



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 449 OF 2006

IN THE MATTER OF THE ESTATE OF CHARLES NTWIGAH BURINI (DECEASED)

HUMPHREY MUGAMBI BURINIAPPLICANT

VERSUS

VICTORIA NJOKI NJIRU.....1ST PETITIONER/1ST RESPONDENT

ELIAS MURIITHI NJIRU.....2ND PETITIONER/2ND RESPONDENT

JUDGMENT

1. The matter for determination before this court is summons for revocation of grant of letters of administration made to the respondents on 24.01.2007.
2. The application is based on the grounds on its face and it's supported by an affidavit sworn by the applicant in which he seeks for revocation and/or annulment of the grant of letters of administration intestate issued to the petitioners. That the only known wife of the deceased is one Mercy Mbogori with whom the deceased separated and Faith Wanjiku who died on 04.08.2004. That before his demise, the deceased's only surviving child was Caroline Gatwiri Ntwiga whose mother is Mercy Mbogori. That at the time of his death, the deceased herein did not and was not living with any wife and was certainly not living with the 1st petitioner/respondent. It was his case that the 1st petitioner/1st respondent's allegation that she is the wife of the deceased has not been substantiated.
3. The 1st petitioner/1st respondent via a replying affidavit dated 15.05.2008 deponed that she is the wife of the deceased herein and that sometime in the year 1996, she met the deceased and so they started a relationship. That they remained friends till 1997 when they started staying as man and wife. She deponed that on 23.07.1997, they were blessed with their first child (Brian Kariuki Ntwiga) and on 17.10.2005 (Sheila Kendi Ntwiga). That the deceased started an affair with one Mercy Mbogori and later Faith Wanjiku. She denied that she acquired letters of administration fraudulently since the applicant was well aware of the filing of the succession cause herein. It was her case that her children were fathered by the deceased and that even at the time of his death, they were living together at Kiambere Police Station and as such, she is not a stranger to the estate of the deceased. It was her case that, she is the one who kept the documents belonging to the deceased and further that, she is the one who surrendered the deceased identity card; she further deponed that she is the one who was issued with the burial permit and that she is the one whom the deceased's employer through the Provincial Police Officer wrote a letter of condolence to. She urged this court to dismiss this application with costs.
4. Directions were taken and viva voce evidence was adduced before the court whereby each party supported its case. The applicant called for the revocation of the said grant while the 1st petitioner/1st respondent urged this court to dismiss the application. It is the case of the applicant that the deceased being his brother, he was only aware of the one wife by the name of Faith Wanjiku who passed on and one child from a previous marriage with one Mercy Mbogori. The 1st petitioner/1st respondent on the other hand argued that she was the wife of the deceased who had died intestate; and that from their union, they were blessed with two children and as such, she had all the rights to seek for the letters of administration intestate to administer the estate of her deceased husband.
5. I have considered the application herein together with the respondent's replying affidavits on record. I have equally considered the submissions as filed by the applicant.
6. The said application is brought under Section 76 of the Law of Succession Act Cap 160 Laws of Kenya and Rule 44 of the Probate and Administration Rules 1980. Section 76 (a) - (d) provides for revocation of grant and the circumstances under which a grant of representation may be revoked. However, from the perusal of the application herein, the applicant's ground for seeking the revocation is mainly that the respondent did obtain the grant fraudulently.
7. As such, it is clear that the application is premised on the provision of section 76(b) and which 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 an interested party or of its

own motion on the grounds either that the grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case.

8. It is trite, however, that the power to revoke a grant is a discretionary power that must be exercised judiciously. This was the court's view in the case of **Albert Imbuga Kisigwa v Recho Kawai Kisigwa, Succession Cause No.158 OF 2000**). Further, in the case of **Matheka and Another v Matheka [2005] 2 KLR 455**, in which the court held that for a grant to be revoked/annulled, the grounds as provided for under section 76 ought to be proved with evidence. Even when revocation is by the court on its own motion, there must be evidence to satisfy the grounds for revocation of grant. As such, any party making an application for revocation or annulment of a grant has a statutory duty to demonstrate the existence of any, some or all the ground(s) which he relies on in challenging the grant.

9. As I have already noted, the ground in support of the applicant's application is that the respondents are strangers to the estate of the deceased herein and as such, the grant already issued to them should thus be revoked. The applicant's case is premised on the process of obtaining of the grant herein as depicted in the prayers on the face of the application reading that "*the grant of letters of administration intestate to the estate of Charles Ntwiga Burini made to Victoria Njoki Njiru and Elias Muriithi Njiru on 24.01.2007 be revoked.*"

10. The law allows for revocation of grant before or after confirmation. However, the conditions under which revocation can be done are clearly limited to the process of obtaining of the said grant (where the proceedings to obtain the grant were defective in substance; and/or where 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; and/or where 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).

11. The Learned Judge **In re Estate of Juma Shitseswa Linani (Deceased) [2021] eKLR** held that where a person is unhappy with the process of confirmation of grant, such a person ought not to move the court under section 76 for revocation of grant. Instead, the person should file an appeal against the orders made by the court on distribution or apply for review of the said orders. This is because the court confirming a grant largely becomes *functus officio* so far as confirmation of the grant is concerned, and cannot revisit the matter unless upon review.

12. In the instant case, the applicant averred that this court ought to revoke the grant issued to the respondents since the 1st petitioner/1st respondent was never a wife but a stranger to the estate of the deceased while the 1st petitioner/1st respondent on the other hand insists that she is a wife to the deceased.

13. The applicant avers that the only wives of the deceased were one Mercy Mbogori with whom the deceased was blessed with one child (Caroline Gatwiri Ntwiga) and Faith Wanjiku who predeceased the deceased herein. It was his case that he is not aware of the 1st petitioner/1st respondent having been married to the deceased and that the known wife of the deceased is Mercy Mbogori in as much as the deceased and the said Mercy are estranged. The applicant further testified that he had never seen the 1st petitioner/1st respondent but further, acknowledged that he first met her in 2005 but then again, he could not ascertain whether she attended the deceased's burial since there were many people and that the 1st petitioner/1st respondent never introduced herself to the family or to anyone that she was the deceased's wife.

14. It was his case further that there was no proof of marriage between the deceased and the 1st petitioner/1st respondent since there is no proof that any dowry discussion or payment was made to the 1st petitioner/1st respondent's family. That there was no proof on a balance of probabilities that the 1st petitioner/1st respondent was the wife of the deceased. The applicant pointed out that the birth certificates of the alleged children belonging to the deceased were acquired after the death of the deceased and that they were issued at Siakago, and as such, contradict the 1st petitioner/1st respondent case that the children were born in Kisumu where she allegedly lived with the deceased at that particular time.

15. On the other hand, the 1st petitioner/1st respondent submitted on how she met with the deceased and how they were blessed with two children (whose birth certificates were produced before this court) and despite being in the union with the deceased, how he had extra-marital relationship with one Mercy Mbogori and Faith Wanjiku (deceased). It was her case that her children were fathered by the deceased and that even at the time of his death, they were living together at Kiambere Police Station.

16. In **Mary Wanjiku Githatu v Esther Wanjiru Kiarie [2010] eKLR**, Bosire JA., summarized the position thus:

The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded. For instance, a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by a long cohabitation or other circumstances evinced an intention of living together as husband and wife.

17. The applicant has submitted that the 1st petitioner/1st respondent has never been a wife to the deceased herein and that he had never seen her save for the brief moments when she attended the burial of the deceased herein and further that the children of the 1st petitioner/1st respondent were never fathered by the deceased herein.

18. The court then has to determine on a balance of probabilities if the 1st petitioner/1st respondent was actually married to the deceased as she alleges. For if that is the case, then she was the right person to seek for the grant in respect of the deceased's estate. From the record and the evidence adduced before this court, I find no proof of customary marriage between the deceased and the 1st petitioner/1st respondent but in the same breadth, the fact that there was no customary marriage between the deceased herein and the 1st petitioner/1st respondent does not preclude this court from reaching a finding that the parties cohabited for a period of time and further conducted themselves as husband and wife in such a manner that a marriage could be presumed(see **Hortensiah Wanjiku Yawe v Public Trustee CA Civil Appeal No.13 of**

1976).

19. It is not lost to this court that the applicant has stated that the 1st petitioner/1st respondent was never a wife and that the known wives of the deceased are Mercy Mbogori and Faith Wanjiku (deceased); the applicant confirmed that in as much as he had wanted to be the one to deal directly with the local authority and further the employer of the deceased, it was the 1st petitioner/1st respondent who instead run these vital affairs. The 1st petitioner/1st respondent invites this court to ponder on how a ‘stranger’ could run such vital processes as the applicant watched (and the alleged recognized wife of the deceased (Mercy Mbogori albeit estranged) who had claimed that he had never seen the 1st petitioner/1st respondent save for the brief moment when she attended the burial of the deceased herein.

20. Ojwang J., (as he then was) stated in **Ruth Wanjiru Njoroge v Jemimah Njeri Njoroge NRB HCCC No. 330 of 2005[2004] eKLR** that,

“In Social Context prevailing in this country the person who is first in line of duty in relation to the burial of any deceased person is the one who is closest to deceased in legal terms.”

The same point was made by Mabeya J., in **John Omondi Oleng and Another v Sueflan Radal [2012] eKLR** that,

“... When it comes to the disposal of the body of a married man or woman the spouse should play a leading role...”

21. It is thus clear that the applicant need not approve the relationship between the deceased herein with the 1st petitioner/1st respondent applicant in order to make it valid before the eyes of the law. This point is further buttressed by Article 45 of the Constitution which states that every adult of the opposite sex is free to marry based on the consent of the parties.

22. It was further argued that the only known child of the deceased is one Caroline Gatwiri Ntwiga; that the children of the 1st petitioner/1st respondent were never fathered by the deceased since their birth certificates were acquired after the death of the deceased herein and further, the same happened in Siakago and not Kisumu where allegedly the 1st petitioner/1st respondent and the deceased had started their relationship. The applicant failed to produce cogent evidence to the contrary nor did he take initiative to get his own proof that the children of the 1st petitioner/1st respondent were never fathered by the deceased herein. He who alleges must prove (See **Section 107 of the Evidence Act; Pinnacle tours and Travel Limited & 3 Others v Pauline Ngigi t/a Safari Market Tours [2019] eKLR**)

23. However, the above notwithstanding, this court notes from the averments made before it that one Mercy Mbogori was a wife of the deceased, albeit estranged. It still remains unclear why the applicant tried to make a case for Mercy Mbogori when out rightly, she never showed any interest in the estate of the deceased. I say so since during the pendency of this matter spanning 15 years or so, she never showed any interest in the same in any way. In the same breadth, it was alleged that one Caroline Gatwiri Ntwiga is the deceased child from the relationship between the deceased and Mercy Mbogori. The same has not been controverted and no evidence has been adduced to prove otherwise.

24. **Section 51(2)(g)** of the Law of Succession Act provides as follows with regard to applications for grant:

“(2) Every application shall include information as to—

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased”

25. Section 51(2) (g) requires the petitioner for *grant of letters of administration* intestate to disclose all the surviving spouses and children of the deceased. The provision is in mandatory terms. The administrators herein disclosed the 1st petitioner/1st respondent and her two children and left out the name of Caroline Gatwiri Ntwiga.

26. This court is bestowed with jurisdiction to determine any dispute which comes before it in relation to an estate of the deceased (see section 47 of the Law of Succession Act) and further the inherent powers to make orders so as to make the ends of justice meet or to prevent abuse of the process of the court. (See Rule 73 of the Probate and Administration Rules 1980).

27. In the end, the applicant has not demonstrated that the grant in this matter was obtained in a manner that rendered the grant defective in substance, or to have been fraudulently obtained by the making of a false statement, or concealed from the court something material to the case, or made an untrue allegation of a fact essential in point of fact to the case.

28. However, and that notwithstanding, I find that the 2nd respondent is a stranger to the estate of the deceased being the sister to the 1st respondent. The petitioner has a higher priority to petition the court compared to him though even him the only interested would be that of an administrator so as to protect the interest of Caroline Gatwiri Ntwiga.

29. In the interest of justice, the court makes the following orders;

i) The grant issued to the respondents on the 24th January, 2007 be and is hereby revoked.

ii) Another grant be jointly issued to the applicant and the 1st respondent.

iii) The administrators to file an application for confirmation of the grant on how the estate will be distributed between the 1st respondent, her two children and Caroline Gatwiri. The same to be filed within 45 days from today.

iv) Each party to bear own costs.

30. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF FEBRUARY, 2022.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondents