



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO 1633 of 2015**

**IN THE MATTER OF THE ESTATE OF GEORGE KUNGU WAINAINA (DECEASED)**

**ROSEMARY WANGARI MWANGI.....OBJECTOR/APPLICANT**

**VERSUS**

**PATRICK KIHARA KUNGU.....1<sup>ST</sup>RESPONDENT/ADMINISTRATOR**

**JOYCE WAMBUI KUNGU.....2<sup>ND</sup> RESPONDENT/1<sup>ST</sup> WIFE**

**RULING**

This Application is dated 10<sup>th</sup> October, 2020. It is brought by Rosemary Wangari Mwangi (Objector/Applicant) by way of Summons seeking the following orders:

1. That the Objector/Applicant be declared as a former wife and dependent to the estate of the deceased.
2. That subsequent to prayer one (1) above, the Objector/Applicant be declared as a co-administrator to the estate of the deceased.
3. That the Objector/Applicant and her children be declared as dependents and beneficiaries to the estate of the deceased.
4. That this Honorable court be pleased to declare that the Respondents have jointly and severally intermeddled with the estate of the deceased and be punished accordingly.
5. That cost of this application be in the cause.

This application is supported by an affidavit sworn by Rosemary Wangari Mwangi dated 7<sup>th</sup> October, 2020 where she states that Grant of Letters of Administration was issued to the 1<sup>st</sup> Respondent/Administrator on 23<sup>rd</sup> October, 2015; that the said Grant of Letters of Administration was issued without her knowledge or that of her children, their consent or participation as they are bonafide dependents and beneficiaries to the Estate of the deceased; that she is the former wife to the deceased having been married customarily in the year 1985 after payment of dowry and cohabited with the deceased in Dagoretti; that the deceased had 2 wives at the time of his demise, herself and Joyce Wambui Kungu; that Joyce Wambui Kungu has the following children: Ann Njeri Kungu, Agnes Njeri Kungu, Veronica Wanjiku Kungu, Joseph Wainaina Kungu and David Ngige Kungu and that she has the following children: Serah Njoki Kungu, Joseph Wainaina Kungu, Lillian Wamucii and Ruth Waithera.

She further states that the Grant of Letters of Administration is therefore illegal and irregular as her and her children were not actively involved in the succession proceedings before court as required by law and that the said Grant of Letters of Administration was obtained fraudulently, irregularly, unprocedurally, by material non-disclosure and misrepresentation to the fact that she was a former wife to the deceased.

She avers that the Estate of the deceased comprised of the following assets:

- (i) Land Parcel No. KARAI/KAMANGU TOWNSHIP/T37.
- (ii) Land Parcel No. KARAI/KARAI/926.
- (iii) Land Parcel No. DAGORETTI/MUTUINI/333.

(iv) Land Parcel No. DAGORETTI /MUTUINI/478.

(v) Plot No. 27.

(vi) Land Parcel No. NGURUIBI/THIGIO/1553.

(vii) Land Parcel No. MUGUGA/GITARU/1426.

The Applicant claims that unknown to her the 2<sup>nd</sup> Respondent in collusion with the 1<sup>st</sup> Respondent secretly, illegally and fraudulently subdivided and transferred the above-mentioned parcels of Land into her names and later sold them to third parties between February and March 2012 without subjecting the same to succession process and or before confirmation of Grant as required by law; that from the illegal transfers mentioned in her supporting Affidavit the 2<sup>nd</sup> Respondent was either selling or transferring the estate of the deceased to her friends to conceal evidence and or defeat the course of justice; that she reported the matter to Kikuyu Police station after discovering that the 2<sup>nd</sup> Respondent had fraudulently authored a letter from the area chief, Mr. Edward Kariuki of Ruaka Location dated 3/6/2015 to enable her and the 1<sup>st</sup> Respondent pursue succession proceedings to the exclusion of the Applicant and her children; that the 2<sup>nd</sup> Respondent is facing Criminal charges in Kikuyu Criminal Case No. 900 of 2017 which is still ongoing and that the Applicant filed an ELC case at Thika ELC court No. 83 of 2018 seeking cancellation of the various title deeds wherein she obtained status quo orders. She states that the Respondent misrepresented to court that his mother was the only wife to the deceased a fact which is not true knowing that she was the 2<sup>nd</sup> wife and had children with the deceased.

In Response the 1<sup>st</sup> Respondent through his Replying Affidavit dated 12<sup>th</sup> April 2021 stated that the deceased was his father and was married to his mother and that he is the fourth born. That on or about October 2017, police officers from Kikuyu CIC arrested his mother on the behest of the Applicant and on allegations that she had applied for succession matter being Nairobi High Court Succession Cause No. 1633 of 2015 using forged documents purporting them to be from the Chief; that the said succession cause is said to have been applied by him and that he has never applied for the same and that he suspects it is the Applicant who filed it to have his mother arrested and charged thereby causing her health to deteriorate further; that the Applicant has filed numerous cases against his family and that the court put a halt to the practice of her abusing the court and his process.

The 2<sup>nd</sup> Respondent through her Replying Affidavit dated 12<sup>th</sup> April, 2021 stated that she was married to the deceased and that as a family they have never applied for any succession cause; that they became aware of this alleged succession cause when she was arrested on or about October 2017 on the behest of the Applicant herein and charged at Kikuyu Law Courts Case Number 900/2017; that the Applicant alleged that she had forged the chief's letter which was used in the cause; that she has strong suspicion that the Applicant filed this cause to advance her evil agenda against her and her family.

The 2<sup>nd</sup> Respondent further states that in the year 2013 the Applicant served her with papers for a case she had filled at Nairobi High Court being Case No. 22 of 2013 formerly and now ELC No. 1025 of 2013 seeking the court to recognize her as the wife of the deceased and that she be restrained from dealing with his property; that in the said application one of the documents she used to file the suit was a limited letters of grant dated 14<sup>th</sup> August, 2013 issued in Nairobi Succession Cause No. 1988/13 by Hon. Justice W. Musyoka; that she replied to the said application and when the matter came up for hearing, the Applicant sensing defeat withdrew the suit; that as they were preparing for hearing in Nairobi ELC suit No. 1025 of 2013 the Applicant advancing her evil schemes filed another case being Thika High Court ELC No. 83 of 2018 on the 9<sup>th</sup> March, 2018 seeking similar orders and that the matter is yet to be heard and adjudicated on. The 2<sup>nd</sup> Respondent contents that the Applicant has filed this instant Application which is an abuse of court and its process.

On 26<sup>th</sup> April, 2021 a further Affidavit in opposition to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents Replying Affidavit was made by the Applicant stating that the criminal proceedings against the 2<sup>nd</sup> Respondent are separate from the current succession proceedings and that the 2 files should be treated separately; that it is surprising that the 1<sup>st</sup> Respondent who is the sole petitioner in this cause has denied having filed the current succession cause; that by his denial the 1<sup>st</sup> Respondent has conceded to her application and the same should therefore be allowed as prayed; that it is surprising to notice that while the 1<sup>st</sup> Respondent denies knowledge of this succession cause, the 2<sup>nd</sup> Respondent deposed that she knew about the succession cause in the year 2017 yet none of them has taken any legal steps to cleanse their integrity if at all they didn't file the succession cause. She states that in reply to paragraphs 8,9,10,11,12,13,14 and 15 of the Replying Affidavit sworn by the 2<sup>nd</sup> Respondent the same are misconceived and have no relationship with the issues in dispute and should be disregarded by this Honourable court; that from the contents of the Replying Affidavits sworn by the Respondents it is not denied that she was one of the wives of the deceased and that she had children with the deceased and that in view of the forgoing this honorable court should proceed and grant the prayers sought.

Directions were given by this court that this matter be disposed of by way of written submissions. On 3<sup>rd</sup> June, 2021 the Applicant filed her submissions in which she has raised 2 issues, namely:

1. Whether the Applicant is entitled to the orders sought in the Summons dated 7/10/2020.
2. Who bears the cost of this Application?

In addressing the first issue she stated that it was evident that she is a former wife to the deceased having cohabited with the deceased for a period of over 25 years within which they sired 4 children; that this fact has not been disputed from the contents of the Replying Affidavit sworn by the Respondents; that in light of the forgoing this makes the Respondents' act of administering the Estate of the deceased upon issuance of the Grant of Letters of Administration intestate, fraudulent since the Applicant who is a bonafide dependent and beneficiary was excluded from participating in the succession proceedings.

She further submits that it was surprising when the 1<sup>st</sup> Respondent denied knowledge of this succession cause and the 2<sup>nd</sup> Respondent alleges

only having known about this cause in 2017 yet none of them has taken any legal steps to deal with the alleged denials; that the 1<sup>st</sup> Respondent has in effect conceded the application herein by denying having filed the current succession proceedings hence the same should be allowed as prayed.

She contends that the allegations by the Respondents that the Applicant is attempting to achieve a malicious agenda against the Respondents is clearly misconceived since the criminal proceedings against the 2<sup>nd</sup> Respondent are separate from the current succession proceedings hence the 2 files should be treated as separate and the said allegations be disregarded by this honorable court; that based on the above-mentioned facts it is conceivable that the Grant of Letters of Administration was obtained irregularly, unprocedurally and fraudulently by material non-disclosure and misrepresentation with a view of disinheriting the Applicant and her children, thus she urges this honorable court to grant the orders sought in her application.

On the second issue she submitted that it is trite law that costs follow the events and that this being a succession dispute in which application has been necessitated to by the actions of the Respondents and that they be ordered to pay the costs.

The Respondents filed their submissions on 22<sup>nd</sup> June, 2021. They have argued that they they did not file this succession cause and as such would not offer any meaningful response to the Applicant's Application; that in their Replying Affidavit they state that this cause is a subject to a criminal case in Kikuyu being Criminal Case Number 900/17 which is ongoing and as such any proceedings relating to this cause should be halted pending its outcome. They further contend that they believe this application is part of the Applicant's scheme to frustrate the Respondents by filing numerous court cases as shown in the annexures in the Replying Affidavit and criminal cases instigated by her and that this is a clear case of abuse of the court process and the Respondents seek the court to stop the Applicant from continuing this practice. They seek to have this application dismissed.

### **Analysis and Determination**

From the outset it is clear to me that there is the issue of who the dependants and beneficiaries of the deceased are. There is also the issue of who should be appointed as administrators of deceased's estate. The Applicant claims to that she is one of the wives of the deceased together with the 2<sup>nd</sup> Respondent. She claims to have had children with the deceased. She claims to have been left out in filing this Succession Cause and left out of the estate's administration. On the other hand the Respondents deny knowledge of this Succession Cause claiming that they did not file it and accusing the Applicant of having filed it in order to subvert justice. To support her claim that she was one of the wives of the deceased, the Applicant has, in her Supporting Affidavit, stated that she was a former wife to the deceased having married him under customary law in the year 1985 and that dowry was paid in that respect. She claims to have cohabited with the deceased in Dagoretti and sired children with him. The only evidence given by the Applicant in support of this claim is an annexed Eulogy which is not legible due to poor copying.

The Law of Succession Act under section 29(a) provides defines who the dependants are as follows:

*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.*

In the case of **Njoki –vs- Mathara and Others Civil Appeal No. 71 of 1989 (UR), Kneller J. A** stated that: -

- a) The onus of proving a customary marriage is on the party who claims it.*
- b) The standard of proof is the usual one for civil action, balance of probabilities.*
- c) Evidence as to the formalities required for a customary law marriage must be proved to the above standard.*

It seems to me that the Applicant took the matter of providing evidence of her marriage to the deceased rather casually. It could also be poor legal advice. However, I note that the Respondents in their Replying Affidavit and submissions have not denied that the Applicant was married to the deceased and had children with her. In this aspect therefore it is not contested that the deceased died polygamous.

The Applicant is not the only one acting in a casual manner in respect to this matter. The Respondents have denied knowledge of this Succession Cause and denied filing it claiming that it is the Applicant who filed it. I have read the file. I note that the 1<sup>st</sup> Respondent filed this Succession Cause, at least from what appears on the face of the court records. There is Petition for Letters of Administration filed on 3<sup>rd</sup> July 2015 as per the appended court stamp. It is the Petition of Patrick Kihara Kung'u the 1<sup>st</sup> Respondent. In support of that Petition is a Supporting Affidavit bearing a court stamp of the same date as the Petition. The Supporting Affidavit is sworn by the 1<sup>st</sup> Respondent. It names six (6) people surviving the deceased including the two respondents. Two Sureties, Stephen Kimani Mumbi and Munyui Kinuthia filed a joint Affidavit of Justification of Proposed Sureties. There is also Guarantee by Personal Sureties signed by the two sureties. There is a consent signed by the other five (5) beneficiaries to the effect that they consent to the 1<sup>st</sup> Respondent petitioning for Grant of Letters of Administration. A death certificate of the deceased and a letter introducing the family of the deceased as the Respondents and the other children of the 2<sup>nd</sup> Respondent as the beneficiaries and the 1<sup>st</sup> Respondent as the proposed administrator are also attached as well as some title deeds.

Court file shows that the succession process took its course and on 23<sup>rd</sup> October 2015, the 1<sup>st</sup> Respondent was issued with a Grant of Letters of Administration Intestate. On 27<sup>th</sup> June 2019, the 1<sup>st</sup> Respondent was notified by the Court under Section 73 of the Law of Succession Act to seek confirmation of the grant failing which the court would revoke the grant. My reading of the court file does not indicate that any

application was made for confirmation of the grant.

The above are not the only problems bedeviling this file. On 29<sup>th</sup> July 2019, this court issued a Notice to the parties to the following effect:

***“The Honourable Justice Lady (sic) A. Onger: Notice having been given to the parties under Section 73 and 76 (d) of the Law of Succession Act (Cap. 160) and no action having been taken to apply for the confirmation of grant, this file is hereby closed.”***

No party brought this Notice to the attention of the court. I wonder if the parties were aware of it. This court inadvertently failed to see the Notice when I took over this matter on 10<sup>th</sup> March 2021. When parties appeared before me on that date, they were concerned about this application. This matter proceeded as though the file was open when in fact it had been closed and there are no proceedings to show that parties moved the court to open the file and admit this application.

My quick calculation shows that the file was closed after roughly 30 days after issuance of the Notice to the Administrator to apply for confirmation. My personal view on the matter is that it is rather drastic to close a file without concerted efforts to ensure the parties were notified by the court of the existence of a Notice to revoke the grant or close the file as the case may be. I cannot help wondering what became of the revocation of the grant if the administrator failed to apply for confirmation. Why was the file closed when the Notice talked of revocation of the grant? This is a succession matter. It involves properties forming the estate of the deceased. By closing the file without ensuring that parties are aware of the Notice would result in injustice in that the beneficiaries of the deceased would not benefit from the estate of the deceased. I feel that in the interest of substantive justice, a different approach ought to have been taken. I feel that all efforts ought to have been made to ensure that the parties were made aware of the Notice to close or revoke the grant. This may have been done since I was not handling this matter before 10<sup>th</sup> March 2021. But there is no record as to whether it had been done.

I have indicated in this ruling that both parties, Applicant and Respondents, bear the blame in the manner this matter has been handled. I note there is a pending Criminal matter against one of the Respondents. I also note that there are pending matters in the ELC Court involving some properties said to form part of the estate. Let the law takes its course in those matters. Of concern to this court in respect of this Succession Cause is that the 1<sup>st</sup> Respondent has not moved the court to confirm the Grant. The reason for this action or lack of action could be attributed to the denial by the Respondents that they did not apply for the Grant. The effect of this denial is an admission that the Grant issued herein was fraudulently obtained. By denying knowledge of the Grant, the Respondents are by extension denying the knowledge of the Petition, Supporting Affidavit, Guarantee by Personal Sureties and Affidavit of Justification as well as consents of all the beneficiaries named in those documents.

This court has inherent powers under Rule 73 of the Probate and Administration Rules to make ***such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court (emphasis added)***. I am invoking this provision to correct the situation in this file. Before pronouncing myself on the issue of the grant, I hereby invoke the above provisions to *suo moto* order this file opened for the ends of justice to be met. This will allow me to proceed with this application and determine the same.

Turning on the issue of the Grant issued herein, I have stated above that the same has been denied by the Respondents. Both Respondents deny ever moving this court to issue the 1<sup>st</sup> Respondent with the Grant. I am not able to understand why this should be the case given the documents filed in court. I now turn to Section 76 of the Law of Succession Act which 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).***

It is clear to me that the 1<sup>st</sup> Respondent has failed to apply for confirmation of the grant and that this grant has become useless and

inoperative through subsequent circumstances. The Respondents deny moving the court to seek a grant of representation. For whatever reasons for their actions, it is clear to me that the grant herein has become useless and inoperative. It will serve no purpose and given the issues now being raised by the Applicant, it is in order for me to order that the Grant issued on 23<sup>rd</sup> October 2015 stands revoked.

Parties are at liberty to move the court in an appropriate manner to ensure that the issues in the estate of the deceased are resolved in accordance with the law for ends of justice to me met. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 23<sup>RD</sup> DAY OF NOVEMBER 2021.**

**S. N. MUTUKU**

**JUDGE**