



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO E035 OF 2021

GRACE MURUGI KARIITHI.....OBJECTOR/APPLICANT

VERSUS

GEORGE MUIGAI NJIHIA.....PETITIONER/1ST RESPONDENT

CHARITY LAVUSA ONGONDI.....PETITIONER/2ND RESPONDENT

RULING

1. The applicant filed a revocation of a grant dated 20th January 2021 and sought for orders *interlia*;

i. THAT this Honourable Court be pleased to stay execution of the Limited Grant of Administration “Ad Colligenda Bona” issued on 8 January, 2021 by Hon. D. Mosse.

ii. THAT the Limited Grant of Administration “Ad Colligenda Bona” issued to GEORGE MUIGAI NJIHIA and CHARITY LAVUSA ONG’ONDI on 8th January, 2021 be revoked and/or annulled.

iii. THAT this Honourable Court be pleased to order that the Petitioners / Respondents either by themselves, their agents, servants and/or employees be restrained from any dealings whatsoever with the ESTATE OF THE LATE DAVID GACHOKA NJIHIA (DECEASED) including acts of waste, collection of income from the going concern hotel business known as PARK TOWN HOTEL situated on that parcel of land known as NAKURU MUNICIPALITY BLOCK 336 registered between the Applicant and the deceased, sale, transfer, leasing and/or any adverse dealing with any part of the deceased’s estate.

iv. THAT pending the hearing and determination of this Summons, this Honourable Court be pleased to order all income collected from PARK TOWN HOTEL situated on that parcel of land known as NAKURU MUNICIPALITY BLOCK 2/336 be deposited in court forthwith.

v. THAT the Petitioners/ Respondents personally (not of the Estate) do pay costs of this application.

2. The application is premised on the grounds on the face of the record and the supporting affidavit of the applicant.

3. In her supporting affidavit the applicant deponed that the deceased died interstate on 25th December 2020 and was survived by her and her 3 children, hence she is the primary beneficiary of the estate of the deceased. The applicant deponed that the 1st petitioner/ respondent is the deceased brother but the 2nd petitioner/ respondent is a stranger to the estate of the deceased.

4. The applicant deponed that she was the only person recognized as deceased’s widow during the burial and according to the deceased’s NHIF member data summary, the 2nd respondent was neither in attendance nor recognized as part of the deceased’s family. It was further deponed that the limited grant of Administration “*ad Colligenda Bona*” was obtained fraudulently by the petitioners by making false statements and concealing material facts as she was not involved in the filing of the petition.

5. The applicant deponed that by virtue of being the legal wife of the deceased, she and her children are the highest-ranking beneficiaries of the estate of the deceased. The petitioners/respondents had no legal capacity to petition for limited grant of Administration “*ad Colligenda Bona*” without the applicant’s express consent and/or involvement. Therefore, the same was devoid of merit as it was anchored on unsubstantiated claims and supported by forged documents.

6. The applicant deponed that no evidence of marriage to the 2nd petitioner/respondent or parentage of the said Ryan Ong’ondi Gachoka was availed to support the assertion that they are the deceased’s wife and child respectively. The petitioners/ respondents are driven by malice and

their actions are geared towards disinheriting the applicant and her children who are the rightful beneficiaries of the estate of the deceased.

7. The applicant asserted that the 1st petitioner/respondent has already taken over the running of PARK TOWN HOTEL situated on that parcel of land known as Nakuru/Municipality Block 2/336 despite the fact that the said business is jointly owned and registered in the name of the deceased and the applicant. He has also taken away 3 motor vehicles Reg No. KBX 368X, KCG 400 Q and KBP 343L, two of them registered in the deceased's name and the other registered in the applicant's name.

8. Further the applicant deponed that motor vehicle registration No. KCG 400Q has not been fully paid and is jointly owned by the deceased and Kenjap Motors Ltd with monthly payments of Kshs. 100,000 due and owing by the estate of the deceased which the petitioners/respondents have no intention to honor hence the same is at risk of re-possession.

9. The applicant deponed that the petitioner's/respondents' actions offend the provisions of section 76 of the Law of Succession Act and as such it is in the interest of justice that this honorable court issues orders restraining the petitioners/respondents either by themselves, their agents, servants and/or employees from dealing with the estate of the deceased herein as the applicant and her children stand to suffer irreparable damage if the orders sought are not granted.

10. The 2nd petitioner/respondent filed a replying affidavit and averred that the application is fatally defective, incurable and an abuse of the court process and it ought to be dismissed with costs. She averred that the deceased was her husband and as at the time of the demise they lived together in the same house at freehold estate as shown in the chief's letter.

11. The 2nd petitioner averred that she is the one who took the deceased to the hospital and upon his demise he booked him in the morgue and was issued with a death notification with serial number 15107 dated 26th December 2020. The objector was not available when the deceased required medical assistance. It was averred that as the 2nd petitioner/respondent embarked on the burial arrangements, the deceased's body was sneaked out of the morgue and hurriedly buried in a place yet to be known to her and the 1st respondent.

12. The petitioner averred that the applicant perpetuated an illegality by mutilating, erasing, amending and/or editing the 2nd petitioners' names and details and the objector's names were inserted without the same being counter-signed nor an affidavit prepared in respect thereof. It was averred that at the time of his demise, the deceased had separated from the objector for almost 10 years, the objector had instituted a children's suit against the deceased being Nakuru CMCC Children Suit No.291 of 2012 between Grace Murugi Kariithi v David Gachoka Njihia wherein she sought for custody and maintenance orders against the deceased. This is a clear demonstration that the objector and the deceased had separated and as such the objector cannot be said to be the deceased's wife.

13. The petitioner/2nd respondent averred that the building in land known as Nakuru Municipality Block 2/336 is currently not in use. It was previously being operated by the deceased as a hotel and lodging which closed down due to Covid 19 pandemic, hence the objector's allegation is baseless. According to the valuer's report which confirmed that the hotel was not in operation, the objector is the one who gave the valuer instructions hence she is the one managing the said property and thus the objector should therefore comply with the court's orders issued on 22nd January 2021. The objector should deposit all the income she has been collecting in respect of the aforementioned property in court.

14. The petitioner/ 2nd respondent averred that if the applicant asserts that she is a wife of the deceased she should obtain a chief's letter from the location where she alleges to have lived with the deceased and she should not bribe her way to the petitioner's area chief and make him denounce his earlier letter. The objector/applicant should also be estopped from procuring a chief's letter 6 months after the demise of the deceased as this will be an afterthought meant to suit the circumstances of this case.

15. The petitioner/ 2nd respondent averred that the deceased stopped paying NHIF almost a year to his demise and that she is the one who was issued with the deceased death certificate which she retains to date. It was also averred that it is the deceased who paid for rent, food, and school fees for the minor Ryan Ong'ondi and all their other expenses and that the petitioner/ 2nd respondent and the deceased owned a joint business in Nakuru town which was their sole source of income, but it was vandalized and goods stolen and the petitioner/ 2nd respondent has reason to believe that the objector was involved in the said vandalism.

16. The petitioner/ 2nd respondent averred that she does not have in custody any of the deceased's motor vehicles. Motor vehicle registration No. KCG 400Q was repossessed by Kenjap Motors Limited and KBP 343L was taken away by the objector as it was registered in her names. It was averred that the ad Colligenda bona is thus not defective as alleged and neither was it sought by concealment of material facts. The objector is not a wife to the deceased herein as she has not established any evidence of marriage and hence she is undeserving of the orders sought. The petitioner/ 2nd respondent averred that she still reserves her right to institute and /or file for succession, thus the objector's application should be struck out with costs.

17. In her supplementary affidavit, the applicant denied all the allegations in the petitioner/ 2nd respondent replying affidavit and averred that the chief's letter is by no means proof of the 2nd respondent's marriage to the deceased and in any case the same was withdrawn by the chief as they misled him to believe that they were rightful beneficiaries of the deceased estate. The applicant averred that she was involved in the burial arrangements of the deceased. The petitioner/ 2nd respondent had misled the morgue attendants that she was the legal wife, upon realizing that she was not, they amended the notification accordingly.

18. It was averred that the deceased was accorded a decent send-off attended by all family members and the applicant was the only one recognized as the legal wife of the deceased. Whereas the applicant and the deceased had their own differences, they were still legally married at the time of death. They had not separated for 10 years as the last born minor was born in 2015, five years before the deceased demise.

19. It was averred that petitioner/ 2nd respondent knew that the applicant was the legal owner but still misrepresented facts. It is therefore in the interest of justice that the summons for revocation of grant be allowed.

20. Parties were directed to canvass the application by way of written submissions. The petitioners/ respondents did not file their submissions.

Applicant's written submissions.

21. The applicant placed reliance in the case of **Jamleck Maina Njoroge v Mary Wanjiru Mwangi [2015] eKLR** as endorsed by the case of **Re estate of Joseph Kilonzo Musyoka (deceased) [2018] eKLR** as well as section 76 of the Law of Succession Act and submitted that the respondents willfully and deliberately concealed material facts when applying for the limited grant of letters of administration. The respondents failed to disclose to the court that the deceased was survived by the applicant, his three children but deliberately lied to the court that the petitioner/ 2nd respondent was the deceased's wife. The respondent's lies begun with misleading the area chief of Bondeni location into issuing a letter in favour of the respondent as the deceased wife but upon conducting due diligence, the chief wrote a letter retracting his earlier letter and confirming that the applicant is indeed the widow of the deceased.

22. The applicant submitted that the respondents were well aware that she was the legal wife of the deceased and that the issues were born of the marriage between the applicant and the deceased and thus entitled to the estate of the deceased in that capacity. Dissolution of marriage is through a decree for divorce and/or separation and in the present circumstances none has been proffered by the respondents to substantiate the allegations that the applicant and the deceased were no longer husband and wife at the time of his death.

23. The applicant submitted that she participated fully in the planning, retrieving the body from the morgue and burying of the deceased and that the 2nd respondent was nowhere to be seen either at the planning stage or at the burial of the deceased. It was submitted that the respondents had no legal right to petition for the grant of letters of administration "*ad Colligenda bona*" as the 2nd respondent and her child are not dependent's within the meaning of s.29 of the Law of succession Act. The 2nd respondent's assertion of being a wife to the deceased are not backed by evidence as the documents relied upon do not disclose any form of relationship between the 2nd respondent and the deceased herein.

24. The applicant further submitted that the 2nd respondent has failed to demonstrate that the deceased paid any school fees for the minor in question. The receipts adduced bear the name of the deceased and nothing shows that the payments were made in the benefit of the 2nd respondent or the minor in question. The foregoing demonstrates that the petitioner/ 2nd respondent is an opportunist seeking to benefit from a person she had no relationship with whatsoever.

25. The petitioner/ 2nd respondent also failed to demonstrate the relationship between the deceased and her child Ryan Ong'ondi. The birth certificate didn't have the name of the deceased as that of the minor's father. The applicant placed reliance in the case of **Re estate of the late Symon Kipngeny Koima (deceased) [2021] eKLR** and submitted that the petitioner/ 2nd respondent is a stranger to the estate of the deceased and urged the court to hold that she lacked locus standi to petition this court for grant of letters of administration "*Ad Colligenda Bona*" of the deceased estate.

26. The applicant submitted further that the 1st respondent ranks lower in priority to the applicant by dint of being the deceased brother and he was legally required to notify and seek consent from the applicant before making the application. **See the case of Re Estate of George Muriithi Gitahi (deceased) [2019] eKLR.** Failure to obtain consent from the applicant and failure to include her in their application renders the limited grant issued to the respondents ripe for revocation as the conditions set out under s. 76 of the law of succession act has been satisfied.

27. Having demonstrated that the said grant was obtained unprocedurally and illegally, it is trite law that all consequent actions taken in line of the same are void ab initio including the assumption of control over park hotel. It is worth noting that the said hotel is registered in the names of the applicant and the deceased and as such the applicant's rights supersede the 2nd respondent's. It is in the interest of justice that this honourable court issues preservative orders to ensure that the estate of the deceased is not wasted to the detriment of the beneficiaries of the deceased estate.

28. The applicant placed reliance in the case of **Re Simon Kimendero (deceased) [2020] eKLR** and submitted that she has met the conditions for grant of preservative orders laid therein being that she has an arguable case, the property is the estate property and that the property is likely to be dissipated or wasted away. Having satisfied the said elements, the applicant submitted that she is deserving of the orders for preservation of that parcel of land known as Nakuru Municipality Block 2/336 and the hotel business thereon namely Park Town Hotel and urged this honourable court to so find and hold.

Issues for determination

29. I have considered the Application, the rival affidavits as well as the Applicant's submissions. The only issue for determination is whether the letters of colligenda bona issued to the petitioners should be revoked. As a general principle of the law of succession, grants may only be made with notice under section 67 of the Law of Succession Act which provides as follows:

"67. Notice of application for grant

1. No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired."

30. This position has been reiterated in a litany of cases including *IN RE ESTATE OF MARY SYOKWIA KYALILI [2015] eKLR AND MARY WAITHERA V ANN NDEGWA & ANOTHER [2014] eKLR*. However, where special circumstances exist, the Law of Succession Act allows application for a limited grant of letters of administration ad colligenda bona for purposes of collecting and preservation of the estate. The same is entrenched under rule 36 of the Probate and Administration rules which provides that:

“where owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the court for the making of a grant of administration ad colligenda bona defunct of the estate of the deceased.”

31. The Petitioners/ respondents application for Letters of Grant Colligenda Bona was within the provisions of section 67(1) of the Law of Succession but for purposes described under rule 36(1). The Petitioners/ respondents are interested in the estate of the deceased specifically for the collection and preservation of the same without powers to dispose or distributing the estate.

32. The supporting documents used by the respondents to apply for the said limited grant however were disputable namely the letter from the chief which was later cancelled by the same chief vide his letter dated 27th January 2021. In it the chief reckoned that he was misled by the respondents into believing that she was the deceased wife.

33. More importantly there are supporting documents which in my view *prima facie* links the respondent to the deceased. These are the said letter of the chief Afraha sub location, dated 27th January 2021, the certificate of registration of PARK TOWN HOTEL dated 17th February 2011 which indicates the deceased name and the applicant, the log book for motor vehicle registration KBP 343L, and the NHIF details attached to the said supporting affidavits.

34. The above documents of course in the course of time may be challenged but for now they appear on the face of it to portray a relationship between the applicant and the deceased. The issue of whether their marriage was estranged is something to be determined at an appropriate stage.

35. The court also takes judicial notice of the pecuniary value of the estate which in this case runs probably beyond the kshs. 20 million mark which was way beyond the lower court’s jurisdiction. On this score alone the lower court had no jurisdiction to deal with the same and ought to have declined and refer the same to this court.

36. All is not lost for any of the parties herein. They have all the capacity, room and time to stake a claim in the estate. For now, however I find that the limited grant issued to the applicant was erroneous and ought to be set aside with all the attendant consequences.

37. As regards the preservation of the estate this court is well aware that the same ought to be maintained and preserve and it should not be in any way disposed off or wasted and the court in terms of **Rule 73 of the Probate rules** must ensure that the estate is managed in the intervening period.

38. In the premises it is hereby ordered that;

a) The limited grant of letters of administration ad colligenda bona issued to George Muigai Njihia and Charity Lavusa Ong’ondi on 8th January 2021 are hereby revoked.

b) Grace Murugi Kariithi, the applicant is hereby granted limited letters of administration ad colligenda bona, in the deceased estate herein, limited only for 45 days, in which she must apply for the full grant of the estate and in default, the same shall lapse automatically and any party be at liberty to apply.

c) The respondents be at liberty to be enjoined in the substantive cause, if need be, pursuant to the applicant complying with order (b) above.

d) The applicant is hereby granted liberty to manage use and preserve the PARK TOWN HOTEL business situate at Nakuru Municipality Block 2/336 but not to lease, sale or transfer or in any way deal with it adversely pending the formal application for a full grant and final determination of the estate herein.

e) Each party shall bear their respective costs.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 16TH DAY OF DECEMBER 2021.

H K CHEMITEI.

JUDGE