REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 1773 OF 2009

IN THE MATTER OF THE ESTATE OF GACHERI

WAIGANJO ALIAS HANNAH GACHERI WAIGANJO(DECEASED)

PHILIP MUTUGA WAIGANJO...ADMINISTRATOR

VERSUS

AGNES WANGUI MANGARA...1ST RESPONDENT

JOSEPHINE WAKONYO NJIRIRI..................................2ND RESPONDENT

RULING

1. By way of Summons for Revocation or Annulment of Grant, dated 8th April 2019, the Administrator sought revocation or annulment of the Grant of Letters of Administration issued in respect of the Estate of Gacheri Waiganjo alias Hannah Gacheri Waiganjo (deceased) granted to Philip Mutuga Waiganjo and confirmed on 5th July, 2005 in the Senior Resident Magistrate's Court at Limuru vide Succession Cause No. 21 of 2001.

2. The application was premised on the ground that proceedings to obtain the grant were defective in substance because contrary to the Petition for letters of administration intestate filed, the deceased died testate and therefore the administrator ought to have applied for letters of administration with written will annexed.

3. In the administrator's affidavit in support of the summons for revocation or annulment of grant, he deposed that letters for the administration of the estate of the deceased were issued to Thomas Mbugua Waiganjo (now deceased) on 13th November, 2001 and confirmed on 8th April, 2003. He averred that when the Administrator died he took up administration of the estate and was granted fresh letters of administration which were subsequently confirmed on 5th July, 2005. He asserted that upon her death the deceased left behind a written will dated 1st September, 1994 which was in the custody of Our Lady of Carmel Parish - Ngarariga up until 27th July, 2018 when it was moved to Kamirithu Parish where the family of the deceased are parishioners.

4. The administrator conceded that the will does not name the executors but that, that notwithstanding, the petition before court ought to have been made for grant of letters of administration with written will annexed. He asserted that the beneficiaries of the estate of the deceased would suffer no prejudice since the application seeks to correct an error in the manner in which the deceased's estate was dealt

with. That this will result in compliance with the wishes of the deceased. He urged the court to revoke or annul the grant issued.

5. In response to the summons for revocation of grant, the 1st respondent filed a replying affidavit dated 26th July, 2019. She deponed that the summons before Court was an abuse of the court process meant to delay and disinherit rightful beneficiaries. She averred that this was exemplified by the Administrator's acts of failing to honour the Court's Ruling of 28th October, 2016 ordering redistribution of the estate to all beneficiaries and claiming the existence of a will 18 years after the deceased's demise, and yet he had applied for and been issued with a grant in his favour before the Court in Limuru. Further, she claimed that the purported will is a forgery and does not meet the legal requirements of a valid will. **6.** Furthermore, she averred that the deceased was illiterate and could therefore neither read nor write and yet the purported will has a signature affixed purported to be hers instead of a thumb print which is what the deceased used. She asserted that other beneficiaries of the estate of the deceased had already been prejudiced due to the delay tactics employed by the Administrator. She urged the court to dismiss the summons for revocation of grant and help enforce the orders on redistribution of the estate.

7. Parties filed and exchanged written submissions in support of their respective positions. The Administrator through Antony Burugu and Company Advocates submitted that where a deceased person died testate, the courts are enjoined to ensure that the wishes of the deceased stipulated in the will are followed as far as possible. There being a will which has been presented and confirmed by a letter from Rev. Fr Bernard Kabiu, from Our Lady of Mt. Carmel Ngarariga Catholic Parish the deceased's wishes ought to be taken into account. It was submitted that the only way to prove that the will dated 1st September 1994, is valid is by calling witnesses to give oral evidence which shall be tested on cross-examination. It was further submitted that any perceived delay cannot outweigh the need to have the Court enforce the wishes of the deceased.

8. The respondent through Muhuhu and Company Advocates submitted that the summons for revocation of grant is defective as there is no provision provided under which the application was brought. Further, that the Administrator's actions of failing to redistribute the estate as ordered by the Court and the sudden discovery of the purported will indicate bad faith on the part of the Administrator. The respondents submitted that they have already suffered great prejudice as they have been shut out of the estate as the Administrator continues to abuse the court process.

9. I have considered the summons, the affidavits in support and in opposition to and the written submissions by counsels. The key issue for the Court's determination is whether the purported Will is valid and whether this application meets the threshold for revocation or annulment of grant under **Section 76** of the **Law of Succession Act**.

10. Section 76 of the Succession Act 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;**
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> **(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;**
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> **(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.

11. The only ground raised by the Administrator in his application for revocation/annulment of grant, is the alleged discovery of a will of the deceased which ought to be considered. It is his position that the deceased having left a will, the Petition filed ought to have been one for letters of administration with will annexed instead of letters of administration intestate.

12. Validity of written wills is provided for under **Section 11** of the Law of Succession Act which states thus:-

No written will shall be valid unless-

a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

13. The document in question is a typed text on one sided A4 paper written in Kikuyu language. A Certificate of Translation has not been provided. The names of the attesting parties and their signatures are blurred and not discernable. The document was accompanied by a letter from Rev. Fr Bernard Kabiu, from Our Lady of Mt. Carmel Ngarariga Catholic Parish stating that he had officially handed over the original will of the deceased to Rev Fr. George Njoroge. No further evidence was adduced on the validity of the purported will.

14. Section 6 of the Law of Succession Act does not make it mandatory for a testator to appoint any executor in his will. In the text known as "Law of Succession" by **W. M. Musyoka** at page 122, the learned author states that:

> **"Executors are usually expressly appointed by the will. Section 6 of the Law of Succession Act provides that a testator may appoint his executor or executors by will. The appointment of executors is not a mandatory requirement, but in practice a will is considered incomplete or badly drafted if it omits to appoint executors."**

15. Where a will does not name an executor the court ought to issue a grant of letters of administration with the will annexed to the persons who qualify under **Sections 63, 64 and 65** of the Law of Succession Act.

5. The law on this is **Section 53** of the Law of Succession Act, which states as follows:-

"53. A court may –

a) Where a deceased person is proved (whether by production of a will or an authenticated copy thereof or by oral evidence of its contents) to have left a valid will, grant, in respect of all property to which the will applies, either –

i. Probate of the will to one or more of the executors named therein; or

ii. If there is no proving executor, letters of administration with the will annexed…"

16. It was the administrator's case that the deceased died testate, having left a will that he had made on 1st September 1994. However, the cause herein was commenced in intestacy, and the grant was made to the Administrator and confirmed on 5th July 2005 after the death of the Petitioner. It was not until 2018 that the Administrator intimated that the deceased had died testate.

17. The Administrator having alluded to the existence of a valid will he did not make this application when he took over the administration of the estate. He proceeded with distribution based on the confirmed grant of intestacy. Subsequently, when summons for revocation of grant was filed in 2009, the Administrator unsuccessfully urged the existence of a valid will of the deceased. The Court ordered him to redistribute the estate equally to all beneficiaries. He has since not complied with those court orders.

18. From the foregoing it is quite clear that if there was a will, the Administrator knew about it from the onset and throughout this litigation. He cannot therefore claim that the Petition ought to be one for letters of administration with will attached to justify his summons for revocation of grant. He cannot now purport to benefit from his own mischief by filing the instant application. It is noteworthy that all through the proceedings, the applicant was represented by able counsels competent on the principles of law applicable. To raise this issue now is to my mind an afterthought. The Administrator appears to be clutching on any straws available in a bid to further delay the redistribution of the estate to the rightful beneficiaries.

19. The Administrator participated in the proceedings despite what he alleges to be his knowledge of the existence of a will and signaled his acceptance of the decision of the court with regard to distribution. He cannot turn around and claim that the process was faulty. If the estate was distributed unfairly or not in accordance with the wishes of the deceased as contained in the alleged will, he had a right to object by filing an affidavit of protest. No such application was filed. It is my view that the instant application is an abuse of the court process.

20. There must be an end to litigation. This cause has been pending in court since 2001. This application for revocation of grant was filed on 8th April, 2019 whereas, the grant was made on 5th July 2005. In between the administrator/applicant had a right to apply for its revocation, but he did not. He has kept the beneficiaries out of their rightful inheritance for far too long. The upshot of all the foregoing is that I find the summons for revocation and annulment of grant dated 8th April, 2019 to be lacking in merit and is accordingly dismissed.

The applicant shall bear the costs of this application.

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

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L. A. ACHODE

HIGH COURT JUDGE