



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 472 OF 2013

FORMERLY CAUSE NO. 15 OF 2006 (NAIROBI)

IN THE MATTER OF THE ESTATE OF RUFUS KIAMBATI M'IKURI (DECEASED)

JENNIFER KARWIRWA.....1ST APPLICANT

RUTH MUKUBA.....2ND APPLICANT

LUCY KAGWIRIA.....3RD APPLICANT

FRIDAH NKATHA.....4TH APPLICANT

NANCY NAITO.....5TH APPLICANT

ANN GACHERI.....6TH APPLICANT

-versus-

MARTIN KOOME.....RESPONDENT

RULING

[1] On 29/7/2020, the court delivered a partial ruling following allegation of discovery of a written will of the deceased dated 26/12/1999. The ruling ordered the applicant to file a certified translation of the alleged will. Meanwhile, the ruling on the application before me was arrested to await the filing of the alleged will. In compliance thereof, a certified translation of the alleged will has been provided- the court is now ready to make a pronouncement on the revocation application aforementioned.

Summons for Revocation of grant

[2] Before me is a summons dated 16/05/2019 which seeks for revocation and or annulment of the grant of letters of administration issued to the late Glory Nkuene Rufus and Martin Koome Kiambati on 9/10/2007. The application is expressed to be brought pursuant to **Section 76 of the Law of Succession Act CAP 160 Laws of Kenya and Rules 44, 49 and 73 of the Probate and Administration Rules.**

[3] The grounds upon which the application is premised are set out in the application and the supporting affidavit of Fridah Nkatha Kiambiti sworn on 16/05/2019. It is contended that the proceedings to obtain the grant were defective for the grant was obtained by means concealment and untrue allegations of facts. They argued that the grant was full of errors so grave that it rendered its confirmation void. Moreover, they stated that the respondent failed after due notice and without reasonable cause to proceed diligently with the administration of the estate. Besides, according to them, the grant has become useless and inoperative as the applicants have discovered a will of the deceased.

[4] The applicants stated further that the applicants who are daughters of the deceased were neither involved in the cause nor signed any documentation used in the cause to obtain the grant. They added that the 1st – 3rd applicants did not get a share of the estate while the 4th – 6th applicants got a ghost share or a non-existing share allegedly with Kenya Grain Growers Co. Union. Months after the death of one of the administrators, Glory Nkuene Rufus, they discovered a written will dated 26/12/1999. Thus, it is their view that the estate was not distributed as per the will which distributed the estate among the two households. To them, the mode of distribution of the estate in the grant is not only unfair to the applicants but also derogates from the testamentary wishes of the deceased.

Respondent: 3rd applicant introduced advocate

[5] The application was opposed vide the replying affidavit of Martin Koome Kiambati sworn on 4/12/2019. He deposed that when they sought to file the cause it was the 3rd applicant who introduced them to an advocate who filed the cause in Nairobi and she was the one who followed up on the matter. That the applicants were given four (4) acres of land from the estate. Also he has been giving the 4th – 6th applicants rent for two rooms each out of the rooms in Plot No. Meru Municipality Block 11/176- this he said is a gesture out of his own freewill. He argued further that the grandchildren of the deceased were catered for. Here he meant the children of their late brother Aaron Kimathi Kiambati. Therefore, according to him, it is untrue that the applicants were not aware of the cause. He stated also that his mother, Glory Nkuene, made the proposal of distribution by following what the deceased had written down as seen in the alleged will.

Submissions

[6] Parties filed written submissions in which they adumbrated their above stated arguments and stand points. The applicants submitted that the estate of the deceased was not distributed to the rightful beneficiaries, precisely the applicants. **Section 38 of the Law of Succession Act** provides for equal distribution but that was not the case as they were discriminated upon. Additionally, the court was misguided for it was not disclosed that the deceased died testate. Therefore, his estate ought to have been distributed according to his will. They relied on the following authorities to support their application: **In re Estate of Francis Mwangi Mbaria (Deceased) [2018] eKLR** and **Ibrahim v Hassan & Charles Kimenyi Macharia, Interested Party [2019] eKLR**.

[7] The respondent submitted by reiterating what he had stated in his affidavit. He added that the application has not been brought in good faith as it does not meet the threshold for revocation and or annulment of the grant as stated under **Section 76 of the Law of Succession Act**.

ANALYSIS AND DETERMINATION

[8] Are there grounds to revoke and or annul the grant?

[9] **Section 76 of the Law of Succession Act** provides for instances when a grant may be revoked and or annulled, to wit:

“(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;

(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.

[10] The applicants who are daughters of the deceased have claimed that they were not aware of this cause, have never signed any documentation relating to this cause and were not provided for in the estate. The respondent has refuted these assertions and has stated that they were aware of the cause and out of his free will, he shares proceeds of rent from the estate with them.

[11] I do note that this cause was instituted in Nairobi. Upon perusal of the record, I observe that the applicants were listed as daughters of the deceased in the Chief’s letter of introduction dated 4/04/2005 as well as in all the petition documents that were presented before the court. In law, the person seeking for grant of administration is required to give details of every person entitled in the same degree as or in priority to the applicant in the estate. In addition, the applicant is required to seek and or obtain consent in the prescribed form from persons entitled in equality or priority to him/her. See **Rule 26 (1) and (2) of the Probate and Administration Rules**.

[12] Consent Form by persons entitled in equality or priority to the petitioner was duly signed by the applicants. The applicants stated that they did not sign any documentation that led to the issuance of the grant herein. He who alleges must prove. See **Section 109 of the Evidence Act** which states that:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

[13] Other than stating that they did not sign any documentation, the applicants did not provide proof that the signatures appearing in the Form 38 are not theirs or they were forged?

[14] I also do note that the respondent argued that the 3rd applicant introduced to them the advocate who filed the cause in Nairobi and that she kept tab of the cause for the family. These averments were not challenged. On this, I say just as Mabeya J stated in the case of **Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 Others [2012] eKLR** that:

“In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.”

[15] There is therefore every indication that the applicants were aware of the cause.

[16] Be that as it may, I have perused the consent form to distribution of the estate filed together with the Summons for Confirmation of Grant. Unlike the consent form filed with the petition, the consent form to distribution only sets out the names of the applicants with no signatures appended against the names thereof. Whereas the applicants signified their consent to the filing of the petition and were aware of the cause, nothing shows that they consented to the distribution of the estate. They are persons of equality with the petitioner and their consent is relevant in the distribution of the estate of the deceased.

[17] I do note that the deceased had two houses made up as follows:

1st House

- a) Marion Nkonge – 1st wife
- b) Jennifer Karwirwa – Daughter
- c) Charity Mwari (deceased) – Daughter
- d) Ruth Mukuba – Daughter
- e) Aron Kimathi – Son
- f) Paul Ndumba – Son

2nd House

- g) Glory Nkuene (deceased) – 2nd wife
- h) Lucy Kagwiria – Daughter
- i) Martin Koome – Son
- j) Fridah Nkatha – Daughter
- k) Nancy Naitore – Daughter
- l) Ann Gacheri – Daughter

[18] The Certificate of Confirmation show distribution of the estate was done as below:

1. Glory Nkuene - LR NYAKI/KITHOKA/44 - Absolutely

2. LR. KIIRUA/NAARI- MAITEI/59

Martin Koome Kiambati

Peter Mwenda Kiambati

David Gitonga Kiambati to be shared equally

Rachael Ntinyari

3. PLOT MERU MUNICIPALITY BLOCK 11/176

Glory Nkuene Kiambati

Martin Koome Kiambati to be shared equally

David Gitonga Kiambati

4. SHARES IN KENYA GRAIN GROWERS CO. UNION CERTIFICATE NO. 35436

Martin Koome Kiambati

Nancy Naitore

Anne Gacheri to be shared equally

Glory Nkuene Rufus

Fridah Nkatha

5. Plot No. 17 Kenderu Market

Peter Mwenda Kimathi

Josephine Makandi to be shared equally

[17] From the above facts it is clear that majority of the dependants were left out of the distribution. It seems the substantial property was shared amongst the widow from the 2nd House, Martin and children of the late Aaron Kimathi. It appears that daughters were not given any real property. Only some of the daughters received shares in KGGCU. The said daughters are the applicants here and have stated that these shares are non-existent. The status of KGGCU is in public domain and their claim is not unfounded. It bears repeating that the applicants are children of the deceased herein and are entitled to the share of the estate. I have not been shown any or clear renunciation of right by the daughters. There is also no lawful and justifiable reason that has been provided by the administrator for excluding majority of the children of the deceased from inheritance of their father's estate. This kind of exclusion of daughters of the deceased is prohibited in law. It is amusing to note that Martin stated that out of his goodwill he shares rent of some rooms in the town property to some of his sisters. Rights of daughters to inherit their parent is not dependent upon the goodwill or magnanimity of their brother or brothers. They have equal right as children of the deceased to inherit. I find this to be grave discrimination and a potent reason to revoke this grant. But, before I close, let me consider other arguments presented in the case.

[18] There is more. The applicants also urged that, subsequently, a valid will of the deceased was discovered and that, the distribution done by the court was inconsistent with the wishes of the deceased which he expressed in the will. A certified translation of the document written in Kimeru language has been filed. I have considered the certified translation of the document. On *prima facie* basis, the document carries signatures which are said to belong to the deceased and witnesses. It also shows that the deceased shared his estate to his two houses. He also shared specific portions to persons specified in the will. I do not however wish to say more about this will; the less I say the better as the validity of the will shall be subject of intense interrogation in the trial for proof of will on the basis of the law especially sections 5 and 11 of the Law of Succession Act. For purposes of the application for revocation, it suffices to state that failure to bring the will to the attention of the court makes these proceedings fatally defective in form and substance. In addition, such non-disclosure of an important document in proceedings of this nature is a fatal blow upon the grant issued thereto.

[19] I am aware that this case has been in court for over fourteen (14) years since it was instituted in 2006. I am also aware that, the court noted in its decision dated 14/11/2018 that some parcels of land forming part of the estate have been subject of litigation for over 37 years and are yet to be concluded while others abated and others were withdrawn. I have also noted that the applicants were aware of these proceedings. Nonetheless, it would be egregious to allow daughters of the deceased to be disinherited in a manner not sanctioned by law. The will, at least, on *prima facie* basis did not disinherit the daughters. Accordingly, justice demands that in the circumstances of this case the grant herein be revoked. Accordingly, I revoke the grant herein.

[20] The testator's will and the translation thereto filed herein is part of record. The will did not, however, name an executor. Therefore, these proceedings shall be deemed to be for grant of letters of administration with will annexed. The proceedings shall be so conducted from now henceforth.

[21] There are two houses in this estate. I note also that Martin has excluded all his sisters from the real estate- this is relevant consideration in the appointment of administrators. In the upshot, I make a fresh grant of letters of administration with will annexed to Martin Koome, Jennifer Karwirwa and Fridah Nkatha Kiambiti. In light of the history of this case, Jennifer and Fridah shall apply for confirmation of grant within 14 days and serve all beneficiaries. Upon service, parties are at liberty to file and serve affidavits of protests within 14 days thereof. Directions, shall be given on a date the court shall appoint. It is so ordered.

Dated, signed and delivered at Meru this 16th day of September 2020

.....

F. GIKONYO

JUDGE

In presence of

Mugiira M for Mbaabu for objector/applicant

M/s Muthuri for respondent (from firm of M/S Kiome)

Ruling delivered accordingly through Teams application.

F. GIKONYO

JUDGE