



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 3189 OF 2014

IN THE MATTER OF THE ESTATE OF PETER MWAURA NJOROGE (DECEASED)

ESTHER NJOKI MUNGAI.....2ND PETITIONER/APPLICANT

VERSUS

NANCY WANJIRU NGATIA.....1ST PETITIONER/RESPONDENT

AND

ESTHER WAMBUI NJOROGE.....OBJECTOR/APPLICANT

RULING

1. The deceased Peter Mwaura Njoroge died intestate on 21st August 2013. On 21st February 2014 Nancy Wanjiru Ngatia and Esther Njoki Mungai (the 1st and 2nd petitioners, respectively) petitioned the Chief Magistrates Court at Thika for the grant of letters of administration intestate. They indicated that they were the two widows of the deceased. The other beneficiaries were Yvonne Njoki Njoroge and Julie Gathoni Njoroge (being the children of the 1st petitioner) and Sheila Nyambura Mwaura (being the child of the 2nd petitioner). A joint grant was issued to them on 9th June 2014. On 14th August 2015 the 1st petitioner applied for the confirmation of the grant. The application was heard and allowed on 2nd November 2015. A certificate of confirmation was issued. The entire estate was shared equally between her daughters Yvonne Njoki Njoroge and Julie Gathoni Njoroge.

2. The 2nd petitioner filed an application dated 30th December 2015 seeking the revocation of the grant. She complained that the 1st petitioner had applied for the confirmation of the grant without her knowledge and consent, and had in the process disinherited her and her daughter. This was because she had not provided for the 2nd petitioner or her daughter in the distribution. Reference had not been made to the 2nd petitioner and her daughter during the hearing of the application and the distribution of the estate and yet in paragraph 2 of the 1st petitioner's affidavit in support of the application she had deponed as follows:-

“2. THAT the deceased was survived by the following:-

(a) Nancy Wanjiru Ngatia – 1st wife

(b) Esther Njoki Mungai – 2nd wife

(c) Yvonne Njoki Njoroge – daughter

(d) Sheila Nyambura Mwaura – daughter

(e) Julie Gathoni Njoroge – daughter.”

3. The 2nd petitioner further stated that both her and the 1st petitioner were being represented by M/s Kamiro R.N.& Co. Advocates, and that there was no time she withdrew instructions.

4. The 1st petitioner's response was that she filed the application for the confirmation of the grant after the 2nd petitioner told her that she wanted nothing to do with the estate of the deceased. After she filed the application, she informed the 2nd petitioner who deliberately refused to attend and participate. She stated that she was the only wife of the deceased, and that her two daughters were the only children of the deceased; that Sheila Nyambura Mwaura was not the daughter of the deceased.
5. There is an affidavit of service filed by Peter Ngei Kimatu who stated that he received the application for confirmation and a hearing notice to serve on the 2nd petitioner. The 1st petitioner had given him the 2nd petitioner's telephone number. He called it and the 2nd petitioner answered. She was in Nairobi. He told her he had these documents for her. She replied that she would attend the hearing. The 2nd petitioner admits she was called. She, however, states that when she answered, the caller said he would call again. He did not. She was therefore not aware of the application or the hearing date.
6. The other issue was that both petitioners were being represented by M/s Kamiro R.N. & Co. Advocates. This is the firm that filed the application for confirmation. It is clear there was no reference in the application to the 2nd petitioner. After the application, the 1st petitioner withdrew instructions and decided to act in person. That meant that the 2nd petitioner was still being represented. There was no evidence of service to her Advocates.
7. Service is never effected by phone. It is either personal service, or a request be made for substituted service. Now that the 2nd petitioner states that the caller did not indicate why he was calling, and there is no rebuttal, the court cannot find that there was effective service.
8. The 1st petitioner cannot be heard to say that the 2nd petitioner was not the wife of the deceased, or that Sheila Nyambura Mwaura was not the daughter of the deceased. This is because when she and the 2nd petitioner filed the petition they declared that the deceased had left two widows (herself and the 2nd petitioner) and three daughters, who included Sheilla Nyambura Mwaura. She alone, filed the application for the confirmation. She swore therein that the 2nd petitioner was the deceased's widow, and that Sheila Nyambura Mwaura was the daughter of the deceased.
9. It is now trite that parties are bound by their pleadings (**I.E.B.C. and Another –v- Stephen Mutinda Mule & 3 Others [2014]eKLR**). Any evidence led by a party which does not support the averments in the pleadings, or which is at variance with the averments in his pleadings, goes to no issue and has to be rejected.
10. Now that the 1st petitioner swore in her affidavit in support of the application for confirmation that the 2nd petitioner was the deceased's widow and that Sheila Nyambura Mwaura was the deceased's daughter, why did she not provide for them when sharing the estate of the deceased?
11. Lastly, it is common ground that Sheila Nyambura Mwaura is an adult. She was not served, leave alone not being provided for. She was entitled to be heard during the distribution of her father's estate.
12. I find that the 2nd petitioner was not served. She was deliberately not involved in the application for the confirmation of the grant, yet she was a co-administrator of the estate of the deceased. On these facts, I find that the process of getting the grant to be confirmed was substantially defective and intended to disinherit both the 2nd petitioner and her daughter. The actions were fraudulent.
13. Esther Wambui Njoroge (objector/applicant) is the sister to the deceased. On 17th November 2014 she applied for the revocation of the joint grant that was issued to the 1st and 2nd petitioners on 9th June 2014. Her case was that the petition had been filed without reference to Yvonne Njoki Njoroge and Julie Gathoni Njoroge when the two were adults. Secondly, the 2nd petitioner was not the widow of the deceased and her child was not the child of the deceased; and that the 1st petitioner had deserted and abandoned the deceased in 2003; that, for all practical purposes the two were no-longer married by the time of the deceased's death. She was supported in her contention by her brother Samuel Kibunja Njoroge and her sister Monica Wanjiku Njoroge.
14. This application is easy to determine. Yvonne Njoki Njoroge and Julie Gathoni Njoroge are adults. They can apply for the revocation of the grant on their own. They have not permitted the objector to seek revocation on their behalf. The objector has no claim to the estate of the deceased. She stated that all that she was interested in was that the two daughters of the deceased should not be disinherited. They will not be disinherited.
15. I find that the objector's application is incompetent and misconceived, and will be struck out with costs.
16. I review and set aside the proceedings that led to the confirmation of grant on 2nd November 2015, and revoke and set aside the certificate of confirmation issued on 2nd November 2015.
17. I ask each petitioner to file and serve an application for the confirmation of the joint grant that was issued to them on 9th June 2014 with 21 days. Each will propose how the estate of the deceased should be distributed, now that the deceased had two widows (the two petitioners) and the three daughters. Upon service, each side can respond in 14 days. The matter shall be mentioned on 22nd June 2020 for directions on hearing.
18. The 1st petitioner shall pay costs of the application.

DATED and DELIVERED electronically, following consent of the parties, at NAIROBI this 30TH day of APRIL 2020

A.O. MUCHELULE

JUDGE