REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

SUCCESSION CAUSE NO.277 OF 2013

IN THE MATTER OF THE ESTATE OF ENOSH OKINDA NJOGA – DECEASED

AND

RUTH OKINDA.....PETITIONER

VERSUS

MILLICANT OKINDA & 2 OTHERS.....OBJECTORS

R U L I N G

[1] The subject grant respecting the estate of Enosh Okinda Njoga (**deceased**) was issued on 15th July 2014, to his two surviving widows, **Ruth Susan Okinda** and **Millicent Apondi Okinda** who henceforth became the duly appointed administrators of the estate for purposes of administration and distribution therefore to the rightful beneficiaries.

The estate comprised three parcels of land described as L.R. No.Bukhayo/ Bugengi/ 7555, Bukhayo /Bugengi/2652 and Bukhayo / Bugengi/6343 in Form PA 5.

However, an amended grant of letters of administration was issued on 8th May 2018 inco-operating a fourth parcel of land i.e. Bukhayo/Bugengi/2848.

[2] Although the re-issued grant was to be confirmed within six (**6**) months of its issuance the summons for confirmation of the grant dated 11th October 2019, was filed herein on 22nd October 2019 by the second administratrix **Millicent Okinda**, more than the prescribed period of time. Nonetheless, when the matter came up for hearing the patties were directed to file written submissions which were considered by the court and a ruling rendered on 27th January 2021 in which the parties were directed on how to proceed with the distribution of the estate considering that the deceased was polygamous. The court also clarified that the property and/or business known as **Star of the Border Academy** was not available for distribution as part of the estate of the deceased. The parties were given thirty (**30**) days within which to file proposed distribution in line with the orders given by the court, failure to which the grant shall automatically be revoked. This requirement was seemingly addressed more to the petitioner, **Ruth Okinda**, but its import was to affect the entire grant.

[3] After that ruling, the second petitioner and two beneficiaries i.e. **Mercy Okinda** and **Sabina Okinda**, filed a notice of motion dated 8th February 2021 under the provisions of the Civil Procedure Act and Rules, seeking a stay of the proceedings and the ruling pending the hearing and determination of an intended appeal and also leave to appeal the ruling.

In the meantime, the thirty (**30**) days window was fast fading away.

On 7th April 2021 the fresh application came up for mention for directions and it was directed that the application would be heard on 18th May 2021 on which date the applicants through their counsel, **Mr. Oyuko** applied in the presence of the respondent's counsel, **Mr. Shihemi** to withdraw the application which was accordingly withdrawn on that date.

[4] Earlier on the 15th March 2021, after the expiry of the thirty (**30**) days window provided by the court, the first petitioner/administratrix filed an application for confirmation of grant vide the summons for confirmation of grant also dated 15th March 2021.

The application was notably brought after the automatic revocation of the grant in terms of the order made by the court on 21st January 2021.

Nonetheless, the application was fixed for mention for directions on the 14th July 2021 on which date the parties informed the court that they were engaging on the matter and requested for a further mention date which was given as the 19th October 2021, on which date the court was informed that the parties did not reach an agreement. The court therefore fixed the application for hearing on 18th November 2021, thereby extending the thirty days window for the parties to distribute the estate.

[5] The application seeks confirmation of the grant in terms of the proposal contained in paragraph (**5**) of the supporting affidavit respecting both movable and immovable property which belonged to the deceased.

The second petitioner/administratrix raised an objection or protest to the said proposal vide her replying affidavit dated 21st September 2022 in which she proposed distribution of the estate in terms of paragraph **(5**) of the affidavit.

The fact that the two proposals are distinct is a clear demonstration that the parties did still not agree on a mode of distribution acceptable to all of them. They have also chosen to disregard the tenor and spirit of the orders of the court made on the 27th January 2021.

[6] Before they could agree on the mode of distribution or even come up with separate and distinct proposals, parties were first and foremost required to clearly identity and mark the property available for distribution whether movable or immovable. They seem not to have done so and this explains their separate and distinct modes of distribution. The point of departure as may be deciphered from the rival submissions appear to be the distribution of the immovable property on which the educational premises known as the Star of the Border Academy stands and by extension the movable property(**m/vehicles**) assigned for usage by the school. However, this should not really be a point of departure for the purposes of the distribution of the estate as it was made clear by the court ruling made on 27th January 2021 that the property on which the school stands inclusive of the school itself are in the present circumstances not available for distribution as part of the estate by dint of the fact that they now belong to the first petitioner on the basis of the doctrine of survivorship applicable where property is jointly owned.

[7] There seems to be uncertainty or confusion as to the exact property on which the school stands.

The proposal made by the first petitioner indicates that the school stands on property No.2652 as well as property No.7555. That, the ECDE section of the school stands on Bukhayo/Bugengi/2652 and the primary section stands on Bukhayo/Bugengi/7555.

The proposal made by the second petitioner indicates that the school is erected on Bukhayo/Bugengi/755.

It may also be noted that some of the documents filed herein indicate that the school is erected on parcel No.Bukhayo/Bugengi/6343.

Whatever the case, the school and the property on which it actually stands would not be available for distribution as ordered by the court on account of the principle or doctrine of survivorship.

[8] The effect of the principle of survivorship also known as "*jus accrescendi*" is to remove jointly owned property from the operation of the Law of Succession upon the death of one of the joint tenants. Therefore, in removing the school and the property on which it stands from the assets available for distribution, the court found that both the business of running the school and the property on which it is erected were jointly owned by the deceased and the first petitioner. On the same premises, the m/vehicles used by the school and purchased for usage by the school and as part of its assets as a business entity would not be available for

distribution in this matter.

Once the property available for distribution has been identified with clarity by the parties, then they would be required to distribute the same in exclusion of the school and the land it is erected on.

[9] Land jointly owned passes automatically to the surviving owner when one passes away without the need to file a succession cause. In **Isabel Chelangat Vs. Samuel Tiro** (**2012**) **eKLR**, it was held that:-

"**A joint tenancy impacts to the joint owners with respect to all other persons than themselves the properties of one single owner. Although as between themselves joint tenants have separate rights as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and "four unities". The right of ownership (Jus-accrescendi) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant.**

A joint tenancy cannot be passed under will or intestacy of a joint tenant as long as there is a surviving joint tenant as the right of survivorship takes precedence."

[10] Where property is in the names of joint owners, upon death of one of them, the surviving owner automatically becomes the owner of the property which automatically passes to the surviving joint tenant.

In the ruling made on 27th January 2021, the court directed the parties to distribute the available property in accordance with **S.40** of the **Law of Succession Act** as the deceased was a polygamous intestate with the first and second petitioners/administrators as his two wives.

In a polygamous setting, a "house" is defined in Section 3 of the Succession Act as a family unit comprising a wife whether alive or dead at the date of death of the husband and the children of that wife.

S.40 of the Act specifically provides for the distribution of the estate of a polygamous man who dies intestate in the following terms:-

(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 in 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**."

(2) "**The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38**"

[11] This provision was examined by the Court of Appeal in the case of **Esther Wanjiku Burungu Vs. Margaret Wairimu Burungu Civil Appeal No.319 of 2002**, at Nakuru which then held that the provision does not state that the division must be equal. That, it specifically states that although the distribution of the estate of a polygamous person is in the first instant to be among the houses it nonetheless specified that that would be done according to the number of children in each house. The court was of the view that the provision negates any proposal that the division must be equal between the houses for to say so would ignore the fact that in most instances, the number of children in each house is never equal (see also **Mary Rono Vs. Jane Rono & Another** (**2005**) **eKLR**.

In the present circumstances, any proposed mode of distribution of the estate ought to comply with the aforementioned provision of the law, but the proposals made herein by the first and second petitioner are clearly not compliant with the provision. So, in the absence of any agreement and/or consent on the mode of distribution between the parties they are obligated to apply S.40 of the Succession Act to distribute the estate.

[12] In **Elizabeth Chepkoech Salat Vs. Josephine Chesang Salat Civil Appeal No.211 of 2012**, at Nairobi, the Court of Appeal reiterated that S.40 of the Act does not provide for equality between houses or that each child must receive the same or equal portion. The court held that the net intestate estate should be shared according to a ratio reflecting the number of units in two houses as was done in the case of **Catherine Nyaguthi Mbauni Vs. Gregory Maina Mbauni Civil Appeal No.34 of 2004** at Nyeri

(**2009**) eKLR.

Most significantly, the court held as follows:

"**Section 40 of the Act does not give discretion to a court to deviate from the general principles therein enunciated.**

Where a matter is contentious and the parties have not reached a consent judgement the court is bound to apply the statutory provisions; more specifically, the court has no power to substitute the statutory principles for its own motion of what is an equitable or just decision. However, court has a limited residuary discretion within the statutory provisions to make adjustments to the share of each house or of a beneficiary where, for instance, the deceased had during his lifetime settled any property to a house or beneficiary or to decide which property should be disposed of to pay inabilities of the estate or to determine which properties should be retained by each house or several houses in trust."

[13] The respective proposals of the two petitioners in this case did not result into a consensus or consent judgment as each proposal was subject to entire scheme of distribution proposed by each being accepted by the court. Such proposals have little weight in the application of statutory principles as was stated in the Salat Case (**supra**).

In sum, none of the two proposals is acceptable by this court. Therefore, the first petitioner's application for confirmation of grant dated 15th March 2021 and the protest thereto vide the second petitioner's affidavit of protest dated 21st September 2022, are hereby dismissed with advise to the parties to return to the drawing board and agree on a scheme of distribution based on the provision of **S.40** of the **Succession Act** or any other scheme acceptable to both of them and which may be construed as a consent judgement.

Both parties shall bear their own costs of the application.

Ordered accordingly.

J.R. KARANJAH

J U D G E

[DATED & DELIVERED THIS 22ND DAY OF MARCH 2022]

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