In re Estate of Reuben Masinde Mtoro (Deceased) (Succession Cause 85 of 1996) [2024] KEHC 3212 (KLR) (20 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3212 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE 85 OF 1996

JRA WANANDA, J

MARCH 20, 2024

IN THE MATTER OF THE ESTATE OF REUBEN MASINDE MTORO (DECEASED)

BETWEEN

ROSEMARY NASIMIYU MASINDE ..... PETITIONER

AND

SELINA KENDAGOR ..... 1ST OBJECTOR

ABRAHAM KOSGEI ..... 2ND OBJECTOR

RULING

1. The Petitioner, sometime in March 1996, commenced this Cause by filing a Petition for Grant of Letters of Administration intestate in respect to the estate of the deceased. The Petitioner attached a copy of a Certificate of Death indicating that the deceased died on 10/10/1984, then aged 54 years. The Plaintiff described herself as the widow and listed 6 survivors, including herself. The only property listed as left behind by the deceased was a parcel of land described as "Mail-Thirteen Settlement Scheme Plot No. 50".

2. The Petition was duly gazetted on 3/05/1996. It appears that the Partitioner never made any further follow-up on the matter since the file appears to have "gone to sleep". However, "out of the blue", on 7/03/2023, the Court Registry issued the Grant of Letters of Administration. The original copy thereof is recorded to have been collected by "Selina Kendagor", presumably the 1st Objector herein. It appears therefore that the new resolve to "push" the matter was by or from the Objectors.

3. On 8/02/2024, acting in person, the Objectors filed the present Application dated 22/01/2024 seeking orders as follows:

    i. That the Grant of Letters of Administration issued on 7/03/2023 be revoked or annulled.

ii. That upon granting prayer (1) above, Selina Kendagor & Abraham Kosgei be appointed as Administrators of the estate of Reuben Masinde Mtoro.

iii. That Selina Kendagor & Abraham Kosgei be issued with the Grant of Letters of Administration intestate and the same proceed for confirmation.

iv. That the costs of the Application be costs in the Cause.

4. The Application is premised under Section 76 of the Law of *Succession Act* and Rules 73 of the *Probate & Administration Rule*s under the same Act and is supported by the Affidavit sworn jointly by the two Objectors.

5. . In the Affidavit, the Objectors depone that they are purchasers/liabilities having purchased the land parcel known as "Mile Thirteen Settlement Scheme/50" from the deceased, that the Petitioner cannot be traced and their efforts to conclude the Succession proceedings has been futile, that 1 year since the Grant was made, the Petitioner-Administrator has not acted by way of moving the Court for confirmation, that the Objectors and 14 others, whom they listed, are purchasers in actual possession and occupation of the said parcel of land, that the Administrator has failed to apply for confirmation and/or to proceed diligently with administration, this being a 1996 matter. The Objectors attached copies of some Agreements.

6. When the matter came up before me on 7/03/2024, the Objectors drew my attention to the Affidavit of Service filed by their Process Server, one Vincent Ogutu to confirm service. The relevant portions of the Affidavit of Service reproduced verbatim, are premised as follows:

> "……
>
> 1. That on 16/2/2024, I received copies of application dated 22/1/2024 fixed for hearing on 7/3/2024 from objectors with instructions to serve the same upon the Eunice Masinde.
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> 2. That on 17/2/2024, I travelled to Kitale town alighted at a busstop hired motorcycle to Kwanza centre then to Luhya Farm. On arrival called Eunice Masinde through phone number [……], she told me she was in Busia county and she instructed me to leave the application with the assistant chief Keiyo area. That I proceeded to assistant chief Keiyo area office and on arrival met with him after my introduction and purpose of visit he acknowledged service but declined to sign.
>
> 3. That on 19/2/2024 Eunice Masinde called me, informing me that she got the application from the assistant chief.
>
> 4. That proper service has been effected as per the provision of law."
>
> ……"

7. It will be noted right away that although it is the Petitioner who is the Respondent in this matter and who is the person whom therefore the Objectors should have been striving to serve, the Process Server's instructions were to serve the Application upon one "Eunice Masinde, whom, as far I am concerned, is a stranger in these proceedings. There is no explanation on who this "Eunice Masinde" is and on what capacity she was being served.

8. When I however prodded the Objectors on this issue, they verbally informed me that the Petitioner is alleged to have died sometime back and that the said "Eunice Masinde" is a daughter to the Petitioner.

Determination

9. I have carefully considered this matter and I find the following to be the issues that arise for determination:

    i. Whether the Objectors possess the legal mandate or locus to apply for revocation of the Grant issued herein and to be substituted as Administrators in place of the Petitioner (current Administrator).

    ii. Whether therefore the Application should be granted.

10. I now proceed to analyze and determine the said issues.

    i. Whether the Objectors possess the legal mandate to apply for revocation of the Grant herein

11. The first item that I have to grapple with is whether the Summons for revocation of Grant is properly before this Court. This is because the Objectors' claims are in the nature of creditors claiming to have purchased portions of a parcel of land from the estate of the deceased. I therefore need to satisfy myself that the claims are not such that they should be placed before the Environment & Land Court (ELC) which is the Court clothed with the jurisdiction to hear and determine land disputes or wherher, in the alternative, the claim should be heard as a civil suit under the law of trusts.

12. On this issue, I cite, for instance, the case of *In Re Estate of Mbai Wainaina (Deceased)* [2015] eKLR, in which W. Musyoka J, held as follows:

> " Even if there was material establishing that there was such a trust, I doubt that the resolution of this issue would be a matter of the probate court. The mandate of the probate court under the law of succession Act is limited. It does not extend to determining issues of ownership of property and determination of trusts. It is not a matter of the probate court being incompetent to deal with such issues but the provisions of the law of succession and the relevant subsidiary legislation do not provide a convenient mechanism for determination of some issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land court. Consequently, and for the reasons above stated, I wish to find and hold that this court has no mandate to resolve the proprietary interest on land based on the alleged trust".

13. Similarly, in the case of *In re estate of Solomon Mwangi Waweru (deceased)* (2018) eKLR in which A.K. Ndungu J remarked as follows:

> " Therefore, claims by interested third parties against the estate of the deceased ought to be litigated in separate proceedings. It is imperative that any adverse claims against the estate of a deceased person are determined through settlement or where inapplicable through suits against the administrator (s) of the estate and not through an objection like the one before court"
>
> .....
>
> "It is my opinion that the fact that the applicant has laid claim to the estate does not give rise to an automatic right to have the distribution of the property stayed by the succession cause. The applicant ought to disclose a legitimate claim which needs to be determined by the Environment and Land court. The succession court would then proceed with the

administration of the estate in respect of other properties not affected by the conservatory order if obtained awaiting the outcome of the suit".

14. I also refer to another decision by W. Musyoka J in the case of *In the matter of the Estate of Stone Kakhuli Muinde (Deceased)* [2016] eKLR. in which he stated as follows:

> "24. The probate process is meant to be largely administrative, where the documents lodged in the cause are scrutinized administratively by court officers before certain instruments are processed and executed by relevant judicial officers before being issued to the parties. It is intended that there be minimal court appearance. The whole process is tailored to be non-contentious, and the only contemplated court appearance is at the stage of the confirmation of the grant of representation. In that scenario then there would be no need to join any person or entity to the succession cause.
>
> 25. The cause can and does, as a matter of course, turn contentious. To facilitate distribution of the estate, the court should identify the persons who are entitled to inherit from the estate of the deceased and the assets to be shared out amongst the person entitled. Disputes often arise on those issues. It may become necessary for the court to determine whether a particular person is entitled to a share in the estate of the deceased or not. An issue may also arise whether some asset formed part of the estate of the deceased or not.
>
> 26. The Act and the Rules have elaborate provisions on resolving such questions, and to settle them there would be no need to bring in persons who have no direct interest in the matter, especially those who are not family members. Whether a person is entitled to the part of the estate is an issue to be resolved without joining other persons to the matter.
>
> 27. With regard to the assets, one of the questions that may present itself would be the ownership of the assets presented as belonging to the deceased. An outsider may claim that the property does not form part of the estate and therefore it need not be placed on the probate table. The resolution of such questions do not necessitate joinder into the cause of the alleged owner to establish ownership. It is not the function of the probate court to determine ownership of the assets alleged to be estate property. That jurisdiction lies elsewhere.
>
> 28. Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the *Civil Procedure Act* and the *Civil Procedure Rules*. This could mean filing suit at the magistrates' courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant, then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.
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> 29. It is the failure to observe the foregoing, and allowing non-survivors or beneficiaries of the estate to prove their claims against the estate within the probate court that has often made succession causes complex, unwieldy and endless. It is by the same token that it had become necessary for the court to

allow joinder of persons to the succession cause who ideally ought not to be party to the cause in the first place."

15. I fully associate myself with the views enunciated in the said cases and I am satisfied that the claims made in the present Application are matters that are squarely within the province of the Environment & Lands Court and not this High Court sitting as a Probate Court. The Objectors may consider moving the Environment & Land Court to determine those matters. Article 162(b) of *the Constitution* of Kenya 2010 gives to the Environment and Land Courts the sole mandate and jurisdiction to determine issues of ownership, use and occupation of land. If and when the Environment & Lands Court rules in their favour and confirms their claims, then the Objectors, if need be, may return to this Court for appropriate orders.

16. Further, and as I have already stated, the Objectors did, upon some probing from the Court, reveal that they have information that the Petitioner may be long dead. If that is the position, then the Objectors may also consider the avenue of Citation under Rule 22(1) of the *Administration and Probate Rules* under the Law of Succession Act which provides as follows.

> " A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto."

17. The Objectors may therefore identify one close relative or survivor of the deceased and make him/her a Citee.

18. It is therefore clear that, if well advised, the Objectors may realize that, besides the Environment & Lands Court, they may still have other avenues at their disposal to seek a remedy. Their recourse may not therefore be strictly limited to the Environment & Lands Court.

19. Although it is not the business of this Court to offer legal advice to litigants, I may just mention that whether they chose to go the Environment & Land Court route or by way of a civil case under the law of Trusts or file a Citation under Rule 22(1) of the *Probate and Administration* cited above, the Objectors should be aware that they still likely to face some substatial legal hurdles to surmount. They will therefore have to tread carefully.

20. On the issue of substitution of the Petitioner, again, if the Petitioner-Administrator is really dead, then the prayer for substitution of the Petitioner as Administrator, cannot not arise. It is trite law that a where a sole Administrator dies, there is no room for substituting him/her. On this point, in the Court of Appeal case of *Florence Okutu Nandwa and Another v John Atemba Kojwa,* Civil Appeal No. 306 of 1998 at Kisumu, it was held follows:

> " A grant of representation is made in personam. It is specific to the person appointed. It is not transferable to another person. It cannot therefore be transferred from one person to another.
>
> The issue of substitution of an administrator with another person should not arise. Where the holder of a grant dies, the grant made to him becomes useless and inoperative, and the grant exists for the purpose only of being revoked. Such grant is revocable under section 76 of the Law of Succession Act. Upon its revocation, a fresh application for grant should be made in the usual way, following procedures laid down in the *Law of Succession Act* and the *Probate and Administration (Rules)*. I agree with the respondent that there cannot be a substitution of the dead administrator by his wife in the manner proposed by the applicant."

21. Further in the case of *Julia Mutune M'mboroki v John Mugambi M'mboroki & 3 others* [2016] eKLR, F. Gikonyo J, held as follows:

> " There is absolutely no room of substitution of the deceased administrator under the Law of Succession Act. In my view, therefore, where the sole administrator is a natural person, and he or she dies, the grant becomes useless or inoperative by reason of subsequent event of his demise .....
>
> Accordingly, in such case, the proper procedure is to apply for revocation of grant of letters of administration under section 76(e) of the *Law of Succession Act* on the reason that the grant has become useless and inoperative through subsequent circumstances and a grant to be made to another person named in the application."

22. It is therefore clear that there can be no substitution of a dead sole Administrator by way of substitution since pursuant to the provisions of Section 76(e) of the *Law of Succession Act*, "the grant has become useless and inoperative through subsequent circumstances

23. On a different point, as aforesaid, the Objectors have attached some Agreements of Sale, some home-made, to support their claims that they purchased portions of the said parcel of land. I however observe that the Agreements indicate that most, if not all, of the purchasers purportedly bought their portions long after the deceased had already died in 1984 and others purchased from third parties who do not even seem to be members of the family of the deceased. I never came across any Agreement which indicates that any of the purchasers bought their portions directly from the deceased during his lifetime. Since, in any case, the Grant issued herein has never been confirmed and the estate has never been distributed, the respective purchasers, together with whoever within the family of the deceased may have purported to sell any portion of the estate, appear to have probably committed the offence of "intermeddling" with the property of a deceased person as defined under Section 45 of the *Law of Succession Act* which provides as follows:

> " (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
>
> (2) Any person who contravenes the provisions of this section shall—
>
> (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
>
> (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration."

24. Regarding this issue of "intermeddling", Gikonyo J, in the case of *Re Estate of M'Ngarithi M'Miriti* [2017] eKLR, stated as follows:

> " Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category

of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person."

25. In view of the foregoing, and particularly on the ground of lack of jurisdiction, I decline to entertain the present Application.

Final Orders

26. In view of the foregoing, the Summons dated 22/01/2024 is hereby dismissed with no order costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 20TH DAY OF MARCH 2024

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WANANDA J.R. ANURO

JUDGE