



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 687 OF 2008

IN THE MATTER OF THE ESTATE OF JULIUS MWAI WAHOME (DECEASED)

JANNEFER WANGUI.....APPLICANT

VERSUS

JOSHUA WAHOME MWAI

JOHN MWANGI MWAI.....RESPONDENTS

JANE WANJIRU MWAI

RULING

1. The application is premised under the provisions of Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules; the applicant seeks a revocation of the grant on the grounds that;

(a) The grant was obtained by concealment from the court that the applicant was one of the deceased's children, hence a beneficiary of the estate;

(b) The procedure to obtain the Grant was defective in that the applicant was not cited or notified of the proceedings herein;

(c) That costs be provided for.

2. The application was supported by the grounds on the face of the and application an affidavit made by the applicant dated the 21/07/2016;

3. Directions were given on the 15/03/2019 that the parties were directed to canvass their respective cases by way of filing and exchanging written submissions; hereunder is a summary of their respective submissions;

THE APPLICANT'S CASE

4. The applicant stated that the deceased **JULIUS MWAI WAHOME** to whom the estate relates had two (x2) wives; one being her mother Jane Wanjiru Mwai who was the first wife of the deceased and she bore him two (x2) children; one child being the applicant herein and the child was her deceased brother who passed away in 2007; the second wife had five children with the deceased including the respondents herein;

5. When filing the succession cause the 1st respondent listed the other children of the deceased but did not include the first house which was represented by the applicant herein; the respondents had chased the applicant from the suit property before they embarked on filing the instant succession cause; when the respondents petitioned for the Grant; she was neither consulted or cited nor was her consent obtained as required by Rule 26(1) of the Probate and Administration Rules;

6. In 2012 the applicant had sought relevant documents from the 1st respondent to enable the administration of the estate but he declined resulting in the applicant making a report to the area chief on the issue; the applicant later learnt of the proceedings from strangers and decided to follow up on it;

7. The applicant's contention was that the Grant was obtained by concealment of material facts from the court that the applicant was one of the deceased's children hence a beneficiary of the estate; and this vitiates the procedure for the obtaining of the Grant;

8. The applicant prayed for the revocation of the Grant and a fresh Grant be issued or in the alternate there be provision made for her equal beneficial interest in the estate of the deceased.

THE RESPONDENTS' RESPONSE

9. The respondents in response opposed the application and relied on the contents of the Replying Affidavit dated 6/06/2017; when the respondents wanted to commence the succession proceedings they had requested the applicant to submit her National Identity Card number to the Area chief but she declined; they then collected the Chief's letter without her details and proceeded to file the succession cause;

10. The applicant was always aware of this cause as it had been in the court for the last twelve (12) years and yet it had taken the applicant eight (8) years to file the instant summons; the reason she had not taken any action was because the deceased had given her money to buy herself land elsewhere and her husband was aware of these facts;

11. There was no concealment of material facts; the application for revocation was belatedly filed and was an afterthought;

12. The respondents urged the court to dismiss the application with costs.

ISSUES FOR DETERMINATION

13. After the reading the parties rival submissions the only issue for determination is;

(i) Whether the Grant was obtained by concealment from the court of something material to the case;

ANALYSIS

14. The late Julius Mwai Wahome to whom this cause relates passed on the 8/03/2008; the 1st respondent herein petitioned for Letters of Administration and was issued with Grant dated 24/02/2009 which was confirmed and a Certificate of Confirmation issued dated 9/09/2009;

15. From the facts deponed by both parties it is not disputed that the applicant is a daughter of the deceased; and it therefore follows that from the onset the applicant qualified as a dependant and a beneficiary to the deceased's estate within the context of Section 29 of the Law of Succession;

Whether the Grant was obtained fraudulently by concealment from the court of something material to the case;

16. The applicant's contention is that when the 1st respondent filed the succession cause he listed the other children of the deceased but did not include the first house which was represented by the applicant herein and concealed from the court at the time of taking out the Letters of Administration that the applicant was a beneficiary to the estate of the deceased; the Grant was therefore obtained by the concealment from the court of material facts and the respondent misled the court into excluding the applicant from benefitting from the estate of the deceased;

17. In their response the respondents stated that when commencing the succession proceedings they had requested the applicant to submit her National Identity Card number to the Area chief but she declined; they then collected the Chief's letter without her details and proceeded to file the succession cause;

18. The applicable law is found at Section 76 of the Law of Succession Act and Rules 26 (1) and (2) of the Probate and Administration Rules;

19. Section 76 of the Law of Succession Act sets out the grounds upon which a Grant can be revoked; and reads as follows;

“Section 76

A grant of representation whether or not confirmed may at any time be revoked or annulled if the court decides, either on application by interested party or its own motion:-

(a) The proceedings to obtain the grant were defective on substance.

(b) The grant was obtained fraudulently by the making of false statements or concealment of something material the case.

(c) The grant was obtained by means of untrue allegations of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

(d) The persons to whom the grant was made have failed after due notice and without reasonable cause either;

(i) To apply for confirmation within one year of such longer time as the court may allow,

(ii) To proceed diligently with the administration of the estate,

(iii) To produce to the court such inventory or account of Administration as required under section 83(e) and 83(g) of the act or has produced false accounts.

(e) The grant has become useless and inoperative through subsequent circumstances.

20. Rules 26(1) and (2) of the Probate and Administration requires that all persons entitled to benefit from the estate of the deceased be notified; and reads as follows;

“26 (1) Letters of Administration shall not be granted to any applicant without notice to every other person entitled in the same degree or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any person shall in default of renunciation, or written consent in form 38 or 39, by all persons so entitled in equally or priority, be supported by an affidavit of the applicant and such other evidence as the court may require”.

21. Apart from the notice the party who petitions for the letters of administration also needs to obtain written consents from all the persons so entitled or a renunciation; in instances where the parties have proved to be un-cooperative then these parties can be cited;

22. Upon perusal of the court record this court notes that the 1st respondent filed the Petition and a letter from the area assistant Chief and therein the names of his mother and his siblings are listed; the court record is devoid of a renunciation by the applicant nor does it contain any citation of the applicant;

23. In their response the respondents admit that they deliberately left out the name of the applicant when they filed the succession proceedings and the reason given was she failed to cooperate;but this court reiterates the provisions of Section 76 of the Act and Rule 26 and states that it is the duty and the responsibility of the intended administrator in this instance the 1st respondent to establish and prove that he had complied with the mandatory provisions of the law;

24. Exclusion of the applicant amounts to concealment from the court of material facts that would have enabled it make a justified determination of the cause;

25. This court finds that the 1st respondent acted contrary to the provisions of Section 76 of the Act and Rules 26 of the Probate Rules; and I am satisfied that the applicant application has met the threshold for the revocation of the Grant.

FINDINGS AND DETERMINATION

26. From the fore-going reasons this court makes the following findings that;

(i) The applicant is found to be a dependant of the deceased and is entitled to directly benefit from the deceased’s estate;

(ii) The Grant was obtained by concealment from the court of facts material to the case;

(iii) The application is found to have merit and is hereby allowed; the Grant and the resultant Certificate of Confirmation issued to the 1strespondent are both hereby revoked; a Fresh Grant to issue in the joint names of the 1st Respondent and the applicant;

(iv) The estate of the Deceased to revert to its original state; the administrators to file an application for Confirmation of the Grant within 30 days from the date hereof; those opposed are at liberty to file their respective protests accordingly.

(v) Each party shall bear their own costs.

Orders accordingly.

Dated, Signed and Delivered Electronically at Nyeri this 26thday of November, 2020.

HON.LADY JUSTICE A.MSHILA

JUDGE