



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2409 OF 2015

IN THE MATTER OF THE ESTATE OF JOHN KIHARA NJAU ALIAS KIHARA JOHN (DECEASED)

STANLEY MBURU KAIRU.....1ST APPLICANT

ISAACK MWANGI KAIRU.....2ND APPLICANT

EUNICE WANGARI MURIITHI.....3RD APPLICANT

VERSUS

MIRIAM NDUTA KIHARA.....1ST RESPONDENT

HANNAH NJERI KIHARA.....2ND RESPONDENT

RULING

1. What is for determination is an application for revocation of grant filed via summons dated 21st January, 2019, brought under **section 76** of the **Law of Succession Act** and **rule 44(1)** of the **Probate and Administration Rules**. In it, the Applicants seek for orders that:

- a. *Spent*.
- b. The Respondents be compelled to produce to the court a full and accurate account of administration of the deceased's estate up to the date of such account.
- c. The grant and certificate of confirmation issued to MIRIAM NDUTA KIHARA and HANNAH NJERI KIHARA on 24th April, 2017 be revoked.
- d. The transfer and registration of land parcel no. RUIRU EAST BLOCK 1/340 and all other resultant titles be revoked.
- e. All the dealings in the deceased's estate flowing from the said confirmed grant be revoked.
- f. The costs of this application be provided for.

2. The application is grounded upon the affidavit of the 3rd Applicant Eunice Wangari Muriithi sworn on 21st January, 2019 in support of the application. In it, she deposes that she is one of the administrators of the estate of Naomi Karungari Kairu (deceased), who is a daughter and beneficiary of the deceased whose estate is in issue. There is on record a copy of a grant Ad Litem issued to Stanley Mburu Kairu, Isaack Mwangi Kairu and Eunice Wangari Muriithi on 19th December, 2018. There is also on record a Certificate of Death of serial number 0307013 which indicates that the said Naomi Karungari Kairu died domiciled in Kenya on 9th September, 1997.

3. It was averred that the Respondents herein had secretly, fraudulently and without any colour of right or regard to due procedure filed an application for confirmation of grant ignoring the bona fide rights of other lawful beneficiaries of the deceased's estate. That in particular, the Chief's letter filed in court omitted the fact that the deceased was survived by three (3) daughters one of whom had since died, but was nonetheless survived by other beneficiaries.

4. The 3rd Applicant asserted that the Respondents herein, being the administrators of the deceased's estate had proceeded to inequitably distribute the deceased's estate, allocating the deceased's estate to themselves. That in addition, the Respondents had failed to render an account of the administration of the estate from the date of confirmation of grant to date. She urged that she had been advised that an administrator is required to produce to the court a true, proper and comprehensive account of administration of the deceased's estate.

Therefore, that unless the orders sought herein are granted, the Respondents would continue to mismanage, waste, mishandle and dispose of the deceased's estate to the detriment of other lawful beneficiaries.

5. On 25th March, 2019 the 1st Respondent filed a replying affidavit of even date in which she urged the court to dismiss the summons for revocation of grant with costs. She denied the allegations that she filed for letters of administration as the sole beneficiary in Thika Chief Magistrate's Court urging that on the contrary, it was she who filed for revocation of grant on 27th July, 2015. She asserted that in obtaining a fresh grant, there was no concealment of facts or making of false statements. She conceded that the subject property had since been subdivided but urged that the 3rd Applicant had never been a beneficiary of the deceased's estate and was only intent on disinheriting the Respondents. That in any event, the 3rd Applicant's claim was an afterthought, having been brought 21 years after her mother Naomi's demise and 27 years after the demise of the deceased and therefore estopped by laches.

6. The 2nd Respondent also filed a replying affidavit sworn by herself on 24th May, 2019 in which she stated that the application was incompetent and a veritable abuse of the court process. She deposed that she was lawfully appointed by the court as a co-administrator of the deceased's estate, a mandate she and the 1st Respondent had carried out lawfully. She asserted that she and her co-administrator dutifully and diligently filed the application for letters of administration and that the Applicants had never raised any objections to their appointment as such or filed any protest after they were issued with the grant of letters of administration intestate. That it was only after no objection or protest was filed that she and the 1st Respondent consequently obtained a confirmed grant.

7. It was averred by the 2nd Respondent that the Applicants lack the *locus standi* to file the application dated 21st January, 2019. She echoed the 1st Respondent's averment that the claim was an afterthought as it had been filed 22 years after the demise of the 3rd Applicant's mother and 27 years after the deceased's demise.

8. For ease of reference, I deem it appropriate to give a brief summary of the events leading up to the filing of the instant application.

9. There was previously a grant of letters of administration in respect of the estate of the deceased herein issued to the 1st Respondent in Thika Chief Magistrate's Court Succession Cause No. 465 of 2013 on 20th November, 2013 and confirmed on 9th September, 2014. Thereafter, the 2nd Respondent filed an application before this court seeking revocation of that grant on the grounds that it had been obtained fraudulently by making of false statements and concealment of material facts. By a ruling delivered on 24th April, 2017 this court revoked that grant and issued a fresh grant to Miriam Nduta Kihara and Hannah Njeri Kihara jointly, on account of being the only beneficiaries of the deceased's estate. Thereafter, the Administrators filed summons for confirmation of grant dated 25th July, 2017.

10. When the summons came up for hearing on 4th October, 2017, the court was of the view that the cause would benefit from court annexed mediation and thereby directed that the matter be mentioned before the Hon. Deputy Registrar in charge of the Family Division for vetting. The parties consequently went through the mediation process which culminated into a Mediation Agreement dated 29th November, 2017, a copy of which is on record. The Agreement was consequently adopted as an order of this court on 22nd January, 2018.

11. The Mediation Agreement indicates that Miriam Nduta and Hannah Njeri, the Respondents herein, had agreed to share the deceased's assets, being ten (10) plots situated in Ruiru, equally. To this end, Miriam Nduta had agreed to remove all caveats on the property and deliver evidence to her sister Hannah. Thereafter, Hannah would give Miriam the registration certificates of five plots and Miriam would transfer them into her name at her own cost. Hannah also agreed to forfeit all expenses spent in preserving the property and the survey fee said to be about Kshs. 10 million. Further that none of them would claim anything else from the other.

12. It was soon thereafter that the Applicants filed the instant application for revocation of grant. On 10th February, 2020, the court directed that the application be disposed of by way of written submissions.

13. Learned Counsel Mr. Njuguna filed written submissions dated 5th October, 2020 on behalf of the Applicants in which he asked the court to rule in the Applicants' favor and allow the application with costs.

14. Mr. Njuguna submitted that the Applicants' interest in the deceased's estate emanates from the fact that their mother was a beneficiary of the deceased's estate. Therefore, that being dependents of the estate of their mother Naomi Karungari Kairu (deceased), the Applicants acquired an interest in their grandfather's estate by virtue of their late mother's share. Counsel asserted that the position in succession matters is that a litigant is clothed with *locus standi* upon obtaining a limited or full grant of letters of administration in cases of intestate succession, urging that the Applicants had obtained a grant *ad litem* dated 19th December, 2018 prior to filing the instant application on behalf of their late mother Naomi.

15. Mr. Njuguna asserted 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**. Counsel contended that by stating that they were the only beneficiaries to the estate, when they were well aware that the estate of the deceased comprised other beneficiaries at the time of filing the petition, the Respondents concealed material facts. Therefore, that the proceedings leading up to the issuance and confirmation of the grant on 24th April, 2017 were defective in substance having been obtained fraudulently by concealing of a material fact.

16. To buttress his arguments, Counsel cited the decisions in **Otieno vs. Ougo [1986-1989] EALR 468; Ibrahim vs. Hassan & Charles Kimenyi Macharia, Interested Party [2019] eKLR; Estate of Ezekiel Mulanda Masai, P & A No. 4 of 1992 and Albert Imbuga Kisigwa vs. Recho Kisigwa [2016] eKLR.**

17. In opposition thereto, learned Counsel Mr. Wakahu Mbugua filed written submissions dated 14th October, 2020 on behalf of the 1st

Respondent in which he asked the court to dismiss the Applicants' claims and allow the 1st Respondent's application dated 19th March, 2018 to enable her realize the benefits intended by the judgment of 21st February, 2018.

18. According to Mr. Wakahu Mbugua, the argument by the Applicants that their application was brought on behalf of their deceased mother has no legal basis. That the Applicants had no proof that their late mother had filed any objection to the initial filing of the succession or that she had been denied an opportunity to be enjoined as a beneficiary of the estate of the deceased herein. Counsel urged that the Applicants could only bring such a claim where their deceased parent had filed for revocation of grant. Counsel further urged that grandchildren are not automatic dependants and it was therefore for the Applicants to show that they were being maintained by the deceased immediately prior to his death in order to benefit as dependants under **section 29** of the **Law of Succession Act**. This, he said, had not been done in the instant case.

19. Mr. Wakahu Mbugua asserted that since the Applicants were not dependants of the deceased, they did not have the *locus standi* to file the summons application for revocation of grant. Counsel contended that the summons had also been brought long after judgment was entered on 21st February, 2018. He urged that **section 30** of the **Law of Succession Act** is clear that no application for provision of dependants shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided under section 71 of the Act.

20. According to Mr. Wakahu Mbugua, the judgment reached following the court annexed mediation process equates to confirmation of grant as it states how the deceased's estate is to be shared amongst other things. Counsel asserted that since the judgment had been entered on the matter, which judgment had not been set aside, the Applicants ought to have sought leave prior to filing the instant application. Counsel urged that though **Article 159** of the **Constitution** gives this court inherent power to exercise its authority as guided by the principles of justice, such authority should not be exercised in isolation with other written laws, in this case, the **Law of Succession Act**.

21. Counsel cited the decisions in **Ibrahim vs. Hassan & Charles Kimenyi Macharia (supra)**; **Re Estate of Florence Mukami Kinyua [2018] eKLR** and **Succession Cause No. 457 of 2005, Re Estate of Joseph Namayi Lukungu** in support of his arguments.

22. In further opposition to the application, learned Counsel Mr. Mburu Machua filed written submissions dated 16th November, 2020 on behalf of the 2nd Respondent. Counsel submitted that since there was no application for confirmation of grant pending before the court, there could not be any basis for the court to address the matter of revocation of an existing grant. Counsel asserted that it was misleading for the Applicants to purport that there exists a confirmed grant issued on 24th April, 2017 when there was no such confirmed grant. He conceded that the Respondents were issued with letters of administration intestate on the said date, but asserted that the grant had not been confirmed to date.

23. It was Mr. Mburu Machua's further submission that the law does not recognize the Applicants as heirs of the deceased unless they are seeking shares of their deceased parents as held in **Re Estate of Veronica Njoki Wakageto (deceased) [2013] eKLR**. Counsel however deviated from this submission, stating that while a grandchild can be dependent of a grandparent, to qualify as such, the grandchild had to demonstrate to the court in an application properly brought under **section 26** of the **Law of Succession Act** that they were dependent on the grandparent immediately before the grandparent's death.

24. Counsel urged that the Applicants in this case had not demonstrated that they were dependants of the deceased immediately before his death as envisaged under **section 29** of the **Law of Succession Act**. Further that since the Respondents rank higher in priority of the order of preference set out under **section 66** of the **Act**, the Respondents did not see reason to consult them when they were seeking the letters of administration of intestate.

25. Upon carefully considering the pleadings on record and the succinct written submissions filed by the respective Counsel's on record, one issue emerges for determination, namely whether the parties have made out a case to warrant the revocation of grant as sought. In my view, all the other prayers sought flow from this issue.

26. The law on revocation of grants is **section 76** of the **Law of Succession Act** 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 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;...”

27. In the instant case, the grant which is sought to be revoked has not been confirmed. While the Mediation Agreement referenced by the parties indeed states how the Respondents had agreed to share in the deceased's estate, it does not amount to a confirmation of grant. The Respondents were nonetheless at liberty to file for confirmation of grant on the strength of the agreement but there is nothing on record to show that this was done. In any event, the provisions of **section 76** above are such that a grant of representation can be revoked whether or not it has been confirmed.

28. The basis for which the application for revocation is sought is that in bringing the application for a grant of letters of administration the Respondents failed to disclose that the deceased was survived by three (3) children one of whom had since died but was nonetheless survived

by beneficiaries, namely the Applicants herein.

29. From the record, it appears that all the parties concede that Naomi Karungari Kairu (deceased) was a daughter of the deceased herein. Her Certificate of Death, a copy of which is on record indicates that she died on 9th September, 1997. Since the deceased whose estate is in issue herein died on 8th May, 1991, the said Naomi survived the deceased. The record further shows that the deceased died intestate having not left behind a written will capable of taking effect. Therefore, the deceased's net intestate estate ought to have devolved in line with the rules governing intestacy under **Part V** of the **Law of Succession Act**.

30. In the instant case, it has not been shown that the deceased was survived by a spouse. As such, the deceased's estate ought to have devolved in accordance with **section 38** of the **Law of Succession Act** which provides thus:

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of section 41 and 42, devolve upon the surviving child, if there be only one, or shall be divided equally among the surviving children.”

31. A child of a deceased who died intestate therefore need not prove dependency in order to inherit from the estate of their deceased parent. The question that follows then is what happens when despite surviving the deceased, such a child dies before the estate of the deceased is distributed. In such instances, the share of the deceased child, otherwise termed as a beneficiary, devolves under the rules of intestacy or testacy as applicable. In the instant case, the child or beneficiary in question is Naomi Karungari Kairu (deceased). Her share of the estate of her late father, the deceased herein, ought therefore to devolve to her beneficiaries. This is to say that a grandchild can inherit from their grandparents directly through their deceased parents.

32. The question of whether grandchildren can inherit from their grandfather's estate was addressed in the case of **Cleopa Amutala Namayi vs. Judith Were Succession Cause 457 of 2005 [2015] eKLR** where Mrima, J observed thus:

“Be that as it may, under Part V of the Act grandchildren have no automatic right to inherit their grandparents (sic) who died intestate after 01/07/1981 when the Act came into operation. The argument behind this position is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents (sic) indirectly through their own parents, the children of their grandparents. The children to the grandparents inherit first and thereafter the grandchildren inherit from their parents. The only time where the grandchildren can inherit directly from their grandparents is when the grandchildren's own parents are dead. Those grandchildren can now step into the shoes of their parents and take directly the share that ought to have gone to the said parents. Needless to say, such grandchildren must hold appropriate representation on behalf of their parents.”

33. It therefore follows that the children of Naomi Karungari Kairu (deceased) ought to have been included as beneficiaries of the estate of their grandfather, the deceased herein, to inherit the share due to their late mother. This is subject to having the requisite representation of the estate of Naomi Karungari Kairu (deceased). In the instant case, the Applicants are in possession of a limited grant of letters of administration *ad litem* of the estate of the said Naomi Karungari Kairu (deceased) issued on 19th December, 2019. Since the Applicants are merely seeking the share of the estate of the deceased that was rightfully due to their late mother, and not directly claiming a share of the deceased's estate in their own capacities, they need not prove dependency as argued by the Respondents. As such, the arguments on dependency are without basis and must fail.

34. A wholesome reading of the persuasive decision in **Re Estate of John Musombayi Katumanga [2014] eKLR** cited in support of the 2nd Respondent's case reveals that the court did not in fact give a blanket holding that grandchildren cannot inherit from their deceased grandfather save by proving dependency under **section 29** of the **Act**. The decision is clear. It states that *“grandchildren are not entitled to inherit from their grandparents so long as their own parents are alive and themselves taking a share in the estate.”* Further that aside from claiming through their deceased parents, a grandchild can be a dependant of a grandparent but to qualify as such, the grandchild must demonstrate to the court that they were dependant on the grandparent immediately before the grandparent's death.

35. In my understanding, the above ruling addresses two different situations pertinent to grandchildren inheriting their grandparents' estates, none of which are applicable hereto. In the instant case, the parent through whom the Applicants are claiming a share in the deceased's estate is not alive. Additionally, the Applicants are merely seeking the share of the deceased's estate that was to devolve to their late mother who despite having survived the deceased, died before the estate could be distributed. The Applicants are not seeking a share of the deceased's estate in their own respect.

36. Interestingly, Mr. Wakahu argued that the Applicants were required to demonstrate that their late mother had objected to the issuance of the grant in the Chief Magistrate's Court, when their mother, Naomi Karungari Kairu (deceased) in fact died in 1997, six years before the said grant was issued on 20th November, 2013. Counsel's argument is therefore to the effect that the late Naomi should have argued her case posthumously. This is achievable, but only through the personal representatives of her estate. In my considered view, this is what the Applicants seek to achieve. To plead their late mother's cause and ensure that the share of the deceased's estate that was to vest in her can devolve to her rightful beneficiaries.

37. Mr. Wakahu Mbugua had also alluded to a judgment delivered on 21st February, 2018 in arguing that the Applicants should have sought leave prior to bringing the instant application. That the judgment was reached following the mediation process. I observe that there is however no such judgment on record. The record shows that on 21st January, 2018, the Mediation Agreement was adopted as an order of the court. There was however no judgment issued at that date.

38. Despite the period of time that has lapsed since the death of the deceased whose estate is in issue, the Estate is yet to be distributed. The record demonstrates that a Grant of Letters of Administration of the deceased's estate was issued on 24th April, 2017 but the Grant is yet to

be confirmed. Additionally, whereas there is a Mediation Agreement on record with an agreed mode of distribution of the deceased's estate, nothing has been done to realize the agreement. In any case, that Mediation Agreement left out some beneficiaries, being the estate of Naomi Karungari Kairu (deceased).

39. The 1st Respondent had in her submissions made reference to an application dated 19th March, 2018. In the application, she sought for orders that the 2nd Respondent hand over all completion documents in respect of five (5) plots which were to devolve to her and allow her take over possession of the said plots and further that the court withdraw the orders made on 9th December, 2015 inhibiting the ten (10) plots comprising the estate. Bearing in mind that the 1st Respondent was seeking that the court grant these orders through her written submissions and there being nothing to show that the application has been determined, it appears that the ten (10) plots comprising the deceased's estate are yet to be distributed or otherwise disposed of.

40. Notably, Mr. Wakahu Mbugua had in urging the court to dismiss the instant application asked the court to allow the 1st Respondent's application dated 19th March, 2018. This ruling is however only in respect of the summons application dated 21st January, 2019. It is therefore improper for Counsel to raise issues pertinent to other applications. Such an action is tantamount to circumventing the court process.

41. Having determined that the deceased's daughter Naomi (deceased) was entitled to the deceased's estate, it is only just and fair that her estate too is included in the distribution. Omitting her name from the list of the beneficiaries who survived the deceased whose estate is in issue amounts to concealment of a material fact, which is a ground upon which a grant of representation can be revoked. Based on the rules of intestacy, the estate of the deceased ought to have been shared equally amongst his beneficiaries, the three daughters who survived him.

42. Where a party files an application seeking the revocation of grant, the court has the discretion to make orders as it considers fit in the circumstances and is not bound to issue orders for the revocation of the grant as sought. (See - **Angelas Maina vs. Rebecca Waiyego Mwangi and Another Succession cause 692 of 2012, [2016] eKLR**) In the instant case, it appears that a revocation is not necessary for the ends of justice to be met.

43. Some of the orders sought by the Applicants seem to suggest that the grant of letters of administration issued to the Respondents has since been confirmed. This has however not been done.

44. The deceased whose estate is in issue died in 1991. It is therefore high time this succession cause is concluded and the deceased's estate distributed. It is on this basis that I direct that the Respondents, as the administratrices of the estate of the deceased, do file an application for confirmation of grant forthwith. The mode of distribution filed together with the application shall include the estate of Naomi Karungari Kairu (deceased).

45. In the end, I find as follows:

- a. The Estate of Naomi Karungari Kairu (deceased) is a beneficiary of the estate of the deceased herein, by virtue of being a daughter of the deceased and having survived the deceased.
- b. The deceased was survived by three beneficiaries: Miriam Nduta Kihara, Hannah Njeri Kihara and Naomi Karungari Kairu (deceased).
- c. The deceased's net intestate estate shall devolve to the three beneficiaries named in (b) above in line with the rules of intestacy, namely that the estate be shared equally amongst the three.
- d. The Respondents shall file for confirmation of grant and include the estate of Naomi Karungari Kairu (deceased) in the mode of distribution.

It is so ordered.

DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 26TH DAY OF OCTOBER, 2021.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Applicants.

In the presence of.....Advocate for the 1st Respondent.

In the presence ofAdvocate for the 2nd Respondent.