



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

SUCCESSION CAUSE NO. 89 OF 2017

(FORMERLY NKR. MISC. SUCC CAUSE NO. 93/2017)

IN THE MATTER OF THE ESTATE OF PHILLIS WAIRURI MAINA (DECEASED)

MWANGI BENSON.....APPLICANT

VERSUS

EDWARD MAINA NDIRITU.....RESPONDENT

JUDGMENT

INTRODUCTION & BACKGROUND:

1. The matter herein arises from the Applicant's application dated (indicated as issued) 24/02/2009 and where the Applicant is praying for the orders: THAT

“The Applicant herein, a grandson of the above named Phillis Wairuri Maina who died on 04/04/1994 prays for an order that letters of administration to Edward Maina Ndiritu the Respondent herein made on the 23/01/2009 be annulled and/or revoked.”

2. The application is supported by the applicant's affidavit and several annexures.

3. The Respondent in opposing the order sought in the summons for revocation or annulment of grant dated 24/02/2009 filed a replying affidavit sworn on 24/07/2009 accompanied by several annexures and later on filed grounds of opposition dated 29/07/2009 and filed on the same day, and where he sought that the Applicant's application be dismissed.

4. The Court directed that the application was to be disposed off by way viva voce evidence and as such the Respondent duly filed his list of witnesses together with his list of documents dated 25/06/2015 and filed in court on 26/06/2015 in support of his defence to have the application dismissed.

5. The parties and their witnesses came to court and testified and relied on all the documents annexed their affidavits and as listed.

Background of the Case:

6. The Respondent herein is a grandson to the late Phillis Wairuri Maina and who passed on sometime in the year 1994.

7. At the time the late Phillis Wairuri Maina died in 1964 she was survived by one of her Children by the name Nelius Wairumu and who is the mother of the Respondent herein.

8. The late Phillis Wairuri Maina had other two children but unfortunately as at 1994 they had already passed on namely:

i. The Late Benson Nderitu – died in 1977

ii. The late Minne Wangechi – died in 1968

9. Nelius Wairumu being the only surviving child of the late Phillis Wairuri Maina authorized her son, the Respondent herein to apply for letters of administration on her behalf. It is this authorization that culminated with the Respondent herein filing a succession cause with respect to the Estate of Phillis Wairuri Maina in a suit serialized as ***Naivasha PMC Succession Cause No. 79 of 2008.***

10. The said Nelius Wairimu as one of the witnesses in the case testified to the effect that she had duly authorized her son, the Respondent herein to petition for letters of administration and that to date she does not oppose the said letters of administration issued on his son, the Respondent herein.

11. Upon filing the succession cause serialized as *Naivasha PMC Succession Cause No. 76 of 2008* the Respondent herein was made the administrator for the said estate of Phillis Wairuri Maina – Deceased approached court objecting to the said letters of administration.

12. The said application by the late Zainabu Waigumo Nderitu (mother to the Applicant herein) objecting the letters of administration issued to the Respondent herein was determined by Court vide a ruling delivered on 23/01/2009 and which ruling together with the typed proceedings were produced in this case as exhibits by the Respondent.

13. The Honorable Court in its ruling dismissed the said objection with costs and held that the late Zainabu Waigumo Nderitu did not have any legal capacity to object to the said letters of administration issued to the Respondent by virtue that she had already been divorced by the late Benson Maina and their marriage dissolved vide Naivasha Civil Suit No. 59 of 1973.

14. After the dismissal of the application by Zainabu Waigumo Nderitu – deceased on 23/01/2009, the Applicant herein would then file an application dated 29/01/2009 seeking to object the said letters of administration but would thereafter on 23/02/2009 withdraw the application and on the next day filed the instant application in the High Court seeking to object the same letters of administration grant to the Respondent.

15. Indeed, the same application the Applicant had filed in the lower court and then withdrawn is the same application filed before this court for determination. This fact is well captured in the typed proceedings of the case serialized as *Naivasha PMC Succession Cause No. 76 of 2008* and which typed proceedings were produced herein as exhibits by the Respondent.

16. The main contention by the Applicant is that he claims to have been the grandson of the late Phillis Wairuri Maina and claims that he was the son of the late Benson Nderitu Maina and as such entitled to a share of the Estate of Phillis Wairuri Maina.

17. The evidence tendered by the Respondent to demonstrate this was a birth certificate which was issued during pendency of this suit and which the Respondent himself during cross – examination stated he had produced because he was advised to do so by his former advocates to support his objection.

APPLICANT/OBJECTOR’S CASE/SUBMISSIONS:

18. That the grant issued was fraudulently obtained by making false statements and by concealment from the court of other material facts.

19. He stated that the particulars of fraud: were that, the Respondent identifies himself as a son to the late Phillis Wairuri Maina and with other persons not known to applicant namely Mr. Duncan Gacheche Maina and Stephen Kimani Kinuthia as the only surviving members of her.

20. That the Late Phillis Wairuri Maina had three descendants Mr. Benson Nderitu Maina, Nelius Wairimu Maina and Mineh Wangechi.

21. The Respondent never obtained a letter from the local Chief while filing the earlier succession cause as is required by law.

22. The Respondent omitted members of the family including his own mother, Nelius Wairimu Maina, who is daughter of the Late Phillis Wairuri Maina.

23. The Respondent is a total stranger as shown in term (b) above and has no capacity to file this succession cause without any proven authority from his mother.

24. That the grant as obtained was based on non-factual documents presented to the Court in Naivasha.

25. That him applicant is a son of the late Benson Maina Nderitu who died on 28/07/1977, that the said Benson Maina Nderitu was survived by the following;

- **Zainabu Waigumo Nderitu – Widow/Wife/Deceased**
- **Phillis Wairuri Nderitu – Daughter/Deceased**
- **Rashid Maina Nderitu – Son/Deceased**
- **Musa Mungathe Nderitu – Son**
- **Mwangi Benson Nderitu – Son**
- **Christine Njoki Nderitu – Daughter/Married**
- **Josphine Wambui Nderitu – Daughter/Married**

· **Salim Irungu Nderitu – Son**

26. That the said survivors had given consent to him for defending their interest in the said Estate. Based on the legal procedures on succession, a next of kin is not an automatic administrator or heir to the deceased rather this next of kin only arrangers for the burial of the deceased.

27. She has produced a certain letter from OI Aragwai Cooperative Society Claiming power as a nominee to the society which is also a forgery. This lady Mrs. Nelius Wairimu obtained monies from Mr. Benson Nderitu illegally.

28. She informed the court that Phillis Wairuri passed on in 1994 and that she was on the land by then.

29. Applicant contend that he went to authenticate all documents as produced to this court by the Respondent. First he went to the Naivasha Court and found that the mentioned Civil Case No. 59 of 1973 was not a divorce as stated in court but rather it was a case between Mr. Kamau Githongo v FDR Knight on destruction of crops as per attached copy from Naivasha labelled AA10.

30. This court instructed him to report the forgery matter to the Naivasha Police Station which was done vide OB Number 37/18/5/2021 attached as AA11.

31. When he followed about the next of kin letter awarded to Mrs. Nelius Wairimu he found that no such letter has ever been written meaning that it was also a forged document.

32. Thus he request therefore is: this Court to dismiss the grant of administration awarded to Mr. Edward Maina Nderitu and the court to award him being the agent for the family, new letters of administration.

33. He contends that because all documents produced in court are all forged, he prays that the said Mr. Edward Maina Nderitu and Nelius Wairimu be struck out from the list of beneficiaries of the late Phillis Wairuri Maina.

34. The costs of the cause be borne by the said Edward Maina Nderitu.

PETITIONER’S/RESPONDENT’S CASE/submissions:

35. On the part of the Respondent and in support to the fact that the Applicant herein is not the son of the late Benson Nderitu Maina, he produced as exhibits a copy of the plaint and an extract of a letter dated 09/06/1977 confirming that the late Benson Nderitu Maina was deserted by the late Zainabu Waigumo Nderitu in 1963 and later on got divorced in 1973.

36. As at the time of birth of the Applicant herein on or around 1966, the late Zainabu Waigumo Nderitu had already deserted the late Besnon Nderitu Maina.

37. The late Zainabu Waigumo Nderitu indeed moved on and even got other kids and a clear example of this fact is indicated in the birth certificate of Salim Irungu Nderitu who has clearly been indicated as having been born in 1980.

38. The birth certificate of Salim Irungu Nderitu has indicated the late Benson Nderitu Maina as the father of the said Salim Irungu Nderitu yet at the time of his birth in 1980 the late Benson Nderitu Maina was already dead having passed on sometime in the year 1977.

39. It is respondent case that prior to the desertion in 1963 the late Zainabu Waigumo Nderitu had been blessed with two (2) children but unfortunately both of them are now deceased. They are namely:

1. The late Phillis Wairuri Nderitu

2. The late Rashid Mahid Nderitu

40. The respondent contends that throughout trial it has been evident that the Applicant herein has absolutely nothing to demonstrate that he was indeed the son of the late Benson Nderitu Maina.

41. During pendency of the suit sometime in the year 2011, the Applicant herein as has become his norm and while there were express orders barring him and his other siblings forced his way into the suit property and established some semi-permanent buildings.

42. This was clear contempt of court noting that there were orders barring them from entering the suit property. This just shows to what extent the Applicant is willing to go to force his way into the Estate of Phillis Wairuri Maina without any colour of right. Two witnesses testified to this fact to confirm the unfortunate events that happened in 2011.

43. **Respondent** states that for determination in this matter and a determination into this issue will ultimately determine whether the Applicant herein has *locus standi* to make the instant application.

44. Submits that the Applicant herein was not the son of the late Benson Nderitu Maina and the Respondent herein has produced enough documentary evidence to demonstrate this fact.

45. This is beside the fact that at all times the burden of proof was on the Applicant herein to indeed demonstrate and prove that he was the son of the late Benson Nderitu Maina. The Applicant herein having approached this court on that basis and further due to the fact that he was the one who was alleging a negative to prove the said negative.

46. Indeed, the Respondent herein and as corroborated by his mother Nelius Wairimu; demonstrated that the late Benson Nderitu Maina was deserted by the late Zainabu Waigumo Nderitu in 1963 as well captured in the Plaintiff in the suit serialized as ***Naivasha Civil Suit No. 59 of 1973*** and later on the marriage was dissolved in 1973.

47. It is therefore crystal clear that as at the time the Applicant herein was born sometime in the year 1966, the late Zainabu Waigumo Nderitu had already deserted the late Benson Nderitu Maina.

48. To confirm this status, the mother to the Respondent and the sister to the late Benson Nderitu maina, one Nelius Wairimu was the one chosen as the next of kin by the late Benson Nderitu Maina as confirmed by the various letters from the employer.

49. Of great importance is the letter dated 24/04/1974 and where the late Benson Nderitu Maina having gone through divorce in 1973 sought to change his next of kin and then included his sister as his next of kin. As stated during testimony by Nelius Wairimu if they had not divorced with the late Zainabu Waigumo Nderitu then it's Zainabu Waigumo Nderitu who would have been included as his next of kin or if indeed the Applicant was his son then it is him who would have been indicated.

50. The Applicant version is therefore not supported by any facts as the late Benson Nderitu Maina himself deliberately left them out and that cannot be by coincidence. The same was because the late Benson Nderitu Maina had been deserted since 1963 and had gone ahead and divorced the late Zainabu Waigumo Nderitu in 1973.

51. In the lower court had the opportunity of hearing the late Zainabu Waigumo Nderitu in the earlier objection made by the late Zainabu Waigumo Nderitu and where the issue of divorce came up and where she did not oppose to that fact. Even after the ruling was delivered, she did not appeal the said findings or even seek review of the same and this thus confirms that indeed she was well aware of the said divorce.

52. Guided by the finding of the lower court as expressly captured in the ruling delivered on 23/01/2009 in the lower court file serialized as ***Naivasha PMC Succession Cause No. 76 of 2008***. The said ruling captures this issue so articulately and indeed confirms that the late Zainabu Waigumo Nderitu was well aware of the divorce.

53. From the foregoing and as hereinabove demonstrated, the Applicant herein was born in 1966 when the late Benson Nderitu Maina had been deserted by the later Zainabu Waigumo Nderitu and as such the Applicant herein is not as son of the late Benson Nderitu Maina.

54. The Applicant herein well aware that there was no documentary evidence demonstrating that he was the son of the late Benson Nderitu Maina would during pendency of this suit got procure some birth certificates to show that he and his other brothers were the sons of the late Benson Nderitu Maina.

55. This was a desperate move and made in bad faith and to add salt to the wound, the Applicant herein during cross – examination confirmed that he had indeed procured the said birth certificates on the advice of his former advocates so as to use them in this case.

56. The said birth certificates were just illegally and irregularly procured and should have absolutely no evidentiary weight in this matter. The Applicant should not be allowed to benefit from his own illegality.

57. The said birth certificates are purely meant to mislead this Honorable Court and purely procured to steal a match herein and blind the court in making a finding not based on facts. Court ought to decline his invitation.

58. Further, the said birth certificates have the following discrepancies namely:

i. One of the said children (Salim Irungu Nderitu) is born in 1980 which was after the death of Benson Nderitu Maina (died in 1977) but in the said birth certificate the said late Benson Nderitu Maina is indicated as the father.

ii. The other two children were born in 1966 and 1967 after the later Benson Nderitu Maina had deserted the late Zainabu Waigumo Nderitu in 1963.

iii. All the birth certificates were issued during pendency of this suit. This means that they could have been easily procured to assist the Applicant in this case and as such not a reflection of the truth.

iv. In some of the birth certificates the name is indicated as three names inclusive of the surname whereas normally the name has two names and the surname forms the third name. This just confirms that this birth certificates were just fabricated and do not tell the truth.

v. In all the names and as compared with their national identity cards and particularly that of the Applicant herein, none of them share or has the surname of the late Benson Nderitu Maina. The surname shared is that of Nderitu and which is the name in their mother's name the late Zainabu Waigumo Nderitu and not Nderitu so as to refer to that of the late Benson Nderitu Maina.

59. It is crystal clear that the Applicant herein has totally failed in demonstrating that indeed he was the son of the late Benson Nderitu Maina and even after fabricating evidence, the said birth certificates are full of contradictions and are clearly untrue.

60. The Applicant himself indeed stated that a DNA ought to have been conducted to indeed demonstrate that he was the son of the late Benson Nderitu Maina but which was never done. It was his obligation to undertake this and convince this court that indeed he was the son of the late Benson Nderitu Maina. Unfortunately, it was now too late for him as the horse has already bolted and left the barn.

61. **Section 38 of the Law Succession Act** to this effect expressly provides as follows:

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

62. The above section of the law is framed in mandatorily terms and it is evidently clear that in case of succession intestate and where there is only one surviving child but no spouse then the net estate shall devolve upon the surviving child.

63. In the instant case, the scenario is similar as the only surviving child was Nelius Wairimu and as such the net estate ought to devolve to her as the only surviving child.

64. It is worth noting that indeed the late Phillis Wairuri Maina prior to her demise nominated her daughter Nelius Wairimu to be the nominee of the suit property and the Respondent did produce the said letter as an exhibit.

65. The said letter was written by the Ol’aragwai Farmers’ Co-operative Society Limited and where the late Phillis Wairuri Maina had been a member leading to her being the owner of the suit property.

66. It is further crystal clear and which was confirmed by the said Nelius Wairimu during trial that she is the one who gave the Respondent herein the go ahead to petition the letters of administration and indeed she confirmed that she is not opposed to his son continuing being the administrator.

67. She beseeched this Honorable Court to dismiss the instant application and to allow his son to continue being the administrator for the said estate.

68. The Applicant herein could only have had some stake in the estate only if he was able to demonstrate and prove that he was the son of the late Benson Nderitu Maina and arising from the finding that this was never proved then the Applicant herein has absolutely no interest whatsoever in the estate of Phillis Wairuri Maina.

69. The Applicant’s written submissions it is strange to note that the Applicant has attempted to introduce new evidence in his submissions and indeed has gone ahead to annex a bundle of documents. This is unacceptable and the law abhors it and the Respondent humbly submits that the said documents be expunged and not to be at all considered by this Honorable Court.

70. In the case of **Susan Nyambura Mwathi v Duncan Kiria Kabete [2020] eKLR** the learned Judge in confirm that a litigant cannot introduce evidence in his submissions and held as follows:

“Although the parties filed and exchanged written submissions, I wish to point out that parties cannot introduce new evidence through written submissions. It is hereby clarified that courts of law, in arriving at their decisions, solely rely on the pleadings and the oral evidence proffered by parties. Of course, the parties can, in their written submissions, canvass the case authorities and the law that they think support their assertions.” (Emphasis mine)

71. In the case of **Njiru Micheni Nthiga v Governor, Tharaka Nithi County Government & 5 Others [2021] eKLR** the learned Judge with respect to the trite law that a litigant cannot introduce new evidence in their submissions held as follows:

“In their submissions that parties have attempted to narrate the oral evidence given by their witnesses. This court clarifies that it has only relied on its version of the oral evidence proffered by the parties. Of course, parties cannot introduce or contrive new evidence in their submissions.” (Emphasis mine)

DETERMINATION

72. The core issue for determination in the instant case is whether the Applicant has established the requirements set out in Section 76 of the Law of Succession Act to warrant revocation the grant issued to the Respondent.

73. Section 76 of the Law of Succession Act is very clear that: -

a. 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...

3. The circumstances in which a Grant may be revoked or annulled are set out in Section 76 of the Law of Succession Act as follows:

4. 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—

5. that the proceedings to obtain the Grant were defective in substance;

6. 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;

7. 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;

8. 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

9. That the Grant has become useless and inoperative through subsequent circumstances.

ISSUES ANALYSIS AND DETERMINATION:

74. The entire case herein is revolving on the issue of paternity of the applicant thus his omission from the list of beneficiaries turns on the question as to whether he is grandson of the deceased herein. Thus he hangs on the evidence of birth certificate he procured during pendency of the instant matter to prove his paternity.

75. On the other hand, the respondent contention is that the mother of applicant deserted his father in 1963 and he was born in 1966 thus not a son of the son of the deceased herein.

76. Suffice it to note that a birth certificate is proof of paternity but not the only and final prove see NE O v H W K [2018] eKLR.

77. I quote with approval the decision in Wilfred Koinange Gathiomi V. Joyce Wambui Mutura & Another, [2016] eKLR where paternity was central to the dispute and it was held that DNA testing was the only way to resolve the paternity issue

78. The decision above is supported by findings in PKM V. SPM & another, [2015] eKLR where it was stated:

“If the applicant denies paternity what other quicker way to resolve the dispute exists than to undergo a DNA test.”

79. I agree with counsel for the respondent that DNA testing is the only final proof of paternity and the applicant has failed to pursue same herein but I hasten to add that the matter cannot be left there. In the best interest of the parties in the matter, the DNA test ought to be done.

80. The matter will be easily resolved by establishing the paternity of the applicant.

81. Thus before making final orders herein,

i. The court orders that the applicant and the remains of Benson Nderitu Maina shall undergo DNA test to confirm applicant’s paternity.

ii. The parties to share costs equally and that in event applicant is not son of Benson Nderitu Maina, he shall refund respondent his contributed expenses and if he is son of same person, then applicant will be refunded the expenses by the respondent.

iii. To facilitate the exercise, the body of the late Benson Maina Nderitu shall be exhumed to enable a sample to be taken by qualified medical professional to be agreed or each party to identify his and Local OCS to provide security.

iv. There be liberty to apply.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 21ST DAY OF OCTOBER, 2021.

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CHARLES KARIUKI

JUDGE