



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 34 OF 2018

IN THE MATTER OF THE ESTATE OF MARY NGONDU MWANUNGA(DECEASED)

BRIGIT KAMENE.....INTRESTED PARTY/APPLICANT

-VERSUS-

ANGELINE MUNYIVA MWITHAMA.....1ST ADMINISTRATOR

SAMMY MWITHAMA NGONDU.....2ND ADMINISTRATOR

RULING

1. By a Petition filed on 1st October, 2018, the Administrators herein, **Angeline Munyiva Mwithama** and **Sammy Mwithama Ngóndu**, being wife and husband respectively petitioned for grant of letters of administration in respect of the estate of **Mary Ngondu Mwanunga** alias **Mary Ngondu** aka **Ngondu Mwanunga** (deceased) who was the mother in law and the mother of the 1st and 2nd Administrators respectively. In their petition they disclosed that the deceased left the administrators, **Miriam Ndunge Ngondu** and **Brigit Kamene** both of whom were adult daughters of the deceased surviving the deceased. On 25th February, 2019 a Grant of Letters of Administration Intestate was issued to the administrators.

2. By Summons for Revocation or Annulment of Grant dated 3rd July, 2020, the Applicant herein, **Brigit Kamene**, seeks the following orders:

- 1. That the Grant of Letters of Administration issued on 25th February 2019 to Angeline Munyiva Mwithama and Sammy Mwithama Ng'ondu be revoked on account that the proceedings to obtain the grant were defective in substance.**
- 2. That a fresh grant of letters of administration be issued and confirmed to Brigit Kamene, Sammy Mwithama Ngondu and Mirriam Ndunge Ngondu.**
- 3. That the 1st Respondent, Angeline Munyiva Mwithama be removed as an administrator of the Estate of Mary Ngondu Mwanunga.**
- 4. That the name of the 1st administrator, Angeline Munyiva Mwithama be removed as a beneficiary of the Estate of Mary Ngondu Mwanunga.**
- 5. That the cost of this application be borne by the 1st respondent.**

3. In support of that application, the Applicant averred that the deceased herein died intestate on 6th July 2018 and that she is a daughter of the deceased. According to her the 2nd Administrator is her brother while the 1st administrator is her the 2nd Administrator's wife and daughter in law to the deceased. According to the Applicant, the proceedings leading to this Succession Cause are defective in substance as it was filed secretly and without her knowledge and that of her sister, **Miriam Ndunge Ngondu** as some of the beneficiaries of the Estate of **Mary Ngondu Mwanunga**. She averred that she never signed or gave her consent to the Petitioners to file the Succession Cause and obtain letters of administration Intestate. Equally, the consent and authority of all the beneficiaries was not sought in choosing the administrators/ petitioners for the Estate. Neither did they sign the Consent to the Making of grant of administration intestate to persons of equal or lesser

priority.

4. According to the Applicant her said sister and herself rank first in priority in applying for letters of administration intestate hence their consent should have been sought. It was deposed that the 1st petitioner/administrator ranks last as a dependant of the deceased and last in priority in application for letters of administration intestate being the daughter in law to the deceased and the wife to the 2nd petitioner.

5. The Applicant averred that the administrators/respondents have colluded in disposing the Estate and have now engaged in the act of selling part of the Estate despite the existence of a court order restraining the beneficiaries of the estate of the deceased from intermeddling in the deceased estate through Sale, lease, transfer or wasting of the estate. It was averred that the third parties who purchased the property Matungulu/Kyaume/2047 which forms part of the Estate of the deceased have since instituted proceedings against the respondents in the Senior Principal Magistrates Court at Kangundo, ELC NO. 71 of 2020 seeking specific performance for transfer of the property.

6. The Applicant lamented that the actions of the administrators/respondents have exposed the deceased estate to litigation and as such the administrators have failed in their duty as administrators to proceed diligently with the administration of the said estate. She averred that the Respondents have wilfully and/or negligently subjected assets forming part of the Estate of the deceased to loss and damage as the Estate has since suffered loss and damage in a bid to refund the purchase price which was used by the respondents for their personal gain.

7. It was averred that the 1st respondent herein made an application before this court dated 8th March 2019 seeking to restrain her husband, **Sammy Mwithama Ngundu, Mirriam Ndunge Ngundu** and the applicant from collecting rent and intermeddling with the deceased estate and in its ruling delivered on 10th June 2019 the Court restrained all the beneficiaries of the Estate of the deceased, their agents or servants from intermeddling with the Estate through sale, lease, transfer or wasting the Estate. Despite that order, the 1st respondent went ahead to defy the same by selling and wasting the Estate of the deceased.

8. It was the Applicant's position that the 1st and 2nd respondents cannot be trusted to jointly administer the Estate of the deceased diligently due to the said intermeddling and wasting of the Estate prior to confirmation of grant.

9. The Applicant was apprehensive that unless the grant of letters of administration intestate issued herein is revoked and the respondents herein restrained from intermeddling with the Estate of the deceased, the beneficiaries of the Estate of the deceased will suffer substantive loss and damage as the respondents will collude to disinherit the applicant and her sister the rightful beneficiaries of the deceased and mis-administer the Estate of the deceased.

10. In response to the application, the 1st Respondent/Administrator disclosed that there exist divorce proceedings before Kangundo Court between her and the 2nd Respondent herein. She however admitted that the Applicant and her said sister are her sisters in law and are beneficiaries to the estate of the deceased. She however contended that these proceedings are known to the beneficiaries of the estate and that subsequent to the filing of this petition the Grant was issued to the Respondents.

11. It was therefore her position that this application is malicious and denied that the two administrators colluded in deceiving the Court and sought that the prayers sought herein be disallowed.

12. On his part the 2nd Respondent deposed that the 1st Respondent herein was previously his wife and a daughter in law to the deceased with whom they have since separated and filed a divorce in Kangundo Law courts. According to him, the Applicant herein **Brigit Kamene and Mirriam Ndunge Ngundu** are his sisters and beneficiaries to the estate of the deceased.

13. He deposed that during the Petition for letters of administration the 1st Respondent herein tricked him to sign the Petition unaware of what he was signing since the said petition was prepared by advocates he had not instructed and he came to know that she had included him as a Joint administrator. According to him, her sisters **Brigit Kamene** the Applicant herein and **Miriam Ndunge Ngundu** rank higher in priority than the 1st Respondent in applying for letters of administration and they never renounced their right to apply for letters of administration. However, the 1st Respondent intentionally omitted their consent and came to know of the petition after the same had been filed.

14. It was therefore his position that the grant herein ought to be revoked and issued afresh as the same is inoperative as the co-administrator is uncooperative and cannot continue administering the estate of the Deceased. According to him, the 1st Respondent's actions were uncalled for and clearly show malice on the part of the 1st Respondent since she is not a beneficiary and cannot efficiently administer the estate of the deceased in light of the fact of their separation with the 1st Respondent and the animosity between them.

15. The 2nd Respondent therefore supported the summons for revocation but sought that fresh letters of administration be issued to himself, the Applicant and **Miriam Ndunge Ngundu** as the only beneficiaries to the estate of the deceased to ensure fair and equitable distribution of the same. Based on legal advice, he averred that if the 1st Respondent is entitled to any part of the estate of the deceased then she ought to claim the same from his share of the estate and cannot purport to exercise such right before this Court as she ought to file a different matter before a family court for matrimonial division of property.

Determination

16. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

17. Section 76(a), (b) and (c) of the **Law of Succession Act** provides as hereunder:

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;

(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;

18. In this case it is not in doubt that the Applicant is one of the daughters of the deceased herein. She says that she was never informed when the Petition for Grant was made and was not aware of the same. Her position is supported by the 2nd Respondent/Administrator who contends that the 1st Respondent, his estranged wife, misled him into executing the documents in support of the petition. The 1st Respondent however states that the beneficiaries were aware of these proceedings.

19. Assuming that the 1st Respondent's position as regards the conduct of the Applicant is true, section 51 of the *Law of Succession Act* provides as follows:

(1) An application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.

(2) An application shall include information as to-

(a) the full names of the deceased;

(b) the date and place of his death;

(c) his last known place of residence;

(d) the relationship (if any) of the applicant to the deceased;

(e) whether or not the deceased left a valid will;

(f) the present addresses of any executors appointed by any such valid will;

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;

(h) a full inventory of all the assets and liabilities of the deceased; and

(i) such other matters as may be prescribed.

20. Section 66 of the *Law of Succession Act*, Cap 160, Laws of Kenya provides that:

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

a. surviving spouse or spouses, with or without association of other beneficiaries;

b. other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

21. Under Part V of the Act, the children of a deceased person rank equally. In this case the Applicant and her sister together with the 1st Administrator are the children of the deceased. Accordingly, there is no superior right to a grant as between the three. Accordingly, any person seeking to petition for Grant ought to have sought their consent or cited them before doing so. In this case, it is clear that the 1st Respondent herein did not rank in priority to the Applicant and her sister since they are both children of the deceased.

22. Part VI Rule 26(1) of the *Probate and Administration Rules* provides that:

Letters of administration shall not be granted to any applicant without notice of every other person entitled in the same degree as or in priority to the applicant.

23. Therefore, what the law requires is that a notification be given to every person entitled in the same degree as or in priority to the applicant. Rule 22(1) of the *Probate and Administration Rules* (hereinafter referred to as "the Rules") however provides that:

A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto.

24. A citation, it was held in the Estate of Sheikh Fazal Ilahi [1957] EA 697 in which the Court relied on *Henderson on Testamentary Succession (4th Edn)*, is an instrument issued by the court, citing persons to come in and show cause why a grant should not issue to a particular person. It was therefore held in Maamun Bin Rashid Bin Salim El-Ruhmy vs. Haider Mohamed Bin Rashid El-Basamy [1963] EA 438 that:

“Where a person claiming to be an heir (or the heir of an heir) of a deceased person applies for a grant of administration, citations should not be issued to other heirs whose existence is disclosed in the petition having an equal right as a matter of course but only when for some special reason the court sees fit to make such an order. The object of a non-contentious citation is to call upon a person who has a superior right to a grant to take the grant. Thus any person who is interested in having an estate administered may apply for a grant of representation, but if there are persons who have a superior right to obtain the grant, he must cite such persons calling upon them to apply for the grant. If the person cited fails to apply for a grant or renounce their right to it, the grant may, subject to the usual conditions, be given to the *citor*. It follows that, save in cases where the court thinks it necessary to do so; non-contentious citations should not be issued unless the petition discloses that the person seeking the grant has a lesser right than some other person who has failed to take the necessary steps to obtain it... If on the other hand the person cited concedes that the person who has applied has a right to the grant but contends that he has a superior right, then, the proper course for him to adopt (after he has been served with citation) is to enter appearance to the citation and himself apply for a grant to be made to him if he so wishes. If the person cited enters appearance but takes no further step, the *citor* may apply on summons for an order that the person cited to take the grant within a stated time and in the event of the latter neglecting to do so, the grant will be ordered to be made to the *citor*...The only issue before the court in a cause brought as a result of a caveat being entered is whether or not the person who has applied for the grant is entitled to it and there is no issue as to whether he or some other person has a better right to the grant.” [Emphasis supplied].

25. It was therefore held by **Kneller, J** (as he then was) in Kiboko vs. Assistant Land Registrar and Others [1973] EA 290 that:

“Citations need not be ordered to issue to all persons shown as heirs in the petition of the deceased for a grant of letters of administration of the estate. They need not be ordered as a matter of course to issue for heirs shown in the petition to have an equal right. They should go forth to anyone shown to have a superior right to take up the grant or for any other special reason.”

26. It is therefore clear that unless the Court thinks otherwise, the Citor must be a person who is himself entitled to a grant, in the event that a person with a superior right fails to take up the grant or for any other special reason. Where two or more persons have equal rights to grant of representation, there is no necessity for a citation to be made unless when for some special reason the court sees fit to make such an order. In those circumstances, one of them is at liberty to apply for grant and the Court may in its discretion join the other persons if it deems fit.

27. Apart from bare averments, there is however no evidence that the Applicant and her sister were notified as required in Part VI Rule 26(1) of the *Probate and Administration Rules* despite the fact that they rank in priority to the 1st Respondent. In her replying affidavit, the 1st Respondent has not given any reason why this was not done.

28. I agree with the holding in the case of Monica Adhiambo vs. Maurice Odera Koko [2016] eKLR in which the court stated as follows:

“... a closer look at the process she took in applying for the said grant of letters of administration reveal that the said grant was obtained through fraudulent non-disclosure of material facts...None of these two beneficiaries had given the petitioner consent in terms of Rule 7(7) (a) (b) and (c) of the Probate and Administration Rules...The petitioner in the instant case cause did not rank higher than the objector in priority in seeking a grant of administration intestate and was required before making of the grant to furnish this court with information and satisfy the court that the objectors having prior preferences to a grant being all children of the deceased, had renounced their right generally to apply for the grant or had consented with making of the grant to the petitioner or that they had been issued with a citation calling upon them either to renounce such right or to apply for a grant. The petitioner therefore acted in contrary to the mandatory provisions of Rule 7(7) of the Probate and Administration Rules and it’s no wonder my sister Sitati J had to revoke the petitioner’s grant for non-disclosure of material facts...With that said, the fact that the petitioners title over the original suit land was revoked will automatically affect the interested parties ownership over the suit property because it will be a corruption of the law to validate how the original suit property belonging to the deceased was transferred to the petitioner. The fact remains that the petitioner stole a march over the other beneficiaries who were also to benefit on equal status on the property of the deceased and it would be unfair to validate the illegal actions of the petitioner by invoking Section 93 of the Law of Succession Act. The reality of the situation is that provisions of Section 93 do not validate unlawful acts and what was intended by Section 93 was where a grant is properly and lawful issued then, Section 93 can come to the rescue of such a purchaser. In my humble view the underlying objective of the law of Succession Act is to ensure that beneficiaries of deceased persons inherit the property.”

29. In the premises, I am satisfied that the proceedings to obtain the grant were defective in substance. Accordingly, the Grant of Letters of Administration issued to **Angeline Munyiva Mwithama** and **Sammy Mwithama Ngóndu** herein on **25th February 2019** is hereby annulled and/or revoked. I am however not satisfied that the 2nd Respondent was an innocent party to the said proceedings. His change of mind seems to have arisen from the fact that his relationship with the 1st Respondent is no longer rosy. Having been a party to the defective proceedings it is my view that none of them ought to further administer the Estate of the deceased.

30. I hereby appoint **Brigit Kamene** and **Mirriam Nduge Ngondou** as joint administrators of the estate of **Mary Ngondou Mwanunga**.

They should expeditiously proceed to apply for confirmation of Grant. However, before doing so none of the properties of the deceased should be disposed of or in any other manner alienated. I further direct that this dispute be referred to mediation for the purposes of proper distribution of the estate of the deceased.

31. As this dispute pits members of the same family, there will be no order as to costs.

32. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 14th day of December, 2020.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Munguti for the Applicant/Interested Party

Mr Kisini for the 2nd Administrator

Mr Nzei for Dr Khaminwa for the 1st Administrator

CA Geoffrey