



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

MISC. APPLICATION NO. 3403 OF 2014

IN THE MATTER OF LENA H WANJIKU GATHURI alias LENA H WANJIKU WAMAGATA (DECEASED)

BETWEEN

EMILY LENA H WANJIKU KAGWE.....APPLICANT

AND

GEORGE DAVID NJUGUNA GATHURI

PAULINE WARINGA GATHURI

MARK WALLACE WAMAGATA GATHURI.....RESPONDENTS

JUDGMENT

1. Before this court is the summons for Revocation of Grant dated 3rd February 2020 in which the Applicant **EMILY LENA H WANJIKU KAGWE** sought the following orders –

“A. SPENT

B. THAT the Grant of letters of Administration Intestate issued on 27th April 2015 and the certificate of confirmation of grant issued on 16th March 2016 to the Respondent GEORGE DAVID MWAURA GATHURI, MARK WALLACE WAMAGATA GATHURI and PAULINE WARINGA GATHURI be revoked or annulled.

C. THAT the Respondents be compelled to submit a true and accurate inventory of assets and liabilities of the accounts of the deceased and full and accurate account of all dealings therewith from the date of appointment to date.

F. THAT the costs of the Application be provided for.

G. THAT the Respondent be held in contempt of court having committed perjury.

H. AND such other relief which this Honourable court may deem necessary to grant.

2. The summons was premised upon **section 71 (2) (a) & 76** of the **Law of Succession Act, Rules 25 (5), 44 (i) & 73** of the **Probate and Administration Rules, Order 40 Rule 1** of the **Civil Procedure Rules, 2010, section 1A, 1B and 3A** of the **Civil Procedure Act** and all other enabling provisions of law and was supported by the Affidavit of even date sworn by the Applicant.

3. The Respondent filed a Replying Affidavit dated **5th March 2020**. The matter was disposed by way of *vive voce* evidence on the online Platform.

The Evidence

4. This Succession Cause concerns the estate of **LENAH WANJIKU GATHURI** alias **LENAH WANJIKU WAMAGATA** (hereinafter 'the Deceased') who died on **30th September 2011**. The Deceased was survived by her husband **JAMES DAVID GATHURI** and her three living children namely -

(i) **George David Njuguna Gathuri**

(ii) **Mark Wallace Wamagata**

(iii) **Pauline Waringa Gathuri**

5. The Deceased left the following assets.

(i) **LR Kiambaa/Thindigua/1174**

(ii) **Kiambaa/Muchatha/T.357**

(iii) **Plot No Muchatha Market**

(iv) **Shares in Kenya Commercial Bank Limited.**

6. It is common ground that following the demise of the Deceased the three living children of the Deceased (the Respondents herein) sought and were issued with letters of Administration Intestate on **27th April 2015**. The Grant was duly confirmed and a certificate of confirmed Grant dated **16th March 2016** was issued to the three Respondents.

7. In her evidence the Applicant told the court that she is the daughter of one **ARTHUR KAGWE GATHURI**, who was also a son to the Deceased, but who pre-deceased his mother having died in the year **2003**. As such, the Deceased in this succession cause is the paternal grandmother of the Applicant. The Applicant therefore brought this application in her capacity as a beneficiary to the estate of her late father **ARTHUR KAGWE GATHURI**.

8. The Applicant avers that she was named as a beneficiary to the estate of the Deceased in the Affidavit in support of the Petition for letters of Administration dated **3rd November 2014**. That she was also named as one of the persons who survived the Deceased in the Chiefs letter dated **7th October 2014**.

9. The Applicant stated that though the Respondents initially involved her in the discussions regarding process of the Administration of the estate of the Deceased, she was later surprised to discover that the Respondents had moved to court and obtained letters of Administration by fraudulently misrepresenting themselves as the only beneficiaries to the estate of the Deceased.

10. The Applicant asserts that she was a dependant of the Deceased as she lived with the Deceased during the period she was in High School and that the Deceased provided for all her needs. She argues that the Respondents failed to include **all** the beneficiaries of the estate in their petition. She states that she is apprehensive that the Respondents may move to transfer properties comprising the estate of the Deceased in order to defeat the shares of the other rightful beneficiaries. The Applicant urges the court to revoke the Grant issued to the three Respondents.

11. The Respondent case is that the Applicant is not a beneficiary of the estate of the Deceased and is **not** entitled to inherit therefrom.

12. **DW1 WALLACE WAMAGATA** testified on behalf of the Respondents. He confirmed that the Applicant was the daughter of his late brother **ARTHUR KAGWE GATHURI** who had pre-deceased their mother. **DW 1** states that during her lifetime the Deceased had expressed the desire that her estate be inherited by her living children. That their father **JAMES DAVID GATHURI** who was aware of these wishes of the Deceased had fully consented to the same.

13. **DW 1** stated that though the Applicant had no right to inherit from the estate of the Deceased his father did allocate to the applicant a parcel of land in Thika. That the Applicant was later sued by her grandfather on allegations that she had fraudulently altered the documents for said parcel of land and had sold the same. That the case in question being **ELC No 122 of 2019** was still pending before the **Environment and Land Court in Thika**. The Respondent insists that the Applicant is not a beneficiary as defined by **Section 29** of the **law of Succession Act**. They urged the court to dismiss the summons in its entirety.

14. **JAMES DAVID GATHURI**, the husband to the Deceased (and father to the Respondents) was not called to testify on account of his age – he was said to be **97 years** old. The Affidavit dated **5th March 2020** sworn by the said **JAMES DAVID GATHURI** was admitted by consent as evidence in this case.

15. In said Affidavit it was deponed that following the death of the Deceased it had been agreed that the children of the Deceased would inherit her estate. That the father wished to leave his children inherit the estate of his wife and therefore consented to the confirmation of Grant.

16. The widower of the Deceased confirmed that he is engaged in litigation with the Objector before the **Environment and Land Court in Thika** where he has accused the Objector of forgery. He urges the court to dismiss this application with costs.

17. Upon close of oral evidence parties were invited to file their written submissions. The Applicants filed the written submissions dated **16th June 2021** while the Respondent relied upon their written submissions dated **12th July 2021**.

Analysis and Determination

18. I have carefully considered the material placed before the court, the evidence adduced before the court, as well as the written submissions filed by all the parties. The **Evidence Act**, places the burden of proof of any fact on the person who wishes to rely on the same **Section 107 of the Evidence Act Cap 80, Law of Kenya provides** as follows: -

“Burden of Proof

(1) Whoever desires any court to give judgment as to any legal 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”

19. The only issue for determination is whether the Applicant is in fact a beneficiary to the state of the Deceased; and whether the Grant issued to the three Respondent should be revoked.

20. The Applicant herein took issue with the fact that she was not included as a beneficiary in the distribution of the estate of the Deceased. The Applicant stakes her claim as beneficiary on two main grounds. Firstly, that she was a dependant on the Deceased prior to her demise and secondly, that as a child of the late son of the Deceased **ARTHUR KAGWE GATHURI** she is entitled to inherit the portion of the estate which would have gone to her father.

21. **Section 29** of the Law of Succession Act defines a Dependant as follows: -

“29 for the purposes of this part “dependant” means –

(a) the wife or wives or former wife or wives and the children of the deceased, whether or not maintained by the deceased immediately prior to his death.

(b) Such of the deceased’s parents, step parents, grandparent, grandchildren step children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters as were being maintained by the deceased immediately prior to his death; and

(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death”. (own emphasis).

22. In her evidence the Applicant told the court that she was estranged from her own mother and had moved to live with the Deceased. She stated that the Deceased provided for all her needs, i.e., food, shelter etc. and that even after the demise of the Deceased she continued to live in the Deceased’s house. The Applicant clarified that her own mother has no interest in the estate of the Deceased.

23. **DW 1** the 3rd Respondent in her evidence confirms that the Deceased took care of the Applicant and her sister while they were young. He asserts that by the time, the Deceased died the Applicant and her sister had moved to live with their mother. **DW 1** asserts that –

“The Applicant was not living with the Deceased at the time of her death”.

24. In **RE ESTATE OF JOHN MUSAMBAYI KITUMANGA (DECEASED) 2014 eKLR** the Court stated as follow: -

“under section 29 of the Act, a grandchild can be a dependent of her grandparent, but for her to qualify as such she must demonstrate to the court in an application properly brought under section 26 of the Act that she was dependent on the grandparent immediately before his death (own emphasis)

25. The Applicant has not availed any evidence whether documentary or oral to prove that she was dependent on the Deceased immediately prior to her death. Indeed the Applicant admitted that in the **year 2011** when the Deceased died she was already an adult. In introducing herself to the court, the Applicant stated that she is **29 years** old and works as a consultant.

26. It is highly unlikely that being an adult and employed at the time of death of the Deceased the Applicant would have been dependant on the Deceased for all her needs. The Applicant has not brought any evidence to prove her dependency on the Deceased immediately prior to her death. I therefore find no evidence to demonstrate that the Applicant was a dependant within the meaning of **section 26** of the Law of Succession Act.

27. Secondly, the Applicant claims that being a daughter to the Deceased’s late son, she is a beneficiary to the estate of the Deceased. The Respondents have claimed that the Deceased left an oral will bequeathing her assets to her **living** children. There is no evidence that the Deceased ever made such a declaration. There was no evidence from any witness who heard the Deceased specify that her Estate was to devolve to her **living** children only. In the Affidavit dated **15th March 2020** sworn by the widower of the Deceased it is stated that the family

had agreed that the estate would devolve to the **children** of the Deceased. It was not specified that only the **living** children would inherit. Indeed the Respondent petitioned for Grant of Administration **Intestate** indicating that the Deceased died intestate. I therefore reject that claim that the Deceased left an oral Will.

28. **Section 38** of the **Law of Succession Act** provides as follows: -

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

29. In this case the Deceased left a spouse and three children. However, the spouse of the Deceased has waived his right to any claim over her estate leaving the estate to be distributed amongst the children of the Deceased.

30. However, the provisions of **section 38** are not absolute and must be read together with **section 41** which provides for the principle of representation as follows: -

“where reference is made in the Act to the “net intestate estate” or the residue thereof devolving upon a child or children, the property comprised therein shall be held in trust in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who pre-decease him and who attain that age or so marry in which case the issue shall take though in equal shares the share which their parent would have taken had he not predeceased the intestate: (own emphasis)

31. **Section 41** therefore provides for the substitution of a grandchild for his or her parents in cases of intestacy where the parent has died before the intestate.

32. In **RE ESTATE OF JOSEPH GITHUKI RIUNGE (DECEASED [2016] eKLR Hon Justice Willian Musyoka** stated –

“However, should the child be survived by their own children, who would then be grandchildren to the dead parent, then it should be the children of the dead child, the grandchildren of the dead parent, who would be considered as the survivors of the parent of their own parent that this the effect of section 41 of the Law of Succession Act, it is called the principle of representation: the surviving child of a dead child taking the share of their dead parent from the estate of the dead child’s parent”.

33. I have perused the Affidavit in support of the Grant for letters of Administration dated **3rd November 2014**. In the said Affidavit, the Applicant and her sister are included as amongst the survivors of the Deceased and are described as **“Granddaughters”**. Likewise, in the Chiefs letter dated **9th October 2014** annexed to the said petition the names of the Applicant and her sister are included. (As stated earlier, the Applicants mother has no interest in this Succession Cause). Having named the Applicant in their petition, the Respondents cannot now purport that the applicants are **not** beneficiaries to the estate of the Deceased.

34. Based on the provisions of **section 41** I find that contrary to the position held by the Respondents the Applicants and her sister are in fact beneficiaries to the estate of the Deceased under the law. They would as it were step into the shoes of their late father. The Applicant and her siblings are therefore entitled under the principle of representation to take the share of the estate which would have been allocated to their late father.

35. The **Law of Succession Act** provides for revocation of grants under **section 76**, which states 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 the 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 circumstance.”

36. The Applicant has prayed that the Grant issued to the Respondents be revoked. However, I have not found any evidence of concealment and/or misrepresentation by the Respondents. As stated earlier the Applicant and her sister were included in both the chiefs letter dated **9th October 2014** and they were also included in the Petition for letters of Administration dated **3rd November 2014**. No attempt was made by the Respondents to conceal the existence of the Applicant or her relationship to the Deceased. The Applicant main complaint was that she was **not** included in the distribution of the estate. In the circumstances, the prayer for revocation/annulment of the Grant would fail.

37. However, I note that the Grant is yet to be confirmed. The Objector took issue with the summons for confirmation of Grant as filed and with the mode of distribution proposed by the Respondents. In the premise, I direct that a fresh summons for confirmation of Grant be filed to include the Objectors as beneficiaries and a mode of distribution be agreed upon.

38. The Applicants have prayed that the Respondents as administrators of the estate of the deceased be compelled to submit a true and accurate inventory of assets as well as an accurate account of all the dealings with the estate to date. It is trite law that an Administrator of an estate is a trustee of the same and as such is accountable to all the beneficiaries for the manner in which he handles the estate. **Section 83 of the Law of Succession Act** provides for the ‘**Duties of Personal Representatives**’. **Section 83 (h)** provides that –

“83 personal representatives shall have the following duties

.....

(h) to produce to the court. If required by the court either on its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account”.

39. In **RE ESTATE OF DAVID KYULI KAINDI (Deceased) [2016] eKLR Hon Justice William Musyoka** stated as follow: -

“the personal representative must give account of the assets and liabilities that he has ascertained, and the assets that he has collected, gotten in, recovered or gathered and the titles he has perfected, and the steps taken to preserve the estate. He should also state the debts and liabilities that he has paid or settled before moving to court for confirmation of the grant, and if he has not yet settled the debts, state how he proposes to have them settled. The account at this state should also state the assets that generate income, stating how much has been collected and how it has been utilized.”

40. A perusal of the record in this mater indicates that to date no account has been rendered to court by the Respondents. They have a statutory duty to render such accounts. Accordingly, I do allow prayer (c) of this application.

41. I note that the Respondents have been administering the estate of the Deceased to the exclusion of the Applicants. In order to prevent any risk of irreparable loss to the beneficiaries it is my view that the *status quo* ought to be maintained pending confirmation of the Grant of the estate. In the interim, any income deriving from the estate ought to be preserved pending final distribution of the estate.

42. Finally and in conclusion, I partially allow this summons and make the following orders:

i. A joint account to be opened within **thirty (30)** days hereof in the names of counsel for both parties.

ii. The respondents to file a fresh application for confirmation of grant within **60 days** and involve **all** the beneficiaries. They should also come up with a mode of distribution reflecting all the beneficiaries named and what properties they will inherit.

iii. An order of temporary injunction be and is hereby issued against the respondents, whether by themselves, their servants and/or agents from trespassing, constructing on, wasting and or otherwise interfering, or dealing with the assets of the deceased pending the determination of the fresh summons for confirmation of grant.

iv. The respondents are ordered to give an account of proceeds forming part of the deceased’s estate within **sixty (60)** days of todays date.

v. As this is a family matter there will be no order as to costs.

Dated in **Nairobi** this **22nd** day of **October 2021**.

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MAUREEN A. ODERO

JUDGE