In re Estate of Joseph Martin Wandera Dindi (Deceased) (Succession Cause 192 of 2010) [2024] KEHC 6061 (KLR) (28 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6061 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

SUCCESSION CAUSE 192 OF 2010

WM MUSYOKA, J

MAY 28, 2024

IN THE MATTER OF THE ESTATE OF JOSEPH MARTIN WANDERA DINDI (DECEASED)

RULING

1. I am invited to determine 2 applications, one dated 26th June 2023, and the other 26th July 2023.

2. The application, dated 26th June 2023, brought at the instance of Lucia Makio Ochieng, and it seeks the rectification of the certificate of confirmation of grant, dated 3rd June 2019, to remove the name of Catherine Okiya Dindi, and to distribute her share equally amongst the surviving beneficiaries. The basis for the rectification sought is that the said Catherine Okiya Dindi is dead. It is proposed that the estate be re-distributed, amongst individuals, but it is not indicated how the individuals are related to the person who is said to have died. It is also said that the land registrar and the surveyor are unable to distribute the estate because of her death.

3. Mary Connie Tebino has responded to that application. She is a co-administratrix of the estate with the applicant. she protests her non-involvement in the filing of the application, given that she and the applicant are supposed to be joint administratrices of the estate. She avers that the application does not seek the mere removal of the name of a dead beneficiary, for it also seeks a re-distribution of the entire estate. She states that rectification is limited to correction of superficial errors on a document, and re-distribution of the estate cannot be achieved through rectification. She further argues that no superficial errors on the face of the certificate, sought to be rectified, have been pointed out. She further argues that the death of the beneficiary was not good ground for rectification of the certificate of confirmation of grant. She points out that that beneficiary has been dead since 20th November 2016, and the certificate in question was issued on 3rd June 2019. It is averred that the delay in bringing the application was unexplained.

4. The application, dated 26th July 2023, seeks revocation of the grant herein. It is brought at the instance of Mary Connie Tebino, who seeks to be appointed the sole administratrix of the estate. She accuses her co-administratrix of breaching the fiduciary duty of an administratrix. She is accused of colluding with lands officials at Busia to transfer Bukhayo/Kisoko/307 to her sole name, with an

intention of disposing portions of that property to third parties. She further avers to have been kept in the dark, by her co-administratrix, regarding administration of the estate. She continues to aver that the administration cannot possibly be completed, so long as her co-administratrix remains an administratrix of the estate. She is accused of failing to act diligently in the administration of the estate, and it is argued that the grant issued to them had become inoperative due to her actions.

5. In the affidavit in support of the application, she points at the events of 4th September 2020, when the lands registry caused a gazette notice to be published, purporting to issue a new title deed for Bukhayo/Kisoko/307, prompting the filing of the suit in Busia ELC JR No. E004 of 2020, to quash the gazette notice, which the court did, by a judgment delivered on 4th August 2022. It is further averred that after that the co-administratrix instructed, without her knowledge, the government surveyor to partition the estate property, which prompted her to move the court again, in Busia ELC JR No. E004 of 2022, to quash the notice of the surveyor, which was done, by a judgement delivered on 25th January 2023. She asserts that in the case of a joint administration, no administratrix should act alone, without involving the co-administratrix in whatever she does. She goes on to make various allegations against the co-administratrix, and concluding that it was no longer tenable for the co-administratrix to remain in office as such.

6. The response to the revocation application is by Lucia Makio Ochieng, by her affidavit sworn on 19th February 2024. She avers that the deceased died a polygamist, and that there was animosity within the estate, which led to a joint administration. She accuses her co-administratrix of failing to participate in the distribution of the estate. She complains of guerrilla tactics, which have seen numerous applications being filed in court, which have stalled the distribution process. She argues that her co-administratrix has never taken a single step towards distribution of the estate.

7. I directed, on 31st January 2024, that both applications be canvassed by way of written submissions. I note that both sides have filed their respective written submissions. I have read through them, and I have noted the arguments made.

8. On the first application, for rectification of the grant, I note that the applicant has not attached any evidence that the said Catherine Okiya Dindi is dead. The court cannot act on a mere averment in an affidavit, that some person is dead. The fact of death is a matter of law. The law requires that any death be reported, and registered, and certificates are issued by the government to evidence the same. Anyone claiming that some person is dead must come to court with documented proof of the alleged death.

9. Secondly, the grant was confirmed, and the said Catherine Okiya Dindi was allocated a share. For her name to be removed from the list of beneficiaries, it has to be demonstrated that the allocation intended for her lapsed with her death. It should be demonstrated that what had been devolved to her by the court could not pass to her estate, to be distributed within a cause in her estate. Related to that would whether she had any children, for that would mean that she would have survivors, who would be entitled to whatever was due from her estate. The same would apply to her siblings. Was she survived by any, for if she was, then her siblings, not step-siblings, would be the persons entitled. I am not aware of any law which requires that once a beneficiary dies, before her share is distributed to her, after confirmation, then her name should be deleted from the list of beneficiaries. Section 39 of the *Law of Succession Act*, Cap 160, Laws of Kenya, is relevant to what I have discussed in this paragraph.

10. Thirdly, the application for rectification, from the way it is structured or framed, does not just appear to seek removal of the name of the dead beneficiary, but also to redistribute the estate. Distribution of an estate is done at confirmation, and any re-distribution must follow the same script, in terms of the beneficiaries being notified of what is going on, regarding how the shares are going to be affected by

the proposed changes, and having them consent to those changes. That is what Rule 40 of the Probate and Administration Rules requires, particularly at sub-Rule (8). That has not been done here.

11. The respondent has challenged the rectification application, on the basis that it targets superficial errors on a probate paper or document, and argues that no such errors have been pointed out. That submission, no doubt, hinges on section 74 of the *Law of Succession Act*. Unfortunately, the application before me is not founded on section 74, for the appellant has been very careful, and has avoided that route and the politics around it. Her application is premised on section 47 of the *Law of Succession Act* and Rule 73 of the *Probate and Administration Rules*, which save the inherent powers of the court. Either way, I am not persuaded that the orders sought are available, for the reasons that I have discussed in the preceding paragraphs.

12. The second application seeks revocation of the grant held by the administratrices, on grounds that they are unable to work together, which circumstance has stalled the process of administration. Secondly, the co-administratrix is accused of acts which run counter to the tenets of the office of a fiduciary. The respondent accuses the applicant of more or less similar things, except for breach of the duty of a fiduciary. The point I get from her is that the applicant has refused to cooperate and work with her. In fact, she is accused of not having taken any step towards executing the obligations of an administratrix, after their grant was confirmed.

13. The starting point for me is the fact that the grant herein was confirmed on 26th March 2019, and a certificate of confirmation of grant was issued, dated 3rd June 2019. The grant confirmed had been made on 14th October 2010. Under section 83(g) of the *Law of Succession Act*, administratrices are placed under duty to complete administration of the estates under their charge within 6 months of the confirmation of their grants. I write this ruling on 28th May 2024, some 5 years 2 months and 2 days after the grant was confirmed. From all indications, the estate is yet to be distributed. Section 83(g) of the *Law of Succession Act* does envisage situations where distribution and completion of administration could go beyond the 6 months. However, that can only be with the leave of court. The administratrices, in this matter, should have completed administration on or about 26th September 2019. If 26th September 2019 came, and they were unable to complete administration, for whatever reason, then they ought to have gone back to court, for permission to complete administration outside of the period allowed by section 83(g). There is no evidence, in the record before me, of the administratrices coming back to court to be allowed to taken more than 6 months to complete administration of the estate. Failure to complete administration, within the 6 months window allowed in law, amounts to a failure of the administration. That failure is compounded by the failure to approach the court, to be allowed to operate as administratrices, outside the permissible period of 6 months, for the purpose of completing administration. The administratrices are in their fifth year of failure as administratrices. An administration cannot go on forever.

14. The law does not envisage or countenance that the administration of an estate should go on forever. What is envisaged is that the entire exercise should be over within 1 year, that is within 365 days, from the date the grant is made, to the date when the estate is distributed and administration completed. That is achievable, for matters that are wholly uncontested. The grant would be made and issued, within 6 months the grant would be confirmed, and 6 months thereafter the estate transmitted. Where the process becomes contentious, the process may take longer, but even then, it would be expected that administration of an estate ought to be completed within reasonable time. The deceased herein died on 1st November 1997. Representation to his estate was not sought until 19th July 2010, 13 years after his demise. The grant obtained in 2010 was not confirmed until 2019, 9 years after the grant was made and issued. After confirmation of the grant in 2019, we are now in mid-2024, distribution of the estate has not been done, and the administration has not been completed. All this displays complete

and total failure of administration. It is indicative of total incompetence on the part of those placed in charge of the estate herein. Where those charged with the administration are unable to discharge their duties, then the estate cannot remain stuck in the logjam forever. Something must give. The way out has always been removal of the incompetent administrators.

15. So what has gone wrong since 2019, when the grant was confirmed? The 2 administratrices have not given a blow-by-blow account of what they have been doing, in terms of distribution of the assets, or transmission of the estate, after confirmation of their grant. Neither have they given an account of the challenges that they have faced, which prevented them from distributing or transmitting the estate. What I can glean, from the accusations being thrown about, is that they have failed to work together, or in tandem, or in concert, to administer the estate to its completion, particularly in respect of its distribution or transmission. Each is accusing the other of not cooperating. There are accusations of lone ranger tactics, and of guerrilla tactics designed to derail transmission of the estate.

16. So, who is to blame for the impasse? The applicant blames the respondent. She says that she has been acting alone, without involving her in her activities over the estate. She has gone to court twice to stop the respondent from doing certain things at the offices of the land registrar and the government surveyor. The respondent counters that the applicant has done absolutely nothing to implement the confirmation orders, and what she has been doing, instead, is to sabotage whatever she tried, through court cases. Transmission of an estate after confirmation of the grant happens at the lands office. It could be that the activities that the respondent was engaged in at the lands office, which provoked the filing of the 2 cases, was in that effort, but she made no effort to explain what exactly was happening. She complains of non-cooperation from the applicant, but there is no evidence that she ever went back to court, to have the applicant compelled to take some action or other. The applicant herself has not given an account of what she has done herself since 2019 to have the estate transmitted. She complains of lone ranger tactics by the respondent, but she has not pointed to any activity by herself, geared towards transmission of the estate in accordance with the certificate of confirmation of grant issued. All I have are counter accusations, but little in terms of an account of what has been done, by both sides to distribute the estate and complete administration. There is total failure on both sides.

17. The appellant invites me to remove the respondent, and to make her the sole administratrix. I do not think I should do such a thing, given that she has not demonstrated competence on her part to administer the estate. The applicant would like to be the sole administratrix, presumably as the respondent is tainted by lack of probity, going by the 2 cases that the applicant has won over her. It could be that there could be a case against the respondent on that score. However, that alone is no justification to make the applicant the sole administratrix. The deceased died a polygamist. It is only democratic that both households of the deceased be represented in the administration of his estate, and it would be selfish of 1 house to be the only 1 administering the estate.

18. When administrators fail, the answer is always to remove them, and replace them with others. I am alive to the fact that the family herein is polygamous. It would appear that there is animosity, and probably rivalry based on historical factors. In such a scenario, it would always be prudent to get a neutral administrator, who does not represent the interests of any of the houses. The office of the Public Trustee is one such. The Public Trustee is an administrator of last resort. I believe that office would be the best to take charge of the estate, to complete administration, or, at least, to allow sense come into the survivors of the deceased.

19. The final order is that the application dated 26th June 2023 is hereby dismissed. That dated 26th July 2023 is hereby allowed. The grant made to the current administratrices is hereby revoked. The revocation order does not affect the orders made on 26th March 2019, on distribution of the estate herein. I hereby appoint the Public Trustee, to take charge of the estate, for the purpose of distributing

the same, as per the orders of 26th March 2019, and the certificate of confirmation of grant dated 3rd June 2019. The Public Trustee has 3 months to complete transmission of the estate, and the administration generally. A grant of letters of administration shall issue to the Public Trustee, accordingly. The administratrices, who I have just removed from office, shall, through their Advocates, avail all the relevant administration records to the Public Trustee, to facilitate his work. The Deputy Registrar shall cause a certified copy of this ruling to be made available to the Public Trustee. This matter shall be mentioned, after 3 months, to confirm completion of administration. The mention shall happen on 25th September 2024. There is liberty to apply. Orders accordingly.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA THIS 28TH DAY OF MAY 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Tebino, instructed by Tebino & Associates, Advocates for the 1st co-administratrix.

Mr. Jumba, instructed by Balongo & Company, Advocates for the 2nd co-administratrix.