



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**SUCCESSION CAUSE NO. 1236 OF 2017**

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

**ERNEST IRUNGU MWANGI.....APPLICANT/OBJECOTR**

**VERSUS**

**MARGARET WAIRIMU MWANGI.....1<sup>ST</sup> ADMINITRATIX/1<sup>ST</sup> RESPONDENT**

**PETER KAMAU MWANGI.....2<sup>ND</sup> ADMINISTRATOR/2<sup>ND</sup> RESPONDENT**

**RULING**

**Background**

This Ruling relates to the estate of the estate of Elizabeth Nyambura Mwangi, deceased, who died on 15<sup>th</sup> February 2009. The matter was commenced by filing a Citation dated 20<sup>th</sup> November 2018. The Citation was filed by Margaret Wairimu Mwangi, daughter of the deceased and Peter Kamau Mwangi who is described as brother of the deceased. The Citation names the Applicant herein Ernest Irungu Mwangi and Josphat Mwangi both sons of the deceased and brothers of Margaret Wairimu Mwangi.

Record shows that the Applicant herein was served with the Citation and entered Appearance in person on 20<sup>th</sup> December 2018 . On 18<sup>th</sup> January 2019, the firm of Mungu, Kimetto & Co. Advocates entered Appearance on behalf of the Applicant herein. The record does not show whether Josphat ever entered appearance.

I have carefully read the court record and noted that Ernest Irungu Mwangi, the Applicant, filed an Objection to the making of the grant dated 21<sup>st</sup> March 2019 and filed on the same day. He named Margaret Wairimu Mwangi and Peter Kamau Mwangi, the administratrix and administrator respectively of the estate of the deceased as the Respondents. Court record further shows that despite there being an objection filed on 21<sup>st</sup> March 2019, the two Respondents were issued with a Grant of Letters of Administration to that estate on 26<sup>th</sup> March 2019. What is puzzling to me is that court record shows the proceeding prior to the issuing of the grant as follows:

**26.3.2019**

***For an Order on the file granting Probate of the Will and Codicil(s) to the Applicant please. No Objection lodged. All formalities complied with by the Applicant as per Kenya Gazette No. 1719 dated 22.3.2019 at page 665.***

**DEPUTY REGISTRAR**

The correct Gazette Notice is No. 1720 of 22<sup>nd</sup> March 2019. But it lists Succession Cause No. 1236 of 2017 as follows:

***“By (1) Margaret Wairimu Mwangi and (2) Peter Kamau Mwangi, both of P.O Box 14796-00100, Nairobi in Kenya, the deceased’s daughter and brother, respectively, for a grant of letters of administration intestate to the estate of Elizabeth Nyambura Mwangi, late of Thika, who died at Kenyatta National Hospital in Kenya, on 15<sup>th</sup> February, 2009.”***

I have reproduced the record to show that while the court record shows that the proceedings refers to a Grant of Probate of the Will, the true position is that the gazettelement refers to intestate estate. Indeed the Grant issued on 26<sup>th</sup> March 2019 is Grant of Letters of Administration Intestate. As at the time of issuing that Grant, there was on record an objection dated 21<sup>st</sup> March 2019 and filed on the same date as the court record will show. The Applicant claims that he was informed by his advocates that at the time of issuing the Grant, the objection was missing

from the file. It is not possible to confirm that claim since there is an Objection in the court file. But it is not lost to me that obviously there is something amiss.

Central to that the Objection filed herein is the claim that the Respondents have omitted some of the beneficiaries of the estate; that the 1<sup>st</sup> Respondent has been collecting proceeds from the estate without accounting for the same; that she has been harassing the Objector because of his stand on fair distribution of the estate; that she is causing wastage of the estate and has hidden original documents relating to ownership of the property; that she has falsely claimed that the deceased left a will and that the 2<sup>nd</sup> Respondent is not a beneficiary or dependant of the deceased and should not be an administrator. The Objection has been overtaken by events after the Grant was issued.

I believe it is because of the turn of events that the Applicant has filed a Notice of Motion dated 24<sup>th</sup> May 2019 seeking to have the Grant of Letters of Administration issue to the Respondents revoked and this file be placed in the strongroom as well as costs. The grounds in support of the Notice of Motion are that the 1<sup>st</sup> Respondent misinformed the Objector that their late mother had left behind a will which turned out to be forged. He states that he entered appearance upon being served with Citation and that this was done before the Grant was issued. He deposed that the 1<sup>st</sup> Respondent is intermeddling with and wasting the estate and that the Respondents have left out some of the beneficiaries in the Grant of the Letters of Administration. He states that it is in the interest of justice that all the beneficiaries be included.

I have noted that the Applicant has not given in the Supporting Affidavit the names of the beneficiaries that he claims were left out. But in the interest of justice this court is not confined to the Application but must read and understand the entire court file. In his Objection he named the beneficiaries who he claims were left out as the following:

1. Joel Ochiengy - husband of the deceased
2. Emmanuel Mwangi - grandson
3. Emmanuel Kieti - grandson
4. Martin Mwangi - grandson
5. Dorcas Nyambura - granddaughter
6. Marvin Ngatia - grandson

The handwritten letter of the Chief of Gatanga Location dated 22<sup>nd</sup> June 2015 lists the following as the persons surviving the deceased:

1. Margaret Wairimu Mwangi – daughter
2. Ernest Irungu Mwangi - son
3. Josphat Mwangi - son
4. Edward Ngatia - son
5. William Gioko - son
6. Elias Roger Mwangi - son
7. Arnold Ngari - son
8. Josephine Nyambura - son (sic)
9. Edward Ngatia Mwituria - son
10. Michelle Wakonyo - son

In the Affidavit in Support of the Petition, both Respondents name the following as beneficiaries:

1. Margaret Wairimu Mwangi – daughter
2. Ernest Irungu Mwangi - son
3. Josphat Mwangi - son
4. Edward Ngatia - son
5. William Gioko - son

6. Elias Roger Mwangi - son

7. Arnold Ngari - son

They further list the following in paragraph 5 without stating whether they are beneficiaries or dependants:

1. Josephine Nyambura - grand daughter

2. Edward Ngatia Mwituria - grandson

3. Michelle Wakonyo - grand daughter

4. Virginia Nyambura - grand daughter

This is untidy. As this matter stands, it is not clear to this court who are the beneficiaries or dependants. It is clear to me that the Respondents are not honest in their pleadings. It is also not clear whether the deceased was married. It is not clear on the issue of the grandchildren: whose sons and daughters are they in respect to the children of the deceased? I note that Respondents have not opposed the Application under consideration. This court took considerable time directing that the Respondents be served before the directions to proceed with this Application could issue but efforts to serve them elicited no response or attendance in court. This court will not benefit from their response to enable the court clear some of the outstanding issues.

As I have stated above, what is pending for determination is the Notice of Motion dated 24<sup>th</sup> May 2019. In my view the Applicant ought to have moved the court by way of Summons for Revocation of the Grant under Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules. The Applicant has cited Order 51 of the Civil Procedure Rules. This Order is not one of the Orders of the Civil Procedure Rules imported into the Law of Succession Act by Rule 63 of the Probate and Administration Rules. However, it is my considered view that the Application before me is not rendered defective by calling it a Notice of Motion and citing Order 51 Rule (1). It is clear to my mind that what the Applicant is seeking is revocation of the Grant and he has also cited Rule 76 of the Probate and Administration Rules. The error is curable under Article 159 (2) (d) of the Constitution of Kenya 2010 and I proceed to cure the defects in the manner this Application has been brought to court.

This court directed that this Application be canvassed through written submissions. the Applicant, through her counsel has filed written submissions dated 14<sup>th</sup> May 2021. He has identified two issues for determination, namely:

1. Whether there is sufficient cause to revoke the Grant?
2. Whether the revocation will be in the best interest of all the beneficiaries in the Estate?

To both issues the Applicant submits in the positive that there is sufficient cause to revoke the grant and that the revocation will be in the best interest of all the beneficiaries. He has cited Articles 40 and 43 of the Constitution and Section 76 of the Law of Succession Act. He has also cited *re Estate of Tabitha Waitherera Kamau (Deceased) [2019] eKLR* and *Jamleck Maina Njoroge v. Mary Wanjiru Mwangi (2015) eKLR*. I have read the cited provisions of the law and the authorities and need not repeat what is stated in the submissions because they form part of the record of the court. I have also considered this matter.

Applications for Revocation of Grant are governed by Section 76 of the Law of Succession Act. It provides as follows:

**76. Revocation or annulment of grant: 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 (emphasis added).***

Central to the issues raised in this Application is the claim that the Respondents have failed to disclose all the beneficiaries of the deceased; that the 1<sup>st</sup> Respondent is intermeddling with the Estate and has failed to account for the proceeds from the Estate and that she has failed to disclose the original documents of ownership of the properties forming the estate of the deceased. I have already noted questionable handling of this file. With the absence of the Respondents, specifically the 1<sup>st</sup> Respondent this court has been denied valuable information and clarifications of the issues that have been raised. I have noted the different persons listed by both the Applicant and the Respondents as beneficiaries. It is not easy for this court to determine who the true beneficiaries or dependants are. Even the letter from the Chief is not helpful at all. It actually names all the people listed in it as sons and daughters of the deceased yet the Respondents have stated that the deceased had three children, the 1<sup>st</sup> Respondent, the Applicant and Josphat Mwangi. The rest are named as grandchildren.

Consent to making the grant was not obtained from all the people named in the Affidavit in Support of the Petition and definitely no consent was obtained from the Applicant or an Affidavit showing that he has been served and failed to appear and stake his claim in the estate. There has been no attempt to have the grant confirmed one year down the line.

I am satisfied that the Grant herein was obtained irregularly and by concealment of material facts. I am satisfied that the Applicant has persuaded this court that his application has merit. However, having said that, it is my view that from the pleadings in this case, this court is not able to determine who the beneficiaries are. It is therefore my considered view that this court ought to return the proceedings in this Succession Cause on the right track. I therefore allow this application and hereby revoke the Grant of Letters of Administration Intestate issued to Margaret Wairimu Mwangi and Peter Kamau Mwangi on the 26<sup>th</sup> day of March 2019. The 1<sup>st</sup> Respondent is also ordered by this court to deposit to this Honourable Court for safe keeping all the documents of ownership in respect of the Estate of the deceased herein until such a time when the issue of the administrator(s) of the Estate of the deceased is sorted out. For the avoidance of doubt, I hereby allow prayers 2 and 3. Being a family dispute I order that each party bears their own costs. Further, given that I am not able to determine who are the beneficiaries and/or dependants due to the unclear information from both sides, I direct that the three children of the deceased sit and discuss this matter to identify all the beneficiaries and dependants of the deceased as well as who shall be appointed the administrator of the estate. I further direct that a fresh letter from the Chief in line with the identified and agreed upon beneficiaries be sourced confirming the names of all the beneficiaries of estate of the deceased. After this is done, a fresh Petition for Letters of Administration be sought. Orders shall issue accordingly.

**Dated, signed and delivered this 21<sup>st</sup> day of June 2021.**

**S. N. MUTUKU**

**JUDGE**