



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**SUCCESSION NO. 151 of 2018**

**IN THE MATTER OF THE ESTATE OF ISABELLA NYAMBURA MWANGI (DECEASED)**

**CHRISTOPHER KABUI MURIITHI.....APPLICANT**

**VERSUS**

**ELON MAINA MWANGI**

**NANCY WANJIRU MUREITHI.....RESPONDENTS**

**RULING**

1. The matter before me pits Christopher Kabui Muriithi (Christopher) against his mother Nancy Wanjiru Mureithi (Nancy) over the estate of Isabella Nyambura Mwangi (the deceased) herein. Christopher and Nancy are respectively, the nephew and sister in law of the deceased. Following the demise of the deceased on 1.11.17, her brother Elon Maina Mwangi (Elon) petitioned this Court for a grant of letters of administration in respect of her estate. In his petition filed on 6.2.18, Elon stated that the deceased was survived by himself and 2 nephews, Duncan Irungu Maina (Duncan) and Christopher and that the estate of the deceased comprised of L. R. No. 1712/55 (Kariobangi Civil Servants Estate). Upon gazettement of the petition, Nancy who is the widow of William Mureithi Mwangi, a brother of the deceased, objected to the making of the grant to Elon. Her grounds were that Elon and herself were the only surviving beneficiaries of the deceased but she had been left out. A grant of letters of administration was on 4.6.19 then issued to Elon and Nancy.

2. By his summons dated 24.10.19, Christopher seeks the revocation of the Grant. His grounds as contained in the summons and in his affidavit sworn on even date are that the Grant was obtained fraudulently and through misrepresentation. Christopher claims that as a nephew of the deceased, he is a beneficiary of the estate and he and other beneficiaries were not involved; that Nancy who is his mother misled the Court that she is a bona fide beneficiary of the estate of the deceased, yet she is not. He accused the Administrators of seeking to disinherit him and other lawful beneficiaries of the deceased. He claimed that he lived with the deceased and took care of her until her demise. According to him, he, Elon and Duncan are the lawful beneficiaries but that he is entitled to the estate by virtue of having occupied the suit property with the deceased and that this is the only home for him and his family. He concedes to consenting to the petition for a grant by Elon but opposes the inclusion of his mother Nancy, in the Grant.

3. Nancy opposed the summons by her replying affidavit sworn on 20.1.2020. According to her, as a sister and brother to the deceased, she and Elon rank in priority to her son Christopher. She accuses Christopher and Elon of colluding to deny her a share of her sister's estate and did not involve her in the filing of the petition for the Grant; that Elon by a letter dated 29.8.19 purported to donate his powers to administer the estate to Christopher; that occupation does not entitle one to a share in the estate of a deceased person and contends that Christopher resided on the property as a tenant. She further accused Christopher of intermeddling with the estate and denying the Administrators access to the property by hiring goons to keep them off. She claimed that Christopher also evicted his brother Burton Muraguri Mureithi who also resided in the property. Nancy urged the Court to dismiss the summons as it has not met the requirements of Section 76 of the Law of Succession Act (LSA) and Rules 44(1) and 49 of the Probate and Administration Rules.

4. Parties filed their written submissions which I have duly considered.

5. Christopher's complaint is that his mother Nancy, is not a beneficiary of the estate of the deceased. He further claims that his mother and uncle Elon seek to disinherit him of the property he occupied for a long period with the deceased, a property he and his family still occupy. According to Christopher, the beneficiaries of the estate of the deceased are Elon, her brother and himself and Duncan, her 2 nephews with whom she stayed. Citing Sections 66 and 39 of the LSA, Christopher argued that as a nephew, he ranked in priority to Nancy to be appointed administrator of the estate of the deceased. He also submitted that other beneficiaries of the estate of the deceased were not disclosed nor were their consents obtained.

6. For her part, Nancy submitted that the Court after considering her objection to the making of the Grant to Elon allowed the same and issued a grant to both her and Elon. Nancy's view therefore is that Christopher is seeking that the Court reopens a matter that had already been determined. Nancy further contended that the gist of Christopher's application is aimed at securing a share of the estate. As such, the same is premature as the estate is yet to be distributed. As regards priority in ranking, referring to the table of consanguinity in the second

schedule of the Rules, Nancy argued that as a nephew of the deceased, Christopher did not rank higher than her, a sister in law of the deceased in priority, to apply for the grant. To Nancy, the Application has not met the requirements of Section 76 of the LSA.

7. It is common ground that the deceased herein was never married and did not have any children of her own. The gravamen of Christopher's claim is that as a nephew of the deceased, he ranks higher in priority in applying for the Grant, to Nancy as a sister in law. He also claims entitlement to the estate of the deceased by virtue of having lived with her on the suit property until her demise.

8. It must be stated at the very outset that the fact that Christopher stayed with the deceased, absent of a will, does not in itself entitle him to her estate or to a greater share thereof. The Court notes that Christopher submitted that there are other beneficiaries of the estate of the deceased, who were not disclosed. The Court also notes that Christopher's brother, Burton Muraguri Mureithi was mentioned by Nancy in these proceedings, yet he was not named in the petition as one of the survivors of the deceased. It would appear therefore that there exist other beneficiaries other than those listed herein. Christopher is well advised to note that his entitlement to the estate of the deceased is no greater than that of his brother or of any other niece or nephew who may have survived the deceased. Further, a determination of who is entitled or more entitled to the estate of the deceased shall be made at the point of confirmation of the grant. The issue of Christopher's entitlement to the estate is therefore premature at this stage.

9. I now turn to the matter of who between Christopher and Nancy has priority to be issued with a grant of representation in respect of the estate of the deceased.

10. The LSA has conferred upon this Court, the discretion as to who a grant of letters of administration shall, in the best interests of all concerned, be made. Priority is given to beneficiaries in accordance with their beneficial interests in the estate. Section 66 provides:

***When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—***

***(a) surviving spouse or spouses, with or without association of other beneficiaries;***

***(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;***

***(c) the Public Trustee; and***

***(d) creditors;***

11. In the present case, the deceased was survived by neither spouse nor children. Section 39 of the LSA stipulates what should happen in a situation such as the present case, as follows:

***(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—***

***(a) father; or if dead***

***(b) mother; or if dead***

***(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none***

***(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none***

***(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.***

12. In the case of a deceased intestate who is not survived by spouse, children or parents, priority is given to brothers and sisters or any child or children of deceased brothers and sisters. If none of these are alive then relatives in the nearest degree of consanguinity up to and including the sixth degree. Accordingly, in the present case, Christopher, a child of a deceased brother of the deceased has priority over his mother Nancy, a sister in law to the deceased.

13. Nancy relied on Rule 7(1)(e) of the Probate and Administration Rules to support her case. The rule provides:

***(e) in cases of total or partial intestacy—***

***(i) the names, addresses, marital state and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving spouse or child, like particulars of such person or persons who would succeed in accordance with section 39(1) of the Act;***

***(ii) whether any and if so which of those persons is under the age of eighteen years or is suffering from any mental disorder, and, if so, details of it;***

**(iii) for the purposes of determining the degree of consanguinity reference shall be made to the table set out in the Second Schedule;**

14. A reading of the rule makes it clear that the same relates to information to be included in an affidavit in support of a petition for a grant in cases of total or partial intestacy, and not the priority of the persons to whom a grant may be made. Citing the table of consanguinity referred to in the rule, Nancy argued that Christopher does not rank in priority to her. It must be noted that when considering to whom a grant is to be issued, priority is given to those related to the deceased by consanguinity. The truth of the matter is that Nancy, being a sister in law, is related to the deceased by affinity. This is why the Court has made a finding that Christopher who is related to the deceased by consanguinity has priority over Nancy, to be issued with a grant in respect of the estate of his deceased aunt.

15. I now turn to the question as to whether the Grant should be revoked because Nancy was included in the same. The grounds upon which a grant may be revoked are stipulated in Section 76 of the LSA which provides:

**76 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.**

16. The record shows that Elon petitioned this Court for the Grant in his capacity as brother of the deceased. The record also shows that Christopher consented to the petition. The record further shows that Nancy objected to the issuance of the Grant to Elon on the ground that as the widow of the deceased's brother, she was not involved, in the proceedings. The Court exercising its discretion issued the Grant to both Elon and Nancy. There is nothing on record to show that Nancy sought inclusion by misrepresentation or through fraud as alleged by Christopher.

17. It is trite law that he who asserts must prove. Section 107 of The Evidence Act stipulates:

**(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

18. In order for this Court to grant the orders sought by Christopher, he was obligated to place before this Court, cogent evidence that Nancy obtained the Grant fraudulently. No such evidence was adduced. Indeed, Nancy in her objection was forthright to the Court as to her relationship with the deceased. Accordingly, Christopher has failed to discharge the burden of proof placed upon him by law.

19. Further, under Section 66 of the Act, this Court has final discretion as to who a grant of letters of administration shall, in the best interests of all concerned, be made. The order of preference set out in the law is just a guide and it bears repeating that the Court has final discretion as to whom a grant shall be made. This Court did exercise its discretion and made the Grant to Elon and Nancy. I have considered the case of Immaculate Wangari Munyaga v Zachary Waweru Ileri [2016] eKLR, cited by Christopher, in which Mativo, J. upheld the order of priority set out in Section 39 of the LSA. While I agree with the finding of the learned Judge, that case is distinguished in that the issue therein was objection to making of a grant that was yet to be issued, whereas the issue herein, is revocation of an already issued grant. The issuance of a grant to a person who ranks lower in priority to another, absence of fraud, is not a ground for revocation of such grant.

20. In the end, I do find that the Summons dated 24.10.19, lacks merit and the same is hereby dismissed. I further direct as follows:

i) The administrators shall file summons for confirmation of grant within 14 days of the date hereof.

ii) The administrators shall list all the survivors of the deceased.

iii) Mention to confirm compliance and for directions on 8.6.21.

**DATED, SIGNED and DELIVERED in NAIROBI this 21<sup>st</sup> day of May 2021**

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**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Applicant**

..... **for the Administrators**

..... **Court Assistant**