In re Estate of Leonard Walter Oselu Nyalik (Deceased) (Probate & Administration 70 of 2011) [2022] KEHC 15484 (KLR) (17 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15484 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

PROBATE & ADMINISTRATION 70 OF 2011

RE ABURILI, J

NOVEMBER 17, 2022

IN THE MATTER OF THE ESTATE OF LEONARD WALTER OSELU NYALIK(DECEASED)

BETWEEN

BASIL OCHIENG OSELU ..... OBJECTOR

AND

BISHOP PAUL OSELU ..... 1ST PETITIONER

ALOYCE OBUNGA OSELU ..... 2ND PETITIONER

JOSEPH OKUMU OSELU ..... 3RD PETITIONER

AND

GEORGE ABIERO OSELU ..... INTERESTED PARTY

RULING

1. By a notice of motion application dated September 20, 2021, the interested party George Abiero Oselu sought the following orders:

   a. Spent

   b. The court be pleased to set aside orders granted in this matter on April 12, 2021 by the honourable judge F Ochieng adopting the mediation settlement between the objector and the petitioner/respondents.

   c. The court be pleased to revoke the grant issued in this matter and a fresh succession process to begin.

d. That pending hearing and determination of this application, the court be pleased to stay any kind of disposal, selling, dividing or sharing of all the estate/properties of the late Leonard Walter Oselu.

2. The application is supported by the grounds on the face of the motion and the interested party's affidavit sworn on the even date wherein he deposes that in the process of succeeding the deceased, the petitioners left out some members of the family. He depones that in the process, one Basil Ochieng filed objection proceedings and the parties were then referred to mediation and a report was filed by the mediator which still did not provide for all the members of the family.

3. It is deposed by the interested party that the deceased had 7 wives/widows and that during the succession process, some of the houses were left out due to the collusion between the objector and the petitioners and have started disposing off some of the properties of the estate.

4. The objector and the petitioners filed joint reply in opposition to the application through Bishop Paul Oselu's affidavit sworn on October 13, 2021 in which he deposes that the interested party is not of sound mind and has been undergoing medication. He disputes the allegation by the interested party that not all beneficiaries of the estate were provided for and that the process of distribution of the estate is ongoing. To the contrary, the deponent avers that they have not participated in any disposal of the estate and accuses the applicant of leasing out part of the estate comprised in parcel numbers Kisumu/Koru/924, 925 and 58 which are now under cultivation by the lessors and supplying sugarcane to Muhoroni Sugar Company.

5. It is further deponed that the estate properties were distributed to houses and not to sons or daughters and that the 2nd house where the interested party hails from was represented by his brother Joseph Okumu Oselu, one of the administrators. Bishop Oselu contends that the during the mediation proceedings, the 2nd house was represented by Joseph Oselu who signed the mediation agreement on behalf of the house where the house has been given a number of parcels from the estate.

6. The application was disposed of by way of written submissions. The interested party did not file his. The objector and the petitioners filed separate yet similar submissions where they submitted on the following issues:

   a. Whether some of the beneficiaries/dependants of the estate of the deceased were not included in the succession and the mediation process.

   b. Whether the petitioners/objectors are disposing/selling part of the estate.

   c. Whether the interested party herein sought and obtained leave to be enjoined as an interested party in this cause.

   d. Whether the interested party is entitled to the prayers sought herein.

   e. Who is entitled to costs of the application.

7. On the first issue, it was submitted that the applicant has not disclosed who the beneficiaries who were left out are. On the second issue, the petitioners and objector submitted that the applicant has not disclosed the specific part of the estate that has been disposed of.

8. Regarding the issue of the propriety of the interested party in the proceedings, it was submitted that the applicant did not first seek leave of the court before filing the instant application. On the issue of whether the interested party is entitled to the orders sought, it was submitted that the applicant had

failed to proof to the court the allegations he had levelled against the petitioners and the objector hence he is not entitled to the orders sought.

Analysis and Determination.

9. I have carefully considered the application, the grounds, the supporting and opposing affidavits as well as the rival submissions by the parties. The following issues emerge for determination:

   a. Whether the interested party applicant lacked the mental capacity to institute the application subject of this ruling;

   b. Whether the interested party ought to have first obtained leave of the court before filing the application;

   c. Whether the applicant is entitled to the orders sought.

10. On the first issue, it is common ground that the applicant is related to the petitioners/respondents and the objector as siblings. After the applicant had filed the application, the respondents/ petitioners and objector(Respondents) in their responses alleged that the applicant is of unsound mind. A letter from the Kisumu County Referral Hospital was annexed to the respondent's replying affidavit indicating that he is a known psychiatric patient who has not been consistent on follow up.

11. The commencement point when a party's mental status has been challenged is to call the treating doctor so he can be cross examined on the contents of the document the doctor allegedly prepared because the generally accepted presumption of sanity was stated in *Grace Wanjiru Munyinyi & another v Gedion Waweru Githunguri & 5 others* (2011) eKLR, that:

> " The starting point is the presumption that must always exist, until it is proved otherwise, that every person is of sound mind. It is a logical presumption otherwise no one would be held responsible for their actions. It is also the position in law, and we find persuasive authority for it in the Wiltshire Case (*supra*), that the burden of proof lies on the person who asserts the incapacity."

12. In the instant case, what is before the court is a letter written by one Raphael Wambura stating that the interested party / applicant is a mental patient who has not consistently been following up on his treatment. The respondents did not call the author of the report for purposes of cross examination and as stated above, the onus is on he who alleges mental incapacity.

13. Further, the dispute between the parties hereto who are all beneficiaries of the state was resolved through the mediation process until a compromise was struck. During that mediation process, none of the parties raised issues over the applicant's mental state and it was not until he filed the instant application that the report from the Psychiatrist was unveiled.

14. I find no merit in the respondent's contention that the applicant is of unsound mind. I dismiss that assertion.

15. On the issue of whether the interested party/ applicant ought to have obtained leave of the court before instituting the instant application, the opening paragraph to Section 76 of the *Law of Succession Act* provides as follows:

> " 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."

16. There is no requirement for one to seek leave first before filing any application and more so, by virtue of the interested party's relationship with the deceased, he already has an identifiable interest or stake in the estate of his late father.

17. In the same vein, rule 44 (1) of the *Probate and Administration Rules* provides that:

    (1) Where any person interested in the estate of the deceased seeks pursuant to the provisions of section 76 of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that resident magistrate's registry."

18. From the above provisions, it is clear that there is no requirement to first seek leave of the court before bringing an application as an interested party. It is only essential that an applicant establishes the interest he has in the estate. accordingly, the objection by the petitioners on account of the interested party/ applicant's locus standi in bringing the application is dismissed.

19. The applicant/interested party also sought orders of setting aside of orders adopting the mediation agreement, revocation of grant and finally, orders staying any sale of part of the estate. The first prayer sought is that of setting aside orders of the court adopting the mediation agreement as an order of the court distributing the estate of the deceased.

20. I have perused the file and note that the orders sought to be set aside were made by the court April 12, 2021 pursuant to a mediation process. The mediation agreement was signed by the parties in the matter and on the day of adoption, the applicant's/interested party as well as the respondent's counsel were present in court. The court record shows that:

    Objector: the mediation was successful. It ended on April 9, 2021.

    Miss Dana: that is the position. Parties have agreed and signed the mediation settlement agreement.

    Court: the mediation settlement agreement is adopted as an order of this court.

21. As is evident from the excerpt of court proceedings and order adopting the mediation agreement as an order of the court, the parties voluntarily agreed to go for mediation and to the adoption of the mediation settlement agreement. The mediation settlement agreement was also executed by the parties.

22. The legal validity of a consent and principles on which it can be set aside were considered by the Court of Appeal in the case of *Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd*; Nairobi Civil Appeal No 276 of 1997 wherein the court of Appeal applied the reasoning in the case of *Flora Wasike vs Destimo Wamboke* (1988) 1 KAR 625 at page 626 where Hancox JA (as he then was) stated:

    > "it is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside."

23. Thus, applications for setting aside of consent orders are similar to those that would vitiate a contract as was held much earlier in the case of *Brooke Bond Liebig vs Mallya* (1975) EA 266 where Mustafa A VP held that:

    > "The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain

circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed."

24. The Mediation Settlement Agreement created a binding contractual arrangement and relationship amongst the parties thereto. More so, under Section 59B (4) and (5) of the *Civil Procedure Act*:

> "(4) An agreement between the parties to a dispute as a result of a process of mediation under this Part shall be recorded in writing and registered with the Court giving the direction under subsection (1), and shall be enforceable as if it were a judgment of that Court.
>
> (5) No appeal shall lie against an agreement referred to in subsection (4)."

25. Indeed, the judgment founded on Mediation cannot be set aside. neither can it be appealed against. The intention was to give finality the Mediation process. The consent entered into herein created a contractual relationship between the parties who are bound by it.

26. In *Kenya Commercial Finance Company Ltd vs Ngeny & Another* (2002) 1 KLR, it was stated that:

> " The court will not interfere where parties have contracted on arms-length basis. However, by its equitable jurisdiction, this court will set aside any bargain which is harsh, unconscionable and oppressive or where having agreed to certain terms and conditions, thereafter imposes additional terms upon the other party. Equity can intervene to relieve that party of such conditions."

27. Having carefully perused the application, I do not find any allegation of coercion, fraud, mistake or misrepresentation as a ground to have been advanced by the interested party applicant herein to warrant the interference with the order given by the court adopting the mediation agreement as the order of the court.

28. The other prayer sought is that of revocation of grant. The law providing for revocation and or annulment of grants is Section 76 of the *Law of Succession Act* Cap 160 which enumerates the grounds for revocation of the grant. 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—
>
> (a) that the proceedings to obtain the grant were defective in substance;
>
> (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
>
> (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;
>
> (d) 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; or

(e) that the grant has become useless and inoperative through subsequent circumstances."

29. From the above provisions of the law, the grounds for evocation or annulment of a grant are very particular and specific. In the instant case, the grant complained of was as a result of a mediation process that the applicant participated in the said process. Furthermore, the applicant has not established to the required standards the specific grounds that would entitle the court to revoke the grant. I find this prayer wanting in merit. It is hereby declined and dismissed.

30. The applicant also sought orders stopping the sale of any part of the estate. The applicant alleged that the respondents have engaged on a wanton sale of the estate. I have perused the entire court record and I have not found any agreement for sale of the estate. What is available is a lease agreement between the applicant/interested party herein and third parties. It follows that indeed, the applicant is the person who should be stopped from continuing to dispose of or lease or waste or intermeddle with the estate of the deceased. He is making the loudest noise yet he is the person responsible for wasting of the estate. I find this prayer an empty shell. I decline it and dismiss it.

31. In the end, therefore I do not find any merit in the application and all the prayers sought herein are therefore found to be devoid of any merit. The application by the interested party is hereby dismissed.

32. As the parties are siblings, and in order to promote peace and harmony amongst them, despite the vexatiousness of the interested party whose application I find to be frivolous and an abuse of court process, I order that each party shall bear their own costs. The administrators to enforce the mediation agreement and expedite to fully distribute the estate of the deceased Leonard Walter Oselu Nyalik among the bonafide identified beneficiaries of the estate in accordance with the law and the schedule of distribution as per the certificate of confirmation of the grant issued to the administrators.

33. This file is hereby closed. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 17TH DAY OF NOVEMBER, 2022

R.E. ABURILI

JUDGE