



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 175 OF 2003

IN THE MATTER OF THE ESTATE OF SAMUEL THUKU KIARIE (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR THE REVOCATION AND/OR ANNULMENT OF GRANT

BETWEEN

JAMES MWAURA THUKU.....PETITIONER

AND

MARGARET NDUTA NDIRANGU.....1ST OBJECTOR

PRISCILLA WANJIKU THUKU.....2ND OBJECTOR

MARY WANGARI THUKU.....3RD OBJECTOR

VERSUS

FLORENCE WAITHIRA MWAURA.....RESPONDENT

RULING

[1] Before the Court for determination is the Notice of Motion dated **26 November 2018**. It was filed herein by the firm of **M/s Mukabane & Kagunza Advocates** on behalf of the Objectors, and is expressed to have been brought pursuant to the provisions of **Sections 3 and 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya, Sections 45, 47 and 76** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya; Rules 44(1), 49, 59 and 73** of the **Probate and Administration Rules**; as well as **Order 24 Rules 3, 4, 5 and 8** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010** for the following orders:

[a] Spent

[b] That the Court be pleased to substitute the Petitioner herein with **Florence Waithira Mwaura**, the Petitioner's legal representative in **Eldoret High Court P&A No. 7 of 2018**;

[c] That an order of temporary injunction do issue restraining and/or stopping the Respondent and/or her agents, assigns and/or servants from wasting, intermeddling, sub-dividing and/or in any other manner dealing with the estate of the deceased person herein to the detriment of the objectors and other lawful beneficiaries to the estate of the deceased herein, and more particularly **Land Parcel No. I.R 57123** or **I.R 1556/167** and **Land Parcel No. I.R No. 31448** or **I.R 6938/94**, pending hearing and determination of this cause;

[d] That the Objectors/Applicants herein be appointed as the Administrators of the estate of the **Samuel Kiarie Thuku** (deceased) and all the other lawful beneficiaries be listed and allowed to use portions of the **Land Parcel No. I.R 57123** or **I.R 1556/167** and **Land Parcel No. I.R No. 31448** or **I.R 6938/94** pending the hearing and determination of this cause;

[e] That pending the hearing and determination of this cause, the Respondent herein be compelled to give account of the proceeds of

the estate of the late **Samuel Thuku Kiarie** (deceased) from the date of the demise of the deceased to date;

[f] That the Grant of Letters of Administration Intestate issued herein and confirmed on **11 December 2006** be revoked and/or annulled;

[g] That costs of this application be provided for.

[2] The application was premised on the grounds that the Petitioner herein, **James Mwaura Thuku**, has since died and therefore needs to be replaced by the Respondent, who is his legal representative, as required by law. It was further averred that the Respondent is intermeddling with the deceased's estate by disposing of **Land Parcel No. I.R 57123 or I.R 1556/167** and **Land Parcel No. I.R No. 31448 or I.R 6938/94** to strangers to the detriment of the Objectors and all the beneficiaries of the deceased, and therefore needs to be restrained by an order of the Court.

[3] It was the contention of the Objectors that the Grant of Letters of Administration and Certificate of Confirmation were obtained fraudulently by concealment from the Court of the existence of the true beneficiaries and properties of the deceased, with the intention of disinheriting the Objectors and other lawful beneficiaries; and that the consent to the making of the Grant was not obtained from the beneficiaries of equal rank as by law required. Hence, it was thus the assertion of the Applicants that unless the Grant is revoked and/or annulled, the Respondent will proceed to distribute the assets of the deceased to the detriment of the Objectors and thereby prejudice the deceased's lawful beneficiaries.

[4] In response to the application, the Respondent relied on her own affidavit sworn on **21 December 2018** and conceded that the Petitioner was her husband; and that he has since died. She exhibited a copy of the Certificate of Death as **Annexure FWM 1** to her Replying Affidavit to prove that the Petitioner died on **24 December 2017**. She further deposed that the deceased Petitioner followed the correct procedure in obtaining Grant of Letters of Administration to administer the estate of the late **Samuel Thuku Kiarie**; which process was undertaken with the knowledge and participation of all the beneficiaries of the deceased, including the Objectors. She further deposed that, upon the Grant being confirmed on **15 December 2006**, the deceased Petitioner distributed the estate according to the law and the parcels of land distributed to him, to wit, **Parcel Numbers I.R 57123 or I.R 1556/167 and I.R 6938/94** were transferred to him by way of transmission and that he had been utilizing the properties as his ever since. She added that during the lifetime of the deceased Petitioner, no objection or issue was raised by the Objectors or the other beneficiaries in connection with the two parcels of land aforementioned.

[5] It was further the contention of the Respondent that, although the Objectors alleged that some of the assets of the deceased had been omitted from the List of Assets as set out in Form P&A 5, they failed to give the particulars of such property to warrant the issuance of the orders sought by them. She also pointed out that the beneficiaries listed in Paragraph 5 of the Supporting Affidavit are the same beneficiaries listed by the deceased Petitioner in the Petition; and added that, having given consent to the Petition and to the application for confirmation of grant and the mode of distribution, the Objectors cannot be heard to challenge the Grant close to 12 years after it was confirmed.

[6] On the allegations of intermeddling, the Respondent contended that the same ought to have been made during the lifetime of the Petitioner. She added that, in any event, the administration of the estate of the deceased **Samuel Thuku Kiarie** having been finalized and the estate distributed, the question of intermeddling would not arise. She filed a Further Affidavit on **18 March 2019** contending that, the deceased Petitioner, **Samuel Mwaura Thuku**, having lawfully obtained a Grant of Letters of Administration, was registered as the owner of land parcel number **IR/57123 or 1556/167**; and that, it was thereafter subdivided and sold to third parties, comprising of over 60 families. The Respondent annexed photographs to her Further Affidavit to prove that substantial developments have been made on the suit property by third parties and therefore that the orders sought are untenable. She accordingly urged the Court to dismiss the application with costs.

[7] The Respondent also relied on the Replying Affidavit filed by **Damaris Wamboi Thuku**, her sister in law and one of the beneficiaries of the estate of the deceased, in which it was asserted that following the demise of their father, **Samuel Thuku Kiarie**, they sat down as a family with their mother, **Esther Michere**, and all her siblings, including the Objectors; and agreed that the properties that are the subject of this dispute, namely **I.R 57123 or IR 1556/167 and I.R 31448 and I.R 6938/94**, which were the only assets left behind by the deceased, be given to the Petitioner, **James Mwaura Thuku**; who was accordingly authorized to apply for Grant of Letters of Administration in respect of the estate of their late father.

[8] It was further averred by **Damaris Wamboi Thuku** that the deceased Petitioner sought and obtained the consent of all the beneficiaries, not only before applying for grant but also before confirmation of grant. She confirmed that the deceased Petitioner had been utilizing the two properties before his death and that all the beneficiaries were all along fully aware of this fact. She added that it was therefore not true for the Objectors to contend, as they have done herein, that they only got to know of the transmission recently.

[9] The application was urged by way of written submissions, pursuant to the directions given herein on **25 February 2019**. In the Applicants' written submissions dated **30 May 2019**, the Court was urged to find that the deceased Petitioner and the Respondent had jointly intermeddled with the estate of the deceased **Samuel Thuku Kiarie** by secretly selling land belonging to the estate. According to Counsel, the Applicants have sufficiently demonstrated that Grant of Letters of Administration Intestate to the estate of the deceased, **Samuel Thuku Kiarie**, was obtained fraudulently by **James Mwaura Thuku**, and therefore ought to be annulled to pave way for the appointment of the Applicants as co-administrators with the Respondent. Counsel relied on the provisions of **Sections 45, 47 and 56(1)(b)** of the **Law of Succession Act** and the case of **Esther Wanjiku Machatha vs. Timothy Gitura & 4 Others** [2015] eKLR to support the foregoing arguments.

[10] In support of the Applicants' prayer for accounts, Counsel submitted that if indeed the Respondent and her deceased husband, the Petitioner, had not mismanaged the estate, they would have no difficulties rendering accounts to the Court with a view of ascertaining what is available for distribution. He cited **Sections 76(d)(ii) and 80(2)** of the **Law of Succession Act** for the proposition that administrators are bound, in law, to show how monies collected from the estate of the deceased have been utilized. He therefore postulated that the only reason why the Respondent is opposed to the prayer for accounts is to cover up for the Petitioner's fraudulent activities. Thus, Counsel urged the Court to allow the application and grant the orders asked for by the Applicants.

[11] On behalf of the Respondent, **Ms. Odwa** relied on her written submissions filed herein on **14 June 2019**. She proposed two issues for determination, namely:

[a] Whether or not this Court has power to order substitution of the Petitioner with **Florence Waithira Mwaura**, the Petitioner's legal representative as mandated in **Eldoret High Court Probate and Administration Cause No. 7 of 2018**; and,

[b] Whether or not the Objectors have demonstrated sufficient grounds to warrant revocation of the Grant of Letters of Administration issued to **James Mwaura Thuku**.

[12] In respect of the first issue, namely, substitution, Counsel for the Respondent took the position that since the **Law of Succession Act** does not expressly provide for substitution of deceased personal representatives, the only option would be to fall back on **Section 81** of the Act, which provides for vesting of the powers and duties of personal representatives in the surviving administrators, if any. On that account, Counsel urged the Court to dismiss, not only the prayer for substitution but also the prayer for accounts as the prayers are, in her view, alien to law.

[13] As regards the second issue, namely revocation, Counsel for the Respondent made reference to **Section 76** of the **Law of Succession Act** as the first port of call. In her submission, it was incumbent upon the Applicants to satisfy the Court as to the existence of any or all of the grounds for revocation set out in the above-mentioned provision. She then proceeded to posit that the Grant was obtained lawfully by setting out the series of actions taken by the Petitioner in compliance with the applicable law; including the filing of consent and gazettelement of the cause. According to **Ms. Odwa**, allegations of forgery and fraud were not proved, and therefore ought to be dismissed. She relied on **Augustine Johnstone Moi Kirigia vs. Catherine Muthoni Isumali Kirimi** [2017] eKLR for the proposition that fraud is a serious allegation which must be satisfactorily proved.

[14] Lastly, Counsel for the Respondent submitted that, the late **James Mwaura Thuku**, having lawfully obtained Grant of Letters of Administration Intestate to administer the estate of the deceased, **Samuel Thuku**, cannot be accused of intermeddling for lawfully discharging his duties. She added that, as it is, the Respondent risks being sued by third parties in her capacity as the administrator of the estate of **James Mwaura Thuku**, on the basis of the transactions that were lawfully done by **James Mwaura Thuku** during his lifetime. Thus, Counsel urged for the dismissal of the application and proposed that all the issues which were raised for the first time in the Applicant's written submissions be ignored, in line with the principle in **Daniel Toroitich Arap Moi & Another vs. Mwangi Stephen Muriithi & Another** [2014] KLR that submissions cannot take the place of evidence.

[15] A brief background of this matter would help put the instant application in perspective. The Petition for Grant of Letters of Administration Intestate in respect of the estate of the deceased, **Samuel Thuku**, was filed herein on **5 August 2003** by one of his sons, **James Mwaura Thuku**; and in the Affidavit in Support of Petition, Form P&A 5, it was averred that the deceased was survived by his widow, **Esther Michere Thuku**, and 7 sons and daughters, who include the three Applicants. All indications are that consent was obtained from each of them by the Petitioner. The matter was thereafter processed in accordance with the law and the Grant of Letters of Administration Intestate issued on **1 December 2005**. The Grant was subsequently confirmed and a Certificate of Confirmation issued dated **15 December 2006**, whereby the two assets comprising the estate, namely land title **No. I.R.57123** (or I.R. 1556/167) and **No. I.R. 31448** (or I.R. 6938/94) were given to the Petitioner, **James Mwaura Thuku**. On that basis, title in respect of the assets was transferred by way of transmission and vested in the Petitioner.

[16] There is no dispute that the Petitioner, **James Mwaura Thuku**, died on **24 December 2017**. A Certificate of Death in that regard was annexed to the Supporting Affidavit and marked **Annexure MNE 3**. As far as is discernible from the court record, the Petitioner had not complied with the requirements of **Section 83** of the **Law of Succession Act** as of the date of his death. In the meantime, the Respondent, as the widow of the Petitioner, **James Mwaura Thuku**, filed **Eldoret High Court Succession Cause No. 7 of 2018**, petitioning the Court for Grant of Letters of Administration Intestate in respect of the estate of the deceased Petitioner. Soon after the said Grant was issued, the Applicants filed the instant application, seeking to have a share in the estate of their deceased father.

[17] Hence, quite apart from defending the deceased Petitioner in the manner in which he administered the estate of **Samuel Thuku Kiarie**, the Respondent averred that it was agreed by the family of the deceased that his entire estate be devolved to her husband, **James Mwaura Thuku**. She further contended that, as the administrator, **James Mwaura Thuku**, had finalized the transmission process well before he died and, therefore, that nothing remains of the estate to be administered. She added that the Applicants have all along been aware of this fact and have never raised any objection; and that everything to do with the administration of the estate of **Samuel Thuku Kiarie** was done openly by **James Mwaura Thuku**. In this assertion, the Respondent has the support of her sister in law and daughter to the deceased, **Damaris Wamboi Thuku**.

[18] Thus, having given careful thought to the application, the averments set out in the pertinent affidavits and the written submissions filed herein, I would agree with Counsel for the Respondent that the key issues for determination are:

[a] Whether it is tenable to have the Respondent come on board herein as an administrator in place of her deceased husband, **James Mwaura Thuku**;

[b] Whether sufficient cause has been shown for the revocation of the Grant issued to the deceased, **James Mwaura Thuku**.

[19] The answers to the foregoing issues will determine whether or not the Applicant and/or the Respondent should be appointed as co-administrators; whether the Respondent ought to furnish accounts on behalf of her deceased husband; whether there should be a temporary injunction to preserve the estate, and what orders ought to be made as to costs.

[20] As rightly pointed out by Counsel for the Respondent, the **Law of Succession Act** does not expressly provide for substitution of deceased administrators. What is envisaged under **Section 81** of the Act is that, in the event of the death of one or more of joint administrators where there are more than one administrator, the surviving administrator or administrators would then have the mandate, by

dint of **Section 81** of the **Law of Succession Act**, to continue with their duties to completion without the need to replace the deceased ones. That Section states thus:

“Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executor or administrators shall become vested in the survivors or survivor of them...”

[21] I note that Counsel for the Applicants relied on **Alice Muthoni Mugo alias Muthoni Paul vs. Grace Waruguru Njagi** (sued as the administrator of the estate of the late **Nelson Njagi Mugo**, Deceased) wherein **Hon. Limo, J.** held thus:

“...I am not persuaded by the position taken that there is no provision under the Law of Succession allowing substitution of a deceased administrator. An administrator can be substituted at any stage upon his/her demise. I also add that substitution does not take away any obligation by an appointed administrator to account for the estate and the beneficiaries...”

[22] The decision in the **Alice Muthoni Mugo Case** aforementioned, was anchored on the provisions of **Article 159(2)(d)** of the **Constitution**, **Section 47** of the **Law of Succession Act**, and **Rule 73** of the **Probate and Administration Rules**, which recognize the inherent powers of the Court and give it powers to determine any dispute under the Act and to pronounce such decrees and make such orders as may be just and expedient without undue regard to procedural technicalities. However, there is, on the other hand, the school of thought that champions the opposite view. Thus, in the matter of the estate of **Mwangi Mugwe alias Elieza Ngware (deceased)** [2003] eKLR, **Hon. Khamoni, J.** took the position that:

“...the operative word is “substitution”. The Law of Succession Act has no provisions talking about substitution of a deceased single administrator...In the circumstances therefore, it is my considered view that the proper provisions of the law to apply is section 76(e) of the Law of Succession Act and Rule 44 of the Probate and Administration Rules whereby the Applicant would apply for revocation or annulment of a grant on the ground “that the grant has become useless and inoperative through subsequent circumstances.” The Applicant would proceed to put a prayer in the same application that a new grant be made to him and could as well add a further prayer, if need be, for confirmation of the new grant. The application, should, of course, be supported by consent from adult beneficiaries in the estate of the first deceased person, the second deceased person being the deceased administrator.”

[23] In the same line of thought, **Hon. Musyoka J.** held as follows in **Re Estate of George Ragui Karanja (Deceased)** [2016] eKLR:

The Law of Succession Act does not expressly provide for substitution of personal representatives who die in office, particularly in cases where the estate is left without one. The closest provision is section 81 of the Act, which provides for vesting of the powers and duties of personal representatives in the survivor or survivors of a dead personal representative. The provision provides as follows –

‘Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executor or administrators shall become vested in the survivors or survivor of them:

Provided that, where there has been a grant of letters of administration which involve any continuing trust a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him.’

It would appear to me that once all the holders of a grant die, section 81 of the Act would be of no application. Indeed, the said grant becomes useless and inoperative, and liable to revocation under section 76(e) of the Law of Succession Act, to pave way for appointment of new administrators. The appointment of fresh administrators to take the place of the previous ones following their death is subject to the provisions of sections 51 through to section 66 of the Act.”

[24] The latter position appears to be the position that has the support of the Court of Appeal. For instance, in the case of **Florence Okutu Nandwa & Another vs. John Atemba Kojwa**, Kisumu Civil Appeal No. 306 of 1998, it was held that:

“A grant of representation is made in *personam*. It is specific to the person appointed. It is not transferable to another person. It cannot therefore be transferred from one person to another. The issue of substitution of an administrator with another person should not arise. Where the holder of a grant dies, the grant made to him becomes useless and inoperative, and the grant exists for the purpose only of being revoked. Such grant is revocable under section 76 of the Law of Succession Act. Upon its revocation, a fresh application for grant should be made in the usual way, following procedures laid down in the Law of Succession Act and the Probate and Administration (Rules)...”

[25] Section 76 of the Law of Succession Act, on the other hand, provides that:

"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 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 has ordered or allowed; 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 material particular; or
- (e) That the grant has become useless and inoperative through subsequent circumstances."

[26] In the light of the foregoing, it is manifest that the Grant of Letters of Administration Intestate issued to the late **James Mwaura Thuku** on **1 December 2005** has become inoperative by reason of his death for purposes of **Section 76(e)** of the **Law of Succession Act**, and therefore lends itself to revocation in accordance with that provision. It follows then that the application that he be substituted by the Respondent simply for the reason that she is his personal representative is untenable. Indeed, it would be absurd that the Respondent would stand in priority to the Applicants for purposes of the administration of the estate of their deceased father.

[27] In the light of the foregoing, I find it superfluous to consider the other grounds proffered by the Applicants in support of their application for revocation. In any case, an allegation such as fraud, is an allegation that targets a deceased person, and cannot therefore be validly raised against the Respondent. In the same vein, the Applicant's prayer for accounts is untenable, the administrator on whom the obligation to account was placed having died. Nevertheless, there is no gainsaying that the applicants have a genuine grievance; and that, for what it is worth, they may be intent on pursuing their grievance further. Accordingly, the justice of the case would require that the suit properties be preserved from further dissipation pending such action, if at all.

[28] In the result, I am satisfied that the Applicants have made out a good case for revocation of the Grant of Letters of Administration Intestate, issued herein on **1 December 2005** to their deceased brother, **James Mwaura Thuku**. Accordingly, I would partially allow the application dated **26 November 2018** and grant orders in the following terms:

[a] That the Grant of Letters of Administration to the estate of, deceased, made to the Respondent herein on **1 December 2005** be and is hereby revoked.

[b] That Prayers 4 and 5 of the Summons for Revocation dated **26 November 2018**, seeking the appointment of the Applicants as administrators in place of **James Mwaura Thuku**, and accounts, be and is hereby declined.

[c] That a temporary injunction be and is hereby issued restraining any further disposal or damage of the subject assets in terms of Prayer 3 of the application dated **26 November 2018** pending such action as the applicants may deem fit; on condition that such action, if any, be taken within one month from the date hereof, failing which this order of temporary injunction will automatically lapse;

[d] That the costs of the application be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF APRIL 2020

OLGA SEWE

JUDGE