to 'names and descriptions, or in setting out the time and place of the deceased's death, or the purpose in a limited grant.' The applicant has not identified any error of the sort in the grant made in this cause.

Section 94 targets neglect by a personal representative to get in or collect any asset forming part of the estate, or misapplying any such asset or subjecting it to loss or damage. There is nothing in the material placed before me to demonstrate that that is the case. The applicant has not demonstrated that the second-administrator has neglected to collect assets, or misapplied an asset, or subjected any asset to loss. There are claims that the second-administrator has collected rents which he has not accounted for. To my mind that does not at all mean misapplication of the assets. Indeed, in such a scenario one cannot even talk of misapplying the asset, where we are talking of rents, before an account has been given, which has turned out to be insufficient or unsatisfactory. Needless to say that section 94 makes such neglect or misapplication or wastage of an asset a criminal offence. Evidence to support an assertion of neglect or misapplication of assets must be to the degree of proof required for criminal offences. What has been placed before me falls far short of what is expected under criminal law.

On revocation of the grant, I am reluctant to consider whether or not I should grant the prayer. In the first place, although revocation is one of the substantive prayers sought in the application, *Section 76* of the Law of Succession Act, which provides for revocation of grants, has not been cited to support the application. Moreover, the processes set out in rule 44 of the Probate and Administration Rules have not been complied with, in terms of obtaining directions as to who ought to be served with the application. This rule is designed to bring every person who is interested in the administration of the estate on board so as to ensure that their interests are recognized and secured. It would therefore be unfair for me to consider revoking the grant herein without hearing the other heirs to the estate or survivors of the deceased.

I note, from the certificate of confirmation of grant dated 21st May 1999, that the bulk of the estate is held in trust by the administrators for the benefit of the children of the deceased. Only one asset was in fact immediately distributed at the confirmation of the grant on 21st May 1999, that is to say Dagoretti/Ruthimitu/652. The rest of the estate is held in trust to be distributed equally between the children at a later date. That later date is not defined in the certificate. Therefore none of the administrators can accuse the other of failing to distribute the estate. As it stands, the certificate of confirmation dated 21st May 1999 makes provision for distribution of only one asset, Dagoretti/Ruthimitu/652. The rest are in abeyance or limbo, they cannot be distributed until the trust created by the certificate is terminated and the estate distributed equally between the children.

The other concern is raised by the second-administrator. He says that some of the assets are not yet available for distribution. He cites encumbrances and pending court cases. It would appear that it is this fact which informed the creation of the trust over the bulk of the estate. The applicant did not address herself at all to these matters in her affidavits. It would appear that the encumbrances have been removed, but the cases are still pending. Unfortunately, the nature of the cases and the stage at

which they are at have not been disclosed. The documents attached to the affidavit of the second-administrator to establish existence of the cases are not helpful at all for they are just hearing notices and letters inviting the parties to the event of fixing of hearing dates. If there are cases which are pending relating to the assets which are the subject of the certificate of confirmation dated 21st May 1999, it is only fair that distribution be delayed to await the outcome of the cases, for the outcomes are bound to affect distribution should they be against the estate. This should be so unless survivors are facing hardship and partial distribution becomes necessary or the surviving spouse exercises her power of appointment under section 35 of the Law of Succession Act.

In the end my conclusion is that a case has not been made for either the rectification of the grant or for its revocation. For the purpose of progress in this matter, I will make the following orders:

1. That prayers 1 and 2 of the application dated 13th February 2012 are dismissed.
2. That prayer 3 is allowed in the following terms:
 - a. That both administrators shall render accounts with respect to the rents that they have collected from tenants occupying Plots No. 465 'A' and 'B' Ongata Rongai;
 - b. That Joseph Ruhui Muigai shall give an account of all the court cases pending touching on any of the assets of the estate, by providing copies of the pleadings relating to such cases and a status report on the cases;
 - c. That the said accounts shall be rendered within 30 days of the date of this ruling; and
 - d. That this matter shall be mentioned after 30 days of this ruling on a date to be given at the delivery of the ruling.
3. That there shall be no order as to costs.

SIGNED DATED and DELIVERED in open court this 10th day of October, **2013.**

W. M. MUSYOKA

JUDGE