



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 443 OF 2015

IN THE MATTER OF THE ESTATE OF THE LATE SAMUEL KAMAU

MBATIA alias MBATIA KAMAU - DECEASED

LUDIA WATETU MBATIAPETITIONER/ADMINISTRATOR

AND

JAMES WAMBUGU MBATIA 1ST APPLICANT

JOSEPH GICHEHA MBATIA 2ND APPLICANT

DAVID WACHIRA MBATIA3RD APPLICANT

JUDGMENT

1. Samuel Kamau Mbatia alias Mbatia Kamau (Deceased) died intestate on 11/05/2008. He was survived by a wife – Ludia Watetu Mbatia (the Respondent herein) and nine children – including the three Applicants herein.
2. On 13/07/2015, the Respondent petitioned for Letters of Administration intestate. In so doing, the Respondent correctly identified all the nine children of the Deceased as beneficiaries of the estate. She also filed, together with her Petition for Letters of Administration, a Consent to the Making of a Grant of Administration to a Person of Equal or Lesser Priority. That Consent was signed by three of the nine children -- all daughters. Suffice it to say that the three Applicants herein – all sons – did not sign that Consent.
3. On 08/10/2015, Counsel for the Respondent filed an application in Court under Certificate of urgency requesting for an order that the succession Cause be gazette notwithstanding the failure of the other beneficiaries to sign the Consent if the other beneficiaries do not file their objection to the making of the grant. Admittedly, this was a curious request because the correct procedure would have been to file a citation.
4. In any event, on 30/10/2015, the Court gave an order that the Succession Cause “shall be gazette upon expiry of 14 days hereof. The named beneficiaries are hereby ordered to execute the necessary forms within the next 14 days [and] in default of which the Cause be gazette in the usual manner.” The Court directed that the order be served on all the beneficiaries.
5. The Cause was subsequently gazetted and Letters of Administration issued to the Respondent on 20/04/2016.
6. Thereafter, the Respondent, through her Counsel, filed Summons dated 18/02/2016 for confirmation of the grant of letters of administration. It was supported by an affidavit by the Respondent deponed on 10/02/2016. The Respondent filed a further Affidavit sworn on 14/06/2018 in which she attached a Consent to Confirmation of Grant and her preferred mode of distribution. The Consent to Confirmation of Grant was, like the earlier Consent to the filing of the Petition, signed by only three children – the same ones who had signed the earlier Consent. She explained in her Further Affidavit that the other beneficiaries had refused to sign the consent.
7. The Summons for Confirmation of Grant came up for hearing before Ndung’u J. on 25/09/2018. The Learned Judge rescheduled the hearing for 13/12/2018 and directed that hearing notices to issue to each of the beneficiaries.
8. The matter was, again, before Ndung’u J. on 13/12/2018. The record indicates that on that day Mr. Githui was present for the Administrator. Mr. Githui rose to address the Court thus:

It is for confirmation of grant. The application is dated 10/02/2016. We served all the children. The mother is the administrator. She

is holding in trust for all children and the rest is divided equally.

9. The Court then ordered that: “Grant confirmed in terms of the Consent and the further affidavit.”

10. A Certificate of Confirmation was, then, duly extracted.

11. The three Applicants, children of the Deceased and the Respondent, are aggrieved. Basically, they complain that the Cause was filed and finalized without their involvement. They contend that as beneficiaries, the Respondent was obligated to inform them before filing the Cause and before filing for Confirmation of the Grant.

12. The Applicants filed a Summons for Revocation and Cancellation of Grant dated 08/06/2020. The main prayer is as follows:

That the Grant of Probate (sic) issued to the Petitioner/Administrator on 20th April 2016 be revoked and the Certificate of Confirmation of a Grant issued to the Petitioner/Administrator on 13th December, 2018 be cancelled.

13. The grounds disclosed on the face of the Summons concisely disclose the grievance of the Applicants. They are as follows:

(1) That the process under which the Grant was issued and later confirmed was materially and procedurally defective in substance.

(2) That the Applicants’ consent was neither sought nor obtained in the process of the issuance of the grant and its subsequent confirmation yet the Applicants have a direct beneficial interest in the deceased’s estate.

(3) That the grant and its subsequent confirmation was obtained discretely through an improper procedure; it was based on false information, concealment of material information, untrue allegations of facts.

(4) That the Petitioner/Administrator is putting into use a Certificate of Confirmation of a Grant in an indiscriminate way by hurriedly sub dividing the deceased’s land and soliciting or touting for potential buyers of the sub division plots knowing quite well that the process under which the Grant and Certificate of Confirmation was obtained is under challenge.

(5) That the Petitioner/Administrator cannot sell, dispose of, or alienate the deceased’s properties in her fiduciary and Trustee position unless the Court issues her with an order.

14. Basically, the Applicants claim that the Respondent, their mother, secretly filed for Letters of Administration without having obtained the consent of the other beneficiaries and without informing them that she was planning to do so. They also claim that she proceeded to have the grant confirmed and mode of distribution ordered by the Court, again, without their consent or information. They, therefore, argue that the grant of representation is a good candidate for revocation and the Certificate of Confirmation an ideal candidate for cancellation since they were obtained irregularly and after concealment of material facts namely that the key beneficiaries were not informed.

15. On the other hand, the Respondent filed a Replying Affidavit in which she denies that she concealed any material facts from the Court. She informs the Court that she petitioned for Letters of Administration after a family meeting held on 07/06/2014 in which the beneficiaries failed to agree on distribution. She says that “upon several deliberations” she was “advised to proceed to Court and file the case.” She further states that she “informed all [her] children of the step [she] was going to take and [she] equally involved the Area Chief who would summon them to his office.” She says that when her sons were summoned by the Chief to sign the Consent, they declined to do so.

16. I have carefully perused the Court record and all the documents filed with respect to the present Application. The basic question presented is whether the Respondent duly informed the Applicants that she had petitioned for Letters of Administration and invited them to file objections if they desired to do so. The Respondent claims that she did so at three junctures; the Applicants deny service at each of those junctures.

17. The first juncture is when the Petition was first presented to Court. The Respondent claims that she served the Applicants through the Area Chief – Mr. Mwaniki. The said Mr. Mwaniki supposedly swore an affidavit to this effect. Three problems immediately become clear from the record:

a. First, the evidence available is equivocal that the Applicants were served with the Court documents at the Petition stage.

Indeed, both the Respondent’s affidavit and the Chief’s affidavit are vague on what documents were served merely calling them

“Petition documents.”

b. Second, the affidavit of the Chief is deponed on 15/08/2018. It is unclear for what purpose the affidavit was sworn. Further, the original affidavit was never availed; only a photocopy was annexed.

c. Third, the procedure used – to ask the area Chief to serve Court documents related to Succession – is unusual for two reasons:

i. The Respondent needed a Court order authorizing service through the Area Chief; and

ii. In any event, where a beneficiary refuses to consent to the filing of a Petition for grant, the proper procedure is to serve them with

a citation. It is not clear that any was taken out or signed.

18. These problems are compounded by the procedure that is followed next. Rather than take out citation, the Respondent approached the Court for an order that the Cause be gazetted. The Court granted the order – but clearly indicated that the order be served on all the other beneficiaries within 14 days. There is no evidence on record or filed through affidavit that the service was ever effected on the Applicants or the other beneficiaries.

19. The problems with service did not end there. When it came time for Confirmation of the Grant, the evidence availed is also not unequivocal that service was done on the Applicants. A perusal of the Affidavit of Service filed in Court reveals the following:

- i. The filed Affidavit of Service is patchy with details. For example, it implies that the three Applicants were in one place when they were served.
- ii. The Affidavit of Service is quite stylistic: the same language and details are used in previous affidavits of service. It is particularly telling that all the three Affidavits of Service on record claim on each occasion that the three Applicants were in one location. In each one of them, there is no detailed description of where the Applicants were found.
- iii. In any event, by its very terms, the service on the other beneficiaries were unprocedural: the affidavit says that the Applicants were jointly served and they accepted service on behalf of other beneficiaries yet they are not adult members of their households.

20. All in all, I am persuaded that the filing of the Petition and the Summons for Confirmation was irregular. I hereby cancel/annul Certificate of Confirmation dated 13/12/2016. However, when it comes to the grant itself, given the nature of the controversy, I conclude that it would be futile and imprudent to revoke it. This is because it is not denied that the Respondent is the wife of the Deceased. As such, she enjoyed priority for the grant of letters of administration intestate as a surviving spouse. She was, of course, obligated to inform the other beneficiaries – but in the event of a dispute on who to appoint, she would, by law, have ranked higher than the Applicants.

21. In the circumstances, even if the grant is revoked, the Respondent would, still, end up an administrator. It, therefore, seems futile to revoke the grant only to re-appoint her as an administrator down the line. It would also be a waste of resources and judicial time. It is more pragmatic to appoint a co-administrator from among the Applicants. The Co-Administrator will cater for the interests of the Applicants and ensure that the rest of the administration of the estate proceeds in a procedural fashion. Since I have cancelled and or annulled the Certificate of Confirmation of Grant, questions of distribution of the estate of the Deceased will be determined anew.

22. The disposition, then, is as follows:

- a. The Certificate of Confirmation of Grant dated 13/12/2016 is hereby cancelled/annulled.**
- b. The Grant of representation issued herein is hereby rectified by adding the name of one of the Applicants to be selected by consensus amongst themselves.**
- c. Either of the Administrators to file Summons for Confirmation of the Grant of Letters of Administration. Questions of distribution of the estate, if unresolved, will be determined during the hearing of that Summons for Confirmation.**
- d. This being a family matter, each party will bear its own cost.**

23. Orders accordingly.

Dated and delivered at Nakuru this 12th day of November, 2020

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JOEL NGUGI

JUDGE