REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 48 OF 2011

(IN THE MATTER OF THE ESTATE OF ANNAH WAIRIMU ALIAS WAIRIMU KAMAU)

ELIJAH KINYUA MWANGI.....APPLICANT

-VERSUS-

JOSEPH RUKURI WACHIRA.....1ST PROTESTER

JOHN NDIRANGU RUKURI.....2ND PROTESTER

NJOKI KAMAU.....3RD PROTESTER

NANCY WATETU NDIRITU.....4TH PROTESTER

JUDGMENT

The deceased, Annah Wairimu died intestate on 5 March 2003 at the age of 100 years old. According to a petition filed in this Honourable Court on 18 January 2011 for grant of letters of administration of her estate, she had ten children four of whom predeceased her; those who survived her are indicated in the petition as follows:

1. Muthoni Kamau
2. Joseph Wachira Kamau alias Wachira Rukuru
3. Ndirangu Rukuri alias Ndirangu Kamau
4. Njoki Kamau
5. Wangui Kamau
6. Charles Nderitu Kamau

The deceased ones, on the other hand, are named as follows:

1. Wangari Kamau
2. Mwangi Kamau
3. Wanjogu Kamau
4. Njeri Kamau

The petition was filed by Charles Nderitu Kamau. He obtained the grant of letters of administration on 5 May 2011; the same was confirmed on 28 September 2012. The certificate of confirmation of grant shows that the deceased's estate which comprised of a parcel of land known as **Title No. Nyeri/Warazo/78** measuring approximately 6.8 hectares was distributed as follows:

1. Joseph Wachira Rukuri (4 ¼ acres)

2. John Ndirangu Rukuri (4 ½ acres)

3. Njoki Kamau 3 acres

4. Charles Ndriritu Kamau (4 ¼ acres)

On 6 November 2012, the applicant filed a summons for revocation or annulment of the grant made to Charles Nderitu Kamau on the grounds that the proceedings leading to the issue of the grant were made without the knowledge or consent of the family of Mwangi Kamau who, as earlier noted, was one of the deceased's children who predeceased her.

In the alternative, the applicant sought for a share of the deceased's estate for the benefit of Mwangi Kamau's family members.

Charles Ndiritu Kamau filed a replying affidavit in which he deposed that the deceased initially lived in Meru together with her children who included Mwangi Kamau. After the declaration of the state of emergency by the colonial government in 1952, they left Meru and settled at Ithekahuno sub location in Nyeri County. Mwangi Kamau, according to him, disappeared before they left Meru; he has never been traced ever since.

In 1962, the deceased moved to her estate where she lived until her demise in 2003. For all this while, neither the applicant nor his mother ever visited them or the deceased, in particular.

He admitted that he did not include the applicant in the succession proceedings because he is a stranger to the deceased's family and was never a dependant to the deceased.

In response to Kamau's replying affidavit, the applicant swore that he lived with the deceased at Ithekahuno and, prior to her death, he had been visiting her occasionally from Meru where he had been living until 2006.

Charles Ndiritu died on 10 November 2014 before the summons for revocation or annulment of grant was prosecuted.

In the wake of the death of Charles Ndiritu, the applicant filed a fresh summons dated 8 September 2016 for revocation or annulment of grant. The grant was revoked on 27 July 2017 solely because of the death of the administrator of the deceased's estate; in his place, the applicant together with the 1st respondent were appointed as joint administrators of the deceased's estate.

By a summons dated 18 July 2018, the applicant sought to have the grant confirmed. In the affidavit in support of the summons, the applicant named the deceased's four surviving children and himself as her dependants. He proposed to have the estate distributed among them equally with each of them getting 3.4 acres of the estate.

The protesters filed an affidavit of protest opposing the scheme proposed by the applicant for distribution of the deceased's estate. They disputed the applicant's claim that he was Mwangi Kamau's son. Mwangi Kamau, according to them, disappeared before 1952. They also swore that they had never met the applicant. They deposed further that Mwangi Kamau had no family of his own. As far as the deceased's estate is concerned, they swore that the deceased had divided the estate amongst her children in 1974 and that they have been settled on their respective parcels since.

Being a stranger to the deceased's estate, the protester swore that the applicant was not the deceased's dependant.

At the hearing, the 2nd protestor testified he was born in 1936 and that Mwangi Kamau disappeared in 1951. The latter was circumcised in 1943 but he was not aware whether he had a wife. He denied knowing Zipporah Wanjiru Mwangi who is alleged to have been Mwangi Kamau's wife. But he admitted that he knew one Mary Wairimu Mwangi although he was not aware whether she was Mwangi Kamau's wife. He was also aware that she had a daughter called Nancy Wanjiru Muchiri. He also admitted having attended her wedding. He denied having lived on the same land with Mwangi Kamau's wives.

The applicant testified that Mwangi Kamau was his father and that his father had two wives whom he named as Zipporah Wangu Mwangi and Mary Wairimu Mwangi. His mother was Zipporah and that she lived in Meru. Mary lived on the deceased's estate. He was surprised that the protesters denied knowing Mwangi's children yet the second protester had stood in as Nancy Wairimu's father during her wedding. He testified that his mother had other children after the death of his father but that they were not interested in the deceased's estate. It was his testimony that they should get the share that their father was entitled to in the deceased's estate. It was his evidence that his own mother had never lived in Nyeri and that when she died she was buried in Meru. He also lived in Meru but left in 2006.

Nancy Wanjiru Muchiri testified that the applicant is her brother; they both shared the same father but their mothers were different. Her mother was Mary Wairimu while her brother's mother was Zipporah Wangu. She confirmed that during her wedding, the 2nd protestor stood in her late father's stead and handed her over to her husband. She also testified that the applicant's first born child was born at the deceased's home in Warazo. Her own mother lived there and that she even schooled there.

The applicant's initial quest to have the grant revoked for the reason that Mwangi Kamau's family was not included in the petition for grant of letters of administration of the deceased's estate was abandoned when the administrator of the estate died. It is, I understand, for this reason, that the applicant filed a second application for revocation or annulment of grant specifically because of the administrator's death.

It is worth recalling that prior to this death, the grant had been confirmed and the deceased's estate distributed amongst her children; the latter had vested rights in the estate proportionate to their respective shares as at the time of the administrator's death.

The question that immediately follows is whether it is necessary, or indeed it is a legal requirement, that fresh confirmation proceedings under section 71 of the Act have to be taken if a sole administrator dies before the completion of administration but after the grant has been confirmed. Subsection (2) of that section reads as follows:

> **71. (2) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.**

There appears to be no specific provision in the Act that specifically addresses the question whether an administrator or administrators appointed in place of a deceased sole administrator has or have to take fresh confirmation proceedings where the grant had been confirmed prior to the death of the initial administrator. The closest the Act speaks of this situation is section 81 of the Act which says that where there are several administrators or executors, the surviving administrator or executor has the mandate to complete the administration if any or some of them die. That section reads as follows:

> **81.Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them:**
>
> **Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of the trust until the court has made a further grant to one or more persons jointly with him.**

The proviso is of little import here; what is clear from section 82(1) is that the surviving administrator or executor (where there are joint administrators or executors) need not begin the process of administration afresh in the event of death of a co-administrator or executor; the surviving administrator or executor has the full mandate to proceed from where his predecessor left and complete the administration of the estate.

By necessary implication, there would be no reason why a case of death of a sole administrator or executor would be treated differently; the administrator or executor appointed in place of the deceased administrator or executor would be expected to conclude the administration of a deceased's estate from the point the previous administrator or executor reached and not to begin the entire process afresh.

It follows that a summons for confirmation of grant filed after the initial the confirmation of a grant made to a deceased administrator would be misconceived. Turning to the present case, all that would be required of the applicant and the 1st respondent as joint administrators of the deceased's estate would to ensure that the estate is transmitted in terms of the confirmation order made on 28 September 2012.

Without underestimating the applicant's bid for a share of the deceased's estate, I am of the humble view that such a bid cannot be considered in the context of a summons for confirmation of grant when it is apparent on the record that an initial grant has hitherto been confirmed but has been revoked only because of the death of the administrator to whom it was made. The appropriate course for the applicant would have been to seek to set aside the confirmation proceedings of 28 September 2012 and the subsequent confirmation order; if successful, he would have been expected to file an affidavit of protest against the summons for confirmation of grant and it is then that the court would have heard him on why he should be considered as one of the persons beneficially entitled to the deceased's estate. In short, this court cannot be seen to be making contradictory confirmation orders at different times in the course of the proceedings; to be precise, this honourable court cannot grant a confirmation order that is contrary to a similar order made on 28 September 2012.

But the applicant's summons for confirmation of grant would still fail assuming it was properly before court. I say so because the applicant has described himself in the application as a dependant and on that basis, he wants a share of the deceased's estate. The word 'dependant' is a term of art and its technical meaning is given in section 29 of the Act; that section reads as follows:

> **29. For the purposes of this Part, "dependant" means -**
>
> > **(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.**

Going by the applicant's evidence that he is the deceased's grandchild, he would fall into one of the category of persons described in paragraph (b). As much as he may be the deceased's grandchild, the applicant never suggested in his evidence that he was being maintained by the deceased immediately prior to her death and therefore on that score alone, he would not fit the description of a 'dependant' as known in law. And even if he was a dependant, the proper application for him to have made is that for reasonable provision under section 26 of the Act; that section reads as follows:

> **26. Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the**

provisions of this Act, then <u>on the application by or on behalf of a dependant</u>, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate. (Emphasis added).

In the absence of an application under this provision of law, there is no basis to provide for the applicant as a dependant.

For the reasons I have given, I am not persuaded that the applicant's summons for confirmation of grant dated 18 July 2018 is merited; it is hereby dismissed. For avoidance of doubt the deceased's estate shall be distributed as per the certificate of confirmation of grant issued by this honourable court on 28 September 2012. Parties will bear their respective costs. Orders accordingly.

Signed, dated and delivered on 20 November 2020

Ngaah Jairus

<u>JUDGE</u>