



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 2295 OF 2015

IN THE MATTER OF THE ESTATE OF JULIUS KAIRU KAMAU (DECEASED)

ESTHER NDUTA KAIRU.....APPLICANT

VERSUS

VERONICAH WANJUGU KIHARA.....1ST RESPONDENT

BETH WANGARI KAIRU.....2ND RESPONDENT

RULING

1. By way of Summons for Revocation or Annulment of Grant, dated 16th September, 2015 the Applicant seeks the revocation or annulment of the confirmed grant issued in respect of the Estate of the deceased to Veronichah Wanjugu Kihara and Beth Wangari Kairu vide Nairobi Succession Cause No. 1889 of 2011.
2. The application is premised on the grounds that, the grant was fraudulently obtained by the Respondents through concealment from court of material facts and making of false allegations. In her affidavit in support of the summons dated 16th September, 2015, she deposed that she was the second wife to the deceased, having been married under kikuyu customary law and lived with him as husband and wife with their three children on property known as Loc 16 Kamindi Wanyaga/598 until his demise on 26th January, 2011.
3. The Applicant averred that the Respondents herein filed a petition for letters of administration which were issued on 30th January 2012 and confirmed on 27th May, 2013 without her knowledge and consent. Further, she stated that the 1st Respondent proceeded to transfer the properties known as Loc 16/Kamindi Wanyaga/598 measuring approximately 0.61 ha and Loc 2/Kanderendu/617 measuring approximately 0.08 ha to herself. She averred that shares in Ndakaini which comprised of two other parcels of land (Loc 2 Kanderendu 1147 and 1161) were also transferred by the 1st Respondent to an individual known as Daniel Gitau Kimani.
4. She was apprehensive that the Respondents were intent on denying her children namely Mary Wanjiru Kairu, Josiah Kamau Kairu and Dennis Ndirangu Kairu and herself their entitlement to the estate of the deceased of which they were equally entitled as wife and children of the deceased. She produced birth certificates which indicated that the deceased was the father of her children and her national identity card stating that she had changed her name taking her late husband's name, the deceased herein. She urged the Court to revoke the grant and redistribute the properties in a fair and just manner.
5. In response to the summons for revocation of grant, the 1st Respondent filed a replying affidavit dated 22nd January 2016. She deposed that she was the only wife of the deceased and that the Applicant was a girlfriend to her late husband. She stated that the Applicant having never been married to the deceased, she can therefore not be a beneficiary to his estate. She asserted that she followed all legal procedures in obtaining the grant and urged the court to dismiss the summons for lack of merit.
6. Parties filed written submissions in respect of their positions. The Applicant reiterated the contents of her affidavit and submitted that she had met the threshold for revocation of grant as provided under **section 76 of the Law of Succession Act**. Further, that the lack of recognition by the Respondents of herself and her children was enough proof of concealment from court of material fact. She submitted that the inclusion of Loc 16/Kamindi Wanyaga/598 in the schedule of properties of the deceased by the Respondents and yet it was the Applicant's matrimonial property was sufficient evidence that the Respondents knew of their existence. She relied on the case of **Re Estate of Wahome Mwenje Ngonoro (deceased) [2016] eKLR** in support of her case.
7. The Respondents submitted that the Applicant had not established or proved the essentials of a Kikuyu customary marriage as alleged and the Applicant was therefore neither a wife nor a dependant within the meaning of **section 29 of the Law of Succession Act**. While asserting that the Applicant was never married to the deceased, they relied on the case of **Estate of D M M (deceased) [2018] eKLR**.

8. I have considered the pleadings, the submissions by counsel and the cases relied upon in support of the summons for revocation of grant. The issue that arises for determination is whether the application before the court passes muster on the threshold set by **section 76 of the Law of Succession Act**.

9. The grant sought to be revoked was granted to Veronichah Wanjugu Kihara and Beth Wangari Kairu and was confirmed on 27th May, 2013 vide Nairobi Succession Cause No. 1889 of 2011. The Applicant avers that the grant in question was obtained fraudulently through concealment of material facts. It is her case that the distribution of the estate of the deceased was arrived at secretly by the administrators without involving herself and her children who are beneficiaries of the estate of the deceased. The 1st Respondent refuted this allegation and claimed that the Applicant had no interest in the estate of the deceased as she was not a wife but a girlfriend of the deceased. That, all beneficiaries of the estate had been involved during the process of obtaining the grant. However, the 1st Respondent did not dispute allegations that the Applicant's children were sired by the deceased.

10. The question that arises is whether the Applicant and her children are entitled to a share of the deceased's estate. The Applicant produced three birth certificates of her children as proof that the deceased was their father. She also claimed to be living on the property known as Loc 16/Kamindi Wanyaga/598 which she claimed was her matrimonial property with the deceased but had since been transferred by the 1st Respondent to herself. It is the Applicant's case that until his demise, she lived with the deceased as husband and wife having been married under Kikuyu customary law.

11. The 1st Respondent's evidence was that she knew the Applicant as a girlfriend to the deceased having never been married to him. She asserted that the Applicant was not a beneficiary to his estate and was not entitled to any share of the deceased's property. She challenged the existence of a marriage which she claimed was non-existent, but she did not challenge the claims that the Applicant's children were all sired by the deceased.

12. **Section 29 of the Law of Succession Act** defines a dependant as

“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;

b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters; as were being maintained by the deceased immediately prior to his death; and

c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

It is noteworthy in this case, that the Applicant has not led evidence as to what ceremony took place to signify her marriage to the deceased, apart from stating that she was married to the deceased under Kikuyu customary law. She did not tender any evidence to support her assertion that a Kikuyu customary marriage ceremony, if any, took place. The indication that her identity card bears the name 'Kairu' is not sufficient evidence as proof of a marriage between herself and the deceased.

13. What follows then is for this court to consider whether the Applicant has made out a case to warrant the revocation of the grant as sought. The circumstances that can lead to the revocation of grant are set out in **section 76 of the Law of Succession Act** which provides thus:

“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;...”

14. **Rule 26(1) of the Probate and Administration Rules**, provides that letters of administration shall not be granted to any Applicant without notice to every other person entitled in the same degree as or in priority to the Applicant. From the evidence tendered, not all the children of the deceased who are dependants were considered in the process of obtaining the grant. It is worth noting that all the Applicant's children are minors within the meaning of **section 56 of the Law of Succession Act** and therefore lack the capacity for grant of representation to be made to them.

15. The effect of failure to comply with **rule 26 of the Probate and Administration Rules** was discussed in **Al Amin Abdulrehman Mohamed and another [2013] eKLR** where the Court held that the Law of Succession by virtue of rule 26 requires that any Petition for issue of a grant must be accompanied by a consent duly signed by all persons entitled to share in the same estate. The duty of a litigant is to make full and fair disclosure of the material facts.

16. In totality, the Respondents made an application to the Court for grant of letters of Administration in Succession Cause No. 1889 of 2011, where they indicated that they were the only beneficiaries of the estate of the deceased in exclusion of the Applicant's children. The Respondents did not give the Applicant as a personal representative for her children notice and neither did they obtain her consent. This court

however has discretion on how to ensure equitable distribution of the estate of the deceased and it is not mandatory that this grant be revoked for the ends of justice to be met.

17. The upshot of the foregoing is that the Court finds no basis to hold that the Applicant was a wife to the deceased. The Court however finds that the children of the Applicant are beneficiaries of the estate of the deceased and makes the following orders:

- i. The grant of Letters of Administration intestate issued on the 30th January 2012 shall stand.
- ii. The subsequent confirmation on 27th May, 2013 in Nairobi Succession Cause No. 1889 of 2011 is hereby annulled.
- iii. Distribution of the estate shall be done to include the deceased's children who were left out of the distribution during confirmation.
- iv. Mention within 60 days to confirm compliance.
- v. There shall be no further sale, subdivision, disposal, alienation or in any other way deal with estate property with the intention of disposal of the same.
- vi. No orders as to costs.

DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 27TH DAY OF MAY 2020.

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L. A. ACHODE

HIGH

COURT

JUDGE
