REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO. 7 OF 2010

IN THE MATTER OF THE ESTATE OF THE LATE HELLEN WANGARI WATHIAI (DECEASED)

AGNES NYAMBURA

PATRICK IROWA

NANCY NJOKI.....ADMINISTRATORS/RESPONDENTS.

VERSUS.

BENSON WATHIAI KARUKU.....OBJECTOR/ APPLICANT.

RULING

1. The applicant is the grandson to the late **Wangari Karuku Wathiai**, the deceased herein who was the wife and the administrator of the estate of the late **Benson Karuku Wathiai**, her husband. The applicant is the son to the late **James Karuku Wathiai**, the eldest son to his late grandfather and grandmother mentioned herein.

2. All the applicants, grandfather, grandmother, father and mother have died. As at the time of his father's death he was already estranged with his wife, the mother to the applicant, one Jane Wangui.

3. When his grandfather passed on, his grandmother filed succession proceedings in respect to his estate vide **Nakuru Succession Cause No. 599 of 2003**, estate of the late **Benson Karuku Wathiai**. She was made the sole administrator of the estate and all the properties bequeathed to her of course on her behalf and that of her children.

4. The said Wangari Karuku Wathiai the deceased herein passed on and the respondents filed this cause wherein on **18th February 2011** the grant was confirmed on their behalf and the estate distributed accordingly. Ever since then, from the courts records, the said grant has been rectified severally upon applications by the above administrators.

5. The applicant on his behalf and that of her sister **Hellen Wangari Wathiai** has filed an application dated **3rd April 2019** challenging the grant and the entire succession cause on the grounds inter alia that they were left out in the distribution first of all by their grandmother as well as the respondents herein.

6. The applicant has argued that his late father if he was alive would have inherited from his parents just like the respondents who were his siblings. He went on to state that by the time his grandmother died on 18th September 2008 he was still a minor aged 16 years and he could not do much to assert his rights. At the same time her late mother Jane Wangui who was estranged to her father by the year 1996 passed on in the year 2013 and was not at all involved in the administration of her late father in laws estate.

7. The above brief historical position is uncontested. The application therefore seeks the orders of this court to revoke the grant and order fresh redistribution taking into consideration their interest. The applicants have also prayed that any titles which have been transferred reverts to his deceased grandmother for afresh distribution.

8. He further prays that the respondents do provide fresh accounts of all income received from the estate from the date they took over. He also prays that the file in respect to the estate of his grandfather, number 599 of 2003, earlier alluded be enjoined in this proceedings.

9. The respondents on their part in opposing the application have filed a preliminary objection dated **11th December 2020** in which they have strongly contested that the applicant has no locus standi to bring this application and that the same is defective and ought to be dismissed.

10. When this matter came up for hearing the court directed that the preliminary objection be argued simultaneously with the application so

as to save on courts time. As a matter of priority of course is the preliminary objection which if it's found to be meritorious then the application would stand spent. The parties' submissions can thus be summarised as hereunder.

ADMINISTRATORS/RESPONDENTS SUBMISSIONS.

11. The administrators' submitted that a copy of the death certificate, a copy of an identity card and the Kenya Revenue Authority Personal Identification Number Certificate tendered as evidence in support of the applicant's claim were not certified as much as they are public documents forming part of the Government records hence they violated **S. 81 of the Evidence Act** which states that Certified Copies of public documents may be produced in proof of the contents of the documents or parts of the documents of which they purport to be copies.

12. The administrators' submitted that the use of 'may' as highlighted in **Section 81** does not stipulate that certifying is optional, its intent is merely to inform a litigant who rightly places reliance on the **Evidence Act** that they may produce **Documentary Evidence** by adhering to the process stipulated.

13. The applicant relied on the case of **MERCY NJOKI IRUNGU V LUCY WAMUYU MARURU [2016] eKLR** where the court outlined the source of the cause of action that should be proved before instituting any succession cause. It states that an interest must exist in the estate in order to have title to be a party to a probate or administration action.

14. The administrators' submitted that these documents as pleaded must disclose a cause of action. The interest or cause of action can only be demonstrated through the exhibits accompanying a pleading. Benson Wathiai Karuku, lacks locus standi to institute a claim. The Summons for Revocation of Grant do not disclose a legal right or interest in the estate vested in the Applicant. It also adduces no evidence capable of being taken judicial notice of, of any party being appointed as an administrator or as a representative of the alleged predeceased issue's estate.

15. The applicant placed reliance in the case of **JULIAN ADOYO OGUNGA & ANOR V FRANCIS KIBERENGE BONDEVA CIVIL APPEAL 119 OF 2005** where the Court of Appeal affirmed **Section 54and 55 of the Law of succession Act**.

16. From the above stated case, it was the court's view that a limited Grant of Letters of administration Ad Litem is usually used when the estate of a deceased person is required to be represented in court proceedings, failure to do so vitiates a right to institute a pleading on behalf of a deceased estate. The administrator submitted based on the above sentiments that due to this defect, the applicant cannot claim any right to the estate because consaquinity has not been demonstrated from the face of the pleadings lodged.

17. The administrators' submitted that the evidence as and if at all tendered in support of the applicant/ respondent's interest in the estate in the summons for revocation is inadequate. Even if the court takes judicial notice of these public documents, they can only establish a relationship between the named James Wathiai and the Government.

18. The evidence of which the aforesaid summons relies on shows no relation between Benson Wathiai Karuku, his alleged father and the interstate. The applicant has failed to demonstrate his right to institute a claim on behalf of his alleged parent's estate and the existence of his legal interest in the estate. He failed to produce any admissible evidence establishing any of the facts deponed of including any loss threatened or occasioned by the said eviction. Hence, no locus standi or cause of action has been demonstrated.

19. The administrators, submitted that even though they do not deny that a legitimate applicant or the court has the right to institute summons for the revocation of a grant as envisaged under **Section 76 of the Law of Succession Act,** the process for revocation in this case was initiated by a private person. Such party is not exempt from showing cause deduced from the evidence produced and satisfying the standard of proof required to substantiate the orders that are given based on the grounds given.

20. In the Summons for Revocation of Grant, the Applicant has alleged fraud and concealment of material facts premised on **Section 76 of the Law of Succession Act.** The aforesaid summons state that it was not disclosed to the Court that the applicant's father who had predeceased the intestate was a beneficiary.

21. It was submitted that the Applicant cannot make such a serious accusation of fraud without any evidence to support it. He is mandatorily expected to tender sufficient evidence as to this alleged fact. He has failed in satisfying the standard of proof required in establishing any actionable claim of fraud. He failed to substantiate the allegation that his father was a beneficiary of the intestate and that he is his son.

22. Reliance was placed in the case of **CHRISTOPHER NDARU KAGINA VS ESTHER MBANDI KAGINA &ANOTHER [2016] eKLR** where the court stated that it is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. The onus of proving any alleged fact in the summons rests squarely on the Applicant.

23. It was submitted that the Summons to Revoke the Grant as framed do not establish any actionable claim for fraud due to a defect in the said evidence tendered. The pleaded facts alleging fraud have not been substantiated as they disclose no locus between the Applicant to the summons and the intestate. It is the administrators 'humble submissions that this application only serves the purpose of antagonizing their client and discloses no occasion of malpractice in the conduct of the appointed Administrators.

24. The administrators' submitted that the revocation for the grant is frivolous, vexatious and a wastage of this court's time and process. The summons can only be seen as a mis-use of this Honourable Court's Process and should be dismissed with costs as it has produced no substantial evidence of any grounds relied on.

25. Looking on whether **Article 159 (2) (d) of the Constitution of Kenya** and the overriding objectives can compel the court to overlook any defects in the pleading as served, the administrators' submitted that the said summons for revocation of grant do not disclose any cause

of action or interest, thus, cannot be salvaged or cured through any means availed by law as the Court will have to presume that the facts alleged in the pleadings are true. This may only be achieved by acting in disregard to the Legal Provision that bind the Court, namely **S. 53 and s.54 of the Law of Succession Act** on the grant limited ad litem and it will also result in the emergence of multiple claimants whose intention would be to use the Court's processes to try their luck.

26. It was submitted that for an Applicant to establish any claim they must tender court Orders or Grant that the Court can take judicial notice of. However, due to failure by the applicant to demonstrate any interest the pleadings should be struck out.

27. The administrator' submitted that their claim for striking out the Summons for the Revocation of Grant through a Preliminary Objection is well founded in law as they are raising a point of law based on the **Law of Succession and The Law of Evidence.** The law clearly stipulates that for an individual to institute any suit on behalf of an estate they must utilize a grant or letters of administration. Hence, the applicant's submissions satisfy the widely acknowledged case of **Mukisa Biscuits Manufacturing Company Limited vs West End Distributors (1969) EA 696.**

28**.** The applicants submitted that since the documents to be taken judicial notice of (annexures to the application) do not disclose any interest in the estate, then they do not achieve the intended purpose. The only document that has adhered to the procedural guidelines of the Evidence Act is the death certificate. The purpose of certification by the Registrar of Deaths is not for the purpose of proving any familial relationship between the applicant to the summons and the intestate. The Document clearly states ***"...shall be received as evidence of dates and facts therein without any proof of such entry."***

29. These documents are not judicially noticed for the purpose of demonstrating a nexus between an intestate and the applicant to the Summons for Revocation of Grant nor do they disclose any threat of eviction or disenfranchisement. They merely demonstrate evidence of dates and facts as disclosed on them, what we refer to as a relationship with Government agencies. The defects in the Summons cannot be rectified through an amendment. An amendment is only available once a court reasonably presumes that a cause of action is available. However, in this case the summons from the face of it has failed to demonstrate this. Hence, the court should have them struck out and the applicants be awarded costs.

APPLICANT'S SUBMISSION

30. The applicant submitted that the fact that he is a grandchild of the deceased is not disputed since the Supporting Affidavit has not been rebutted. They indeed feature at Page 2 and Page 4 of the Rectified Certificate of Confirmation of Grant dated 23rd May 2018 hence they are entitled as beneficiaries. They would otherwise not have featured if they were strangers to the estate of the deceased. To that end, the Applicants kinship to the deceased is not denied.

31. Submitting on whether failure to take letters of administration is fatal to his application, the applicant placed reliance in the case of **CHRISTINE WANGARI GACHIGI V ELIZABETH WANJIRA EVANS & 11 OTHERS [2014] eKLR** where the court held; -

> ***"Under section 38 of the Act, all that one needed to establish in this cause was to show that they were either children or grandchildren of the deceased. Matters of failure to participate actively in the litigation proceedings should not have been a disentitling consideration in respect of the 2nd, 3rd, and 4th cross appellants, in the absence of their renunciation of respective claims to the estate. (Emphasis supplied)"***

32. The applicant submitted that since it is not denied that the Applicant is a grandchild of the deceased, he cannot be declared as unfit to institute these proceedings as that would certainly disinherit himself and his sister.

33. The Court of Appeal further held that grandchildren of the deceased and whose parents predeceased the deceased are entitled to a share that their parent would have gotten had he been alive. The court delivered itself as follows:

> ***"Although Section 35 and 38 of the Law of Succession Act is silent on the fate of surviving grand children whose parents predeceased the deceased, the rate of substitution of a grandchild for his/her parent in all cases of intestate known as the principle of representation is applicable. The Law is section 41. If a child of the intestate has pre- deceased, the intestate then that child's issue alive or in centre as mere on that date of the intestate's death will take in equal shares per stirpes contingent on attaining the age of majority. Per stirpes means that the issue of a deceased child of the intestate take between them the share their parents would have taken had the parent been alive at the intestate's death".***

34. The Applicant submitted that having demonstrated that he is a grandchild of the deceased whose parent pre-deceased the deceased, has locus to file this instant application. The applicant has not renounced his right to the estate and the Respondents have not rebutted the fact that the applicant is a grandchild of the deceased. Therefore, it would be a travesty of justice for this court to drive the Applicant from the seat of justice in a preliminary manner for failure to take out letters of administration for his father's estate.

35. The Administrators are merely raising a Preliminary Objection to sanitize their illegality of non-disclosure of material facts to court, to wit, the very existence of the applicant as a beneficiary of the estate, contrary to **Section 51(2) of the Law of Succession Act.**

36. The applicant placed reliance on the case of **RE ESTATE OF MARY KARUGI MWANGI(DECEASED) [2018] eKLR** wherein it was held:

> ***"There is no dispute that the Objectors herein are grandchildren of the deceased and not mere busybodies. They are aggrieved by their alleged exclusion from the proceedings."***

37. The applicant further relying on the above stated case, submitted that failure to take out letters of administration for his father's estate ought not be used to disqualify him as a person entitled to a share of the estate, or be used as justification for the Administrators/ Respondents non-compliance with **Section 51(2) of The Law of Succession Act**. Further, failure to take out letters of administration for his father's estate ought not to be a ground to disqualify the applicant for lacking locus to institute these proceedings. That would be tantamount to sacrificing justice at the altar of procedural technicalities **contrary to Article 159 of the constitution.**

38. The applicant submitted that his right to bring these proceedings is anchored in law and more specifically **S. 41 of the Law of Succession Act and S. 73 of probate and Administration Rules.** He emphasized that he is entitled under law to file the instant application. The objective of the court is to uphold substantive justice and this has to be done by ensuring that the applicant and his sister who were largely left out when the proceeds of the property were shared are given their share of the estate in question, the same share that their father would have gotten or a share equal to their father's siblings on the ground that the deceased used to maintain them after their father passed on.

ISSUES FOR DETERMINATION

a) Whether the Preliminary objection is merited, hence warranting a dismissal of the applicant's summons.

b) Whether the applicant has locus standi to file and prosecute the said summons for revocation of a grant.

(a) Whether the Preliminary objection is merited, hence warranting a dismissal of the applicant's summons.

39. A preliminary objection has been defined by the courts in a number of cases, the celebrated one being **Mukisa Biscuits Manufacturing Co Ltd vs West end Distribution Ltd [1969] E.A.696** where the courts defined it as; -

> ***"a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration … a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion"***

40. The Supreme Court of Kenya held in **AVIATION & ALLIEDWORKERS UNION KENYA V KENYA AIRWAYS LIMITED & 3 OTHERS [2015] eKLR,**

> ***"a preliminary objection may only be raised on a "pure question of law". To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record."***

41. The administrators submitted that the applicant had no locus standi as he has not demonstrated any nexus between him and the intestate estate and that he failed to demonstrate his right to institute a claim on behalf of his alleged parent's estate and the existence of his legal interest in the estate by use of evidence. The administrators also contended that the applicant failed to obtain letters of administration hence vitiating his right to institute a pleading on behalf of a deceased estate.

42. The administrators further contended that the documents as pleaded by the applicant being the death certificate, the identification card and KRA PIN have not been certified and that they do not disclose a cause of action as the interest or cause of action can only be demonstrated through the exhibits accompanying a pleading.

43. A preliminary objection cannot be raised if any fact is to be ascertained or if what is sought is the exercise of discretion. Clearly, from the above sentiments by the administrators the preliminary objection is not on a point of law as there are facts which needs to be ascertained hence it should fail on that ground. The issues for instance concerning whether documents are valid or not are issues that are factual and if disputed then evidence ought to be adduced.

44. To my understanding the road in a preliminary objection on a point of law is narrow and must not be subjected to any other prove but ought to be clearly discerned without any need for any explanation. In the case of **LUCY NJOKI KAMANJA V EZEKIEL MUENJA NGURE [2017] eKLR**, for instance, the court stated that**;**

> ***"There are so many facts that need to be ascertained. The preliminary objection as drawn does not raise a pure point of law which requires no ascertainment of facts. All matters raised would***
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> ***require prove through evidence. The preliminary objection must dramatically fail."***

(b) Whether the applicant has locus standi to file and prosecute the said summons for revocation of a grant.

45. It is trite law that pleadings filed in court by persons with no locus standi are void ab initio and the court does not have jurisdiction over such. As it was rightfully observed by R. Nyakundi J

In **IBRAHIM V HASSAN & CHARLES KIMENYI MACHARIA, INTERESTEDPARTY [2019] eKLR:**

"Locus standi is basically the right to appear or be heard in court or other proceedings. That means if one alleges the lack of the same in certain court proceedings, he means that party cannot be heard, despite whether or not he has a case worth listening. The issue herein is whether the Applicant lacks the requisite locus standi to seek relief from the court to revoke the grant in question issued to the Respondent. In my view, issues as regards locus standi are critical preliminary issues which must be dealt with and settled before dwelling into other substantive issues."

46. Looking at both parties' submissions, my appreciation of the matter at hand is that the Applicant herein brought this summons before court as a Beneficiary of the Estate of his late father who predeceased the deceased herein. A grandchild is a direct heir to the estate of the grandparent where the parent predeceased the grandparent. The grandchildren get into the shoes of their deceased parents and take the parent's share in the estate of the grandparents as was enunciated in the case of **RE ESTATE OF WAHOME NJOKI WAKAGOTO (2013) eKLR** where it was held: -

"Under Part V, grandchildren have no right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents."

47. The position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In **OTIENO V OUGO [1986-1989] EALR468**, the Court rendered itself thus:

"… An administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception."

48. However, **Section 76 of the Law of Succession Act** provides:

"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…"

49. What this section means is that applications for revocation of grant is not limited to only beneficiaries but to any interested party.

50. In **IBRAHIM V HASSAN &, CHARLES KIMENYI MACHARIA, INTERESTED PARTY** (supra) the Learned judge held that under **Section 76 of the Law of Succession Act**, any party interested in the estate of the deceased may bring the application contemplated under that **Section and/or Rule 2** as read with **Rule 17(1) of the Probate and Administration Rules. Rule 17(1) of the Probate Administration.**

51. **Rules** provides that: -

"Any person who has not applied for a grant to the estate of a deceased and wishes to object to the making of a grant which has already applied for by another person may do so."

52. The evidence on record suggest that the Applicant herein brought these proceedings on behalf of his father; Abdi Ibrahim Hassan (deceased) who was the beneficiary to his father's estate. The Applicant's interest emanates from the fact that his father was a beneficiary to the suit property, thus the Applicant being dependent to his father Abdi Ibrahim Ibrahim's estate within the provisions of Section 29 of the Law of succession Act, he acquires an interest in his grandfather's estate; the suit property by virtue of his father's share. Therefore, in the court's view, the instant Application is properly before this court.

53. In my humble view, therefore, it is clear that the applicant had the locus standi and he was rightfully before the court to fight for the interests of the estate of his late father with regard to the deceased grandmother's estate. The fact that he was a grandchild of the deceased taken care of by his deceased grandmother prior to her death and a dependant of his father's estate has not been disputed.

54. This therefore supports the fact that he and his sister acquired interest over the deceased's grandmother's estate and thus he had the necessary locus standi. Consequently, his deceased father's name should have been disclosed in the grant and also he should have been involved in the proceedings for confirmation of grant and more specifically in giving consent to the mode of distribution.

55. Reliance is placed on the case of **RE: ESTATE OF PHILIP KIPRONO BETT (DECEASED,) (2005) eKLR** where it was held that consent of all adult survivors for both the grant of administration as well as the confirmation and mode of distribution ought to be given. Non-disclosure of all beneficiaries is therefore a defect that goes to the root of the administration cause. **Rules 7(e) of the Probate and Administration Rules** requires that all survivors of the deceased ought to be disclosed.

56. The applicant submitted that the administrators had full knowledge of the relationship between the applicant and the deceased as they bequeathed them in an unfair and unequal manner but nevertheless failed to disclose to this to court and/or include the applicant, his sister and/or his deceased father in the succession cause as beneficiary.

57. With the above reasoning therefore this court is not persuaded that the preliminary objection is meritorious and the same is hereby dismissed with no orders as to costs.

58. Turning to the application, it is apparent that much of the reasoning above has touched on the issues that are raised therein. The relationship between the deceased herein and the applicants is that of grandmother and the grandchildren. The deceased by implication was a trustee of her deceased husband estate by virtue of the fact that she had to apply to be an administrator after his death. Whatever she was holding was in essence a life interest.

59. The applicant's father was the first born child to the deceased. In rank therefore he was equal to the respondents as well as the other siblings who have already benefited from the estate. If for instance he was alive he would have inherited his father's estate just like the rest.

60. The court finds that failure to get consent from the applicant and his sister constituted concealment as envisaged in the Succession Act. They had a duty of care to get their consent and indeed the consent of all the rest of the known beneficiaries. What is interesting is the fact that the respondents gave the applicant and his sister a portion of the estate which by implication is an admission that they were aware of their existence. There was nothing difficult in seeking their consent.

61. There was unrebutted allegation that the respondents through various rectifications of grants have transmitted part of the properties to their children who in essence are the deceased grandchildren just like the applicant. If this is the case, then they have no reason why the applicants should not get a share in their grandfather's and by extension grandmother's estate.

62. The court is alive to the fact that much has happened from the time the grant was confirmed. To order total reversal of titles for instance to the deceased, (which is still possible), could cause a lot of anguish to some innocent beneficiaries beside financial losses. It is therefore necessary to grant the parties room to correct the situation and in the event that they fail, this court shall proceed to correct the same.

CONCLUSION

a) Considering the fact that this courts unfettered discretion under Rule 73 of the Probate Rules is applicable and very wide, the application to cancel the grant, revert the titles to the deceased and order fresh distribution is for now held in abeyance to allow the respondents consider what proportion and which part of the estate ought to be given to the applicant and his sister. In considering the above directive, the same ought to be as reasonable as possible to what the rest of the beneficiaries have been given.

b) The above directives must be done within the next 60 days from the date herein. In the event that the respondents failed to do so then this court will be left with no other option but to take further precipitate action to ensure equity in the distribution of the estate.

c) The status quo orders herein barring any sale, charging or in any way dealing adversely with the estate by all the beneficiaries is hereby extended till compliance with the above directive.

d) There be no attempt to evict the applicant or his sister from where they are residing at the moment till the determination of their rightful share.

e) The preliminary objection is dismissed with no order as to costs.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 29TH DAY OF APRIL 2021.

H .K. CHEMITEI

JUDGE