**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**SUCCESSION CAUSE NO. 82 OF 1989**

**In The Matter Of The Estate Of Tuaruchiu Marete Alias M'turuchiu M'marete Alias Turuchiu S/O Marete (Deceased)**

**FREDRICK KABURU IKIUGU.....1ST ADMINISTRATOR/RESP**

**JOHN KABITI M'TURUCHIU.....2ND ADMINISTRATOR/RESP**

**VS**

**JANET NAIROTE M'TUARUCHIU.....APPLICANT**

**JUDGMENT**

[1] **TUARUCHIU MARETE alias M'TURUCHIU M'MARETE alias TURUCHIU s/o MARETE ("the deceased)** to whom this succession cause relates died on 13th November 1979. M'Ikiugu M' Itwaruchiu petitioned for letters of administration where he stated that the deceased was survived by his children: **M'Ikiugu M'Itwaruchiu, Josphat Muriuki M'Twaruchiu, Henry Muthuri M'Twaruchiu, Johnson Mbihwe Mbaya** and **John Kabiti M'Turuchiu**. His estate comprises of land parcel No. ABOTHUGUCHI/KITHIRUNE/591 and parcel No. NTURUKUMA /433. He was issued with the letters of administration on 8th May 1990 and confirmed on 11th November 1996. But the said grant was revoked on 3rd February 1997 and the court made a grant to M'Ikiugu M'Twaruchiu and John Kabiti M'Turuchiu. The grant was confirmed on 30th July 2008.

[2] The 1st administrator filed an application by way of summons for rectification of the grant dated 3rd May 2014. He sought to replace M'Ikungu M'Twaruchiu, his father, for he is now deceased. On 8th October 2014 the court allowed his application only in respect of substitution.

**Revocation sought once again**

[3] The applicant through her application dated 26th March 2018 filed summons for revocation or annulment of grant pursuant to **Section 76 of CAP 160 and Rule 44 (1) of the Probate and Administration Rules.** The grounds upon which the application is based are stated in the application and the supporting affidavit of Janet Nkirote sworn on 26th March 2018 to be:-

> 1. That after the administrator died grant was issued to a person who did not have locus to administer the estate for he is a grandson of the deceased who should not take precedence or priority to the living sons and daughter of the deceased.
>
> 2. That the substituted administrator has substantially changed the original distribution mode agreed by the parties and made illegal and irregular proposal to distribute the estate and has left out and excluded some of the beneficiaries.

[4] The application was opposed vide the replying affidavit of Fredrick Kaburu Ikiugu sworn on 11th June 2018. It was averred that he only applied for only for rectification of the grant so that he may be able to be substituted for his deceased father. He denied ever changing anything or excluding some of the beneficiaries as alleged. He termed the applicant's allegations as false and misleading. He lamented that after the death of his father, the 2nd administrator and the applicant have tried all means to take away his father's share by force and this is the reason why they are coming to court after 10 years since the confirmation of the grant on 30th July 2008 to have the grant revoked. He approached the 2nd administrator and applicant to have the said land registered, subdivided and cause transfer of the same to the beneficiaries but they declined. Several letters have been written to their counsel but they have been un-cooperative.

[5] This matter was canvassed by way of written submissions. The applicant submitted that the only way to have the interest of a beneficiary named therein devolve to another person is through another separate succession cause in respect to that beneficiary who dies before transmission in his favour is completed. That the application made on 3rd May 2014 was defective in substance as it sought to fundamentally change the character of the grant. Based on that there is sufficient ground to revoke the grant issued to the respondents on 8th October 2014.

She relied on the case of **Kamau v Kirima [2002] 2 KLR 172**

[6] The 1st administrator submitted that revocation of a confirmed grant under **Section 76(e) of the Law of Succession Act** and **Section 66 of the said Act** on appointing new administrators on a priority basis would only apply in a situation whereby all the administrators are dead. In this case the 2nd administrator is alive and **Section 81 of the said** Act would apply. He relied on the case of **In re Estate George Ragui Karanja (Deceased) [2016] eKLR.** That whoever alleges must prove thus the applicant cannot be allowed to state allegations before the court nor indicating or proving where the same arose from.

**ANALYSIS AND DETERMINATION**

[7] The issue of determination before this court is whether to revoke the confirmed grant dated 8th October 2014.

[8] Section 76 of the Law of Succession Act stipulates the grounds upon which a grant may be revoked or annulled. In this cause the reasons cited for revocation of grant are that it was issued to a person with no *locus standi* and who has substantially changed the mode of distribution. The 1st administrator supported his ground by relying on **Section 81 of CAP 160.**

**Rectification distorted grant**

[9] I have thoroughly perused the initial certificate of confirmation of grant dated 30th July 2008 and the rectified certificate of confirmation of a grant dated 8th October 2014. The mode of distribution is the same except the 1st administrator is named as the beneficiary in place of his father. The other change is that the 1st administrator was appointed a joint administrator of the estate. Two issues emerge as a result of these amendments. Upon the amendment the 1st administrator became; sole beneficiary of his father's estate; and a joint administrator.

**Death of one of administrator**

[10] This subject is covered under section 81 of the Law of Succession Act which states as follows:-

> **81. Powers and duties of personal representatives to vest in survivor on death of one of them**
>
> **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. 82**

[11] There are however situations where an additional administrator should be appointed. For instance where there is a resulting trust, a sole surviving administrator is required to apply for an additional administrator to be appointed which failing the court will appoint on its own motion. Similarly, where the intestate is polygamous, death of one of the administrator may require a replacement for purposes of the house he represented. Or for a good cause and in the best interest of all persons concerned the court may appoint an additional administrator of an estate. This is in discretion under section 66 of the Law of Succession Act. Therefore, there is no complete prohibition of appointing another administrator in addition to a surviving administrator or administrators. Nothing wrong in the appointment of the first administrator herein.

[12] I note that there are two houses in this cause. Also, I note that two administrators had been appointed earlier after the initial grant was revoked. One of them died. And despite section 81 of the Act the appointment of the 1st administrator has not been shown not to have been for good reason and in the best interest of the parties concerned. His appointment does not flout any law.

[13] I am aware that it has been argued that he did not have locus standi to apply to be appointed an administrator and the order of preference has been cited as the basis of the argument. The argument is neither here nor there for he is the son of the deceased beneficiary and that may justify his appointment as an administrator.

**Share of deceased beneficiary**

[14] The elephant n the room is that he replaced his father as the sole beneficiary of his share. Whereas a child of the deceased may take the share of his deceased parent directly, but this should be done in clear cases and with much circumspection. Trouble may comes when one of the children of the deceased beneficiary takes the whole of the estate of the deceased beneficiary. This is fraught with many dangers. Consider these dilemmas; (1) you may disinherit other dependants of the deceased; (2) the court may not be in a position to identify the rightful beneficiaries of the estate of the deceased beneficiary; (3) the cause does not relate to the deceased beneficiary, thus, the safeguards in law say gazettement of the cause to invite objections may not be available in that kind of transmissions; (4) in case of disputes amongst the beneficiaries of the deceased beneficiary, those may not be resolved in the original cause. I have seen in my practice as a judge, many causes being unduly delayed by wrangles amongst the beneficiaries of the estate of deceased beneficiary. Of significance to note is that the share of the deceased beneficiary belongs to his estate and therefore, to all the beneficiaries of the deceased beneficiary. A more creative way which is supported by law is to indicate that the share shall go to the estate of the deceased to be shared equally by all his children. Such share is held in trust by the administrators of the original cause for transmission to the estate of the deceased beneficiary. I should think, these are the reasons which have prompted courts to insist on strict adherence with the procedure outlined by Khamoni J in the of **Kambora Mamau v Esther Nyambura Kirima [2002] eKLR** should be adhered to. The judge stated:-

> **"As I said in this court's Succession Cause No 1086 of 1995, i*n the matter of the estate of Ndungu Kariuki* (unreported); a certificate of confirmation of grant confers upon a beneficiary under it a beneficial interest. I stated:**

**"As a certificate of confirmation of grant, also referred to as a certificate of confirmation, confers upon a beneficiary under it a beneficial interest in the estate of the deceased person, where such a beneficiary subsequently dies before the executor or administrator of the estate for which the certificate of confirmation was issued transfers the resultant legal interest or title to the aforesaid beneficiary, it is not proper and lawful to proceed under rectification of that certificate of confirmation to replace the deceased beneficiary with a person other than a confirmed executor or administrator of the estate of the deceased beneficiary."**

**…To get to be a confirmed executor or administrator of the estate of a deceased beneficiary, the proper procedure would be for the person aspiring to replace the deceased beneficiary to start the ball rolling in separate proceedings being a petition for the grant of probate or letters of administration in the estate of the deceased beneficiary. The aspirant will start those proceedings either as a petitioner as well as a beneficiary or as a purely beneficiary influencing others interested to have the petition filed."**

[15] Consequently, I direct that the share of the deceased beneficiary, the father of the 1st administrator shall revert back to his estate to devolve to all the beneficiaries of his estate in equal shares. The certificate of confirmation herein shall be so amended. Meanwhile, my understanding of the law is that the said share shall be held by the administrators herein in trust for the benefit of his estate. The name of the 1st administrator as a beneficiary shall be removed forthwith. However, he remains an administrator of the estate as his father's share is at stake. There is absolutely no ground for or point in revoking the grant. It is so ordered.

**Dated signed and delivered in open court at Meru this 30th January, 2019**

**.....**

**F. GIKONYO**

**JUDGE**

**In presence of**

**Marete for Mbaabu for 1st administrator**

**2nd respondent in person**

**M/s Njenga for Kaumbi for applicant**

**.....**

**F. GIKONYO**

**JUDGE**