



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1499 OF 2019

IN THE MATTER OF THE ESTATE OF PGN – (DECEASED)

MKN.....1ST APPLICANT
 TPN.....2ND APPLICANT
 WRN.....3RD APPLICANT
 SPN.....4TH APPLICANT

VERSUS

VMN.....1ST RESPONDENT
 CMN.....2ND RESPONDENT
 INN.....3RD RESPONDENT

RULING

1. This ruling seeks to resolve two applications. The 1st application was dated 16th September 2020 brought by MKN and her children TPN, WRN and SPN seeking to revoke and/or annul the grant of probate issued to the respondents VMN, CMN and INN in respect of the estate of the deceased PGN who died testate on 23rd March 2019. The applicants alleged that the application for the grant was made without reference to them and without their consent. Further that, the proposed distribution of the estate contained in the application for confirmation had not obtained the consent of the applicants; had not made provision for the 1st applicant and had discriminately dealt with her family; and had omitted some property of the deceased. They sought an order for the respondents to render a full and accurate inventory of the assets of the deceased.
2. The second application was dated 16th November 2020 by the 3rd respondent INN seeking the revocation of the grant of probate that had on 3rd March 2020 jointly issued to the 1st and 2nd applicants and herself. Her case was that although she had been involved in the petition for the grant and application to have the grant confirmed, she had since realised that she had been misled into committing an illegality.
3. The applications were opposed by the 1st and 2nd respondents.
4. The deceased PGN died at the Nairobi Hospital on 23rd March 2019. He had on 20th September 2001 executed a Will in which he had bequeathed his property to his family. In the Will, he had appointed his wife RN as the sole executrix. In the event that his wife predeceased him or had died within 30 days following his death, he had appointed Wainaina, Ireri & Company Advocates to execute the Will.
5. When the respondents on 19th November 2019 petitioned for the grant of probate, they deponed that their mother (RN) had been found by Dr. Peter Mutisya Mativo, a neurologist at the Aga Khan University Hospital, to be suffering from Alzheimer’s Dementia and that her memory had deteriorated to the extent that she was not able to remember relatives, places and properties; that she was not able to execute her late husband’s Will; and a recommendation was being made that an alternative person within the family be appointed to execute the Will. The respondents further swore that Wainaina Ireri & Co. Advocates had consented to their petitioning the court for the grant.

6. The 3rd respondent in her application stated that, on seeking legal advice, she had been advised that the issue of the mental incapacity of her mother RN ought to have been determined by the court; that they (the applicants) had no capacity to petition for the grant or to obtain the grant of probate. She stated that the purported consent of Wainaina Ireri & Co. Advocates was illegal.

7. The 3rd respondent doubted that indeed RN suffered from Alzheimer's Dementia as claimed. This was because she had signed the consent dated 21st September 2020 in support of the distribution schedule in the application for the confirmation of the grant.

8. The 1st applicant swore a further affidavit on 28th January 2021 to align herself with the 3rd respondent's case that the grant of probate had been illegally obtained; and that the respondents had gone against the express provisions of the deceased on who would execute his Will.

9. Advocate David Wainaina of Wainaina Ireri & Co. Advocates opposed the 3rd respondent's application. He acknowledged that the deceased had appointed the firm as an alternate executor, the executor being the deceased's widow. When the Will was read to the family, the 3rd respondent was not happy with what had been provided to her. Similarly, the 1st applicant had reservations. Counsel advised the deceased's widow to get an independent counsel through whom she would petition for the grant. When the new counsel was instructed, it turned out that the widow had Alzheimer's Dementia. In the meantime, the alternate executor renounced its right under **section 59 of the Law of Succession Act (Cap 160)**. The alternate executor denied that they did not respect the wishes of the deceased. They denied that there was anything illegal that they did.

10. I have considered the evidence contained in the sworn affidavits and annexures. I have also considered the written submissions by Igeria & Ngugi Advocates for the 1st and 2nd respondents, Mr Chigiti (S.C.) for the 3rd respondent and Mr. Muoka for the applicants. The issue for determination is whether, under **section 76 of the Act**, a case had been made for the revocation of the grant issued to the respondents. In seeking to determine the issue, I bear in mind that the 3rd respondent has conceded that the grant was illegally issued to them.

11. There is no dispute that the deceased left a written Will whose validity has not been challenged. It is reiterated that the deceased had testamentary freedom to bequeath his property to his family. That freedom was sanctioned by **section 5(1) of the Act** in the following terms:-

“5(1) Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses.”

12. The deceased was clear that the executor of the Will was going to be his widow. He went on to state as follows:-

“But if my wife RN predeceases me or dies within a period of 30 days following my death then I appoint Wainaina Ireri & Company Advocates of P.O. Box xxxxx Nairobi to be the executor of this my last Will and Testament.”

13. There is no dispute that his widow did not predecease him and neither did she die within 30 days of his death, or at all. It follows that the decision for Wainaina Ireri & Company Advocates to step in to execute the deceased's Will had not come. The deceased's widow was still, and is still, alive. The firm had no business trying to petition for the grant, or attempting to renounce its right to petition for the grant. Time had not come for the firm to join the executorship of the Will. The firm had no right to executorship that it could donate to the respondents.

14. If the deceased's widow lacked mental capacity to execute the Will, a petition ought to have been filed under the provisions of the **Mental Health Act (Cap 248)** for her to be determined to be a mental patient and for another person to be her guardian and manager of her estate, with powers to exercise her obligation of executorship under the deceased's Will. That was not done. It follows that, the respondents had no authority under the deceased's Will to petition for the grant and to be issued with the same. The proceedings leading to the grant were consequently tainted with illegality, and were defective in substance under **section 76(a) of the Act**.

15. I have stated that the court was not asked to determine that the deceased's widow lacked mental capacity to execute the Will. Even then the applicants and 3rd respondent have put doubt on whether the widow had any mental problem. This is because, and it is common ground that, when it came to the respondents applying to confirm the grant the widow participated by appending her signature on the consent to the distribution of the estate. This meant that they were saying the widow had capacity to consent.

16. The next complaint was by the applicants. Their case was that they were not invited by the respondents to participate in the petitioning for the grant, and neither were their consents sought or obtained. Yet they had not renounced their claim to petition. It is common ground that the respondents were daughters of the deceased. They had a brother DN, who had died. DN had left a widow, the 1st applicant, and children, the 2nd to 4th applicants.

17. It is now trite that a daughter-in-law of a deceased, in the sense that she was the widow of the late son of the deceased, was a recognised beneficiary of the Estate of the deceased (**In Re Estate of the Late M'Thigai Muchangi (Deceased) [2020]eKLR; In the Estate of Florence Mukami Kinyua [2018]eKLR; and In Re Estate of James Kiani Kiranga (Deceased) [2020]eKLR**). It follows that, the 1st applicant was entitled to be informed that a petition was going to be filed in respect of the estate of the deceased. Her consent was legally required. Now that the respondents unilaterally petitioned for the grant, without reference to her, the resultant grant has to be revoked. (**Estate of Ezekiel Mulanda Masai P & A No. 4 of 1992**). The grant issued to the respondents should be revoked under **section 76(b) of the Act** for having been fraudulently obtained, with the existence of the 1st applicant and her claim having been concealed from the court.

18. In conclusion, and for the stated reasons, I allow the two applications and revoke the grant issued to the respondents on 3rd March 2020.

I recall the grant. Now that the respondents have since 3rd March 2020 been in charge of the estate of the deceased, I give them 60 days to give a full and accurate inventory of the estate to date, and further direct that within the same period they will give a full and accurate account of how they have dealt with the estate of the deceased so far. The inventory and account shall be contained in a detailed affidavit filed into court and served on the applicants who shall within 14 days of service file a response.

19. This matter shall be mentioned on a date the Deputy Registrar shall give for further orders.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER 2021.

A.O. MUCHELULE

JUDGE