



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 1742 OF 2014

IN THE MATTER OF THE ESTATE OF KIMANI KINYORI ALIAS WILLIAM KINYORI (DECEASED)

JANE WANJIRU MUMBE.....1ST APPLICANT/OBJECTOR

MARY NYAMBURA KIMANI.....2ND APPLICANT/OBJECTOR

VERSUS

MWANGI WILLIAM.....1ST RESPONDENT

WILLIAM KIMANI.....2ND RESPONDENT

FRANCIS CHEGE.....3RD RESPONDENT

MARGARET NYAMBURA.....4TH RESPONDENT

RULING

1. In an application brought by way of a Notice of Motion dated 28th April, 2016 and filed pursuant to **section 3A** of the **Civil Procedure Act** and **Order 50 rule 1** of the **Civil Procedure Rules**, the Objectors herein invited the court to grant the following prayers:-

- i. That the court file in respect of this suit be reconstructed.
- ii. The pleadings and documents annexed to the affidavit be accepted as copies of the originals filed in court.
- iii. The Honourable court be pleased to grant conservatory orders restraining the Respondents whether by themselves, their agents and or servants from offering for sale, selling, disposing, leasing or in any manner interfering with the properties specified above pending the hearing and determination of this application and succession cause.
- iv. The file be kept in the strong room for safe keeping.
- v. The costs of the application be provided for.

2. The application was supported by the affidavit of Ms. Diana Odero, counsel for the Objectors, sworn on 5th May, 2016 in which she averred that: the Respondents obtained a Grant of Letters of Administration fraudulently in Succession Cause 345 of 2001 at Thika Law Courts and the same needs to be revoked; the Respondents have in their possession property belonging to the estate of their deceased father which was distributed to the exclusion of the Applicants; the deceased's estate is being wasted and interfered with thus causing the Applicants irreparable loss.

3. Ms. Odero complained that despite several attempts to fix the matter for hearing, the file could not be found. Numerous visits to the court registry to locate the file have proved futile. That on 3rd May, 2016 they received a letter from the Court confirming that the said file cannot be traced. She urged the court to allow the Applicants/Objectors to reconstruct the court file on the basis of the documents attached to her affidavit and to make them part of the record of Succession Cause 1742 of 2014.

4. In reply to the application, Mwangi William Kinyori, the 1st Respondent, swore an affidavit on 8th November, 2016 in which he denied the averments raised by the Applicants/ Objectors on behalf of himself and his Co-Respondents. He denied the allegations that the Applicants

had been deliberately left out stating that the Applicants had themselves indicated non-interest in the proceedings at the Thika Lower court. He urged that the confirmation of the grant was based on the court records and the Applicants did not at any point object to the mode of distribution. That the distribution was effected as per the wishes of their mother, who has since also died.

5. The background of this matter as seen in the lower court file, Succession Cause 345 of 2001 at Thika Law Courts, is that the deceased whose estate is in issue herein died intestate on 14th March, 1999. The deceased was survived by his widow Phylis Wambui, now deceased, and eight (8) children: six (6) sons and two (2) daughters. The deceased's estate constituted the following assets:

- a. Land parcel Loc 3/Kariua/490
- b. Land Parcel Loc 3/Kariua/T. 21
- c. Title No. Nairobi/Block 122/30
- d. Title No. Nairobi/Block 122/341
- e. 1794 shares with City Chicken & Eggs Dealers Co-op Society Ltd.

6. A grant of letters of administration intestate was issued to the late Phylis Wambui Kimani, the widow of the deceased, on 26th June, 2002 in Succession Cause No. 345 of 2001 in the Chief Magistrates Court at Thika. The grant was confirmed on 3rd June, 2004 and the deceased's estate shared between the deceased's six (6) male children and his widow Phylis Wambui Kamau to the exclusion of the deceased's two (2) daughters who were already married at the time. The present application is premised on the exclusion of the deceased's daughters, who are the Applicants/Objectors herein, from sharing in their late father's estate.

7. The matter came up for hearing on 18th September, 2017 whereupon the court directed that the matter be disposed of by way of written submissions upon application by Counsel for the Applicants/Objectors.

8. Mr. Kibathi filed written submission dated 11th June, 2018 on behalf of the Applicants/Objectors and stated that the basis of the application is that the Respondents fraudulently obtained letters of administration in Thika Succession Cause No. 345 of 2016. That the Applicants consequently filed Summons for Revocation of Grant dated 25th June, 2014. He urged that the Respondents are in possession of the deceased's estate having distributed the same to the exclusion of the Applicants.

9. Mr. Kibathi asserted that there are two main issues for determination: whether the Applicants have a *prima facie* case for revocation of grant and whether there is sufficient legal justification for issuance of conservatory orders.

10. Mr. Kibathi contended that the Applicants/Objectors have a *prima facie* case for revocation of grant in accordance with **section 76** of the **Law of Succession Act**. He referred the court to the Court of Appeal case of **Samuel Wafula Wasike vs. Hudson Simiyu Wafula**, as cited by Mutende J in **Eric John Mutemi & another vs. Agnes Mumbanu Kinako [2016] eKLR**, in which it was held that a grant obtained on the strength of false claims, without obtaining the consents of persons who had prior right to the grant and on the basis of facts concealed from the court, is liable to revocation.

11. Mr. Kibathi urged that this is a proper case for the exercise of the court's discretion and issuance of conservatory orders as held in the case of **Jane Wanjiku Ngugi vs. Veronica Mbutu Njunge [2015] eKLR**.

12. In opposition, Mr. Kugwa filed written submissions dated 6th July, 2018 on behalf of the Respondents and submitted that the application dated 28th April, 2016 is an abuse of court process. He contended that the entire application seeks orders that cannot be granted by the court. He urged that the use of the Civil Procedure Act and Rules in succession matters have been clearly established and outlined under **Rule 63** of the **Probate and Administration Rules**.

13. Mr. Kugwa stated that the Applicants have failed to establish a *prima facie* case for revocation of grant. He contended that the Applicants claimed that the proceedings to obtain the grant were defective yet they were present during the proceedings and confirmed to the court that they were married and therefore not interested in the estate.

14. Mr. Kugwa contended that the Applicants are not deserving of the conservatory orders as sought since they have failed to prove the alleged fraud or demonstrate that there is imminent threat of the Respondents disposing of the sole remaining asset of the deceased's estate. Further that the Applicants had failed to prove that the Respondents are wasting and interfering with the estate of the deceased herein.

15. Mr. Kugwa asked the court to strike out the affidavit annexed to the application and sworn by Diana Odero stating that advocates should not swear affidavits on behalf of their clients especially on facts they are incapable of proving or testifying on. To buttress his argument, he referred the court to the case of **Mansukhlal Damji Pattni vs. Nasir Ibrahim Ali & 2 others [2005] eKLR** where an affidavit sworn by an advocate on behalf of his client was struck out because the advocate could not prove all the statements of information and belief that he had stated.

16. Mr. Kugwa urged the court to dismiss the Applicants' application stating that the application is intended only to derail the administration of the deceased's estate.

17. I have considered the pleadings on record and the rival arguments of both parties and find that the key issue for determination is whether

the Applicants have established a *prima facie* case with a likelihood of success, and they would suffer irreparable loss if the conservatory orders sought in the Notice of Motion dated 28th April, 2016 are not granted.

18. Mr. Kugwa raised a concern that this application is filed pursuant to **Order 51** of the **Civil Procedure Rules** which is not among the orders contemplated under **Rule 63** of the **Probate and Administration Rules** as relevant to succession proceedings. It is however noteworthy that this court has jurisdiction to entertain any dispute concerning the interest of a beneficiary under the Law of Succession Act without undue regard to technicalities by virtue of **Article 159(2)(d)** of the **Constitution** which enjoins courts to administer justice without undue regard to procedural technicalities. Further, **Rule 73** of the **Probate and Administration Rules** provides that nothing in the rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice.

19. In the premise therefore, I find that the failure of the Applicants to refer to the correct section or rules is not a basis to deny the determination of the application on merit. I will therefore proceed to determine the merits of the present application.

20. In his written submissions filed on behalf of the Applicants, Mr. Kibathi submitted that the proceedings to obtain the grant were defective in substance since they were premised on untrue allegations of fact essential in law to justify the issuance of a grant. That the Applicants/Objectors who are children of the deceased herein were not aware of and did not consent to the grant of the letters of administration or the subsequent distribution of the estate. He urged that the Applicants/Objectors were discriminated upon on account of their gender since it is only the two of them who were left out of the distribution.

21. Mr. Kibathi asserted that the parcel of land known as Nairobi/Block 122/341 has already been sold as manifest in the Replying Affidavit dated 8th November, 2016. That the only remaining asset of the deceased is a parcel of land known as Nairobi/Block/122/30 which is in danger of being disposed of.

22. In the replying affidavit dated 8th November, 2016 the 1st Respondent confirmed that the property known as Nairobi/Block 122/341 had been sold by their mother Phylis Wambui, now deceased.

23. I note also that the Respondents have not denied that the Applicants did not share in their late father's estate. All they have done is allege that the Applicants relinquished their share of the deceased's estate but they have not produced any affidavit or any documentation in support of their allegations.

24. In my view, the foregoing facts in paragraphs 20, 21, 22 and 23 point to a *prima facie* case with a probability of success. Whether or not the case will actually succeed is a matter of fact depended on evidence to be produced at the trial. The Applicants have demonstrated that Nairobi/Block 122/30 is in danger of being disposed of since it is the only remaining asset of the deceased's estate, the other assets having been sold already. If the conservatory orders as sought are not granted, then the Applicants' consequent application for revocation of grant will be merely an academic exercise and if successful, orders granted therein will be rendered nugatory. At this stage, all that is required of the court is to determine whether the allegations raised by the Applicants require further investigation. The facts asserted herein will however have to be proved by evidentiary material to the required standard during trial.

25. It must be appreciated that a conservatory order is a discretionary remedy and accordingly, it will not be granted where it is shown that an applicant's conduct with respect to the matters pertinent to the suit does not meet the approval of a court of equity.

26. Should it turn out that there is substance in the averments of the Applicants, the actions of the Respondents will have led to their being disinherited and in my considered view that amounts to irreparable loss. In the premise therefore, and in the interest of justice, I find that the balance of convenience tilts in favour of the Applicants at this point in time.

27. With regard to the reconstruction of the file, I note that this Succession Cause was filed in 2014 but the proceedings in it date from 10th May, 2016. There are no proceedings from 2014 which is when the cause was initiated. In the affidavit filed in support of the application, Ms. Diana Odero asked the court to allow the reconstruction of the file on the basis of the documents attached thereto. The documents are copies which bear stamps of the court to indicate that they had previously been filed in this succession cause from 2014 when the matter was initiated.

28. Mr. Kugwa sought to strike out the affidavit stating that advocates should not swear affidavits on behalf of their clients especially on facts they are incapable of proving or testifying on. I note that in **Kamlesh Mansukhlal Damji Pattni vs. Nasir Ibrahim Ali & 2 others [2005] eKLR**, to which Mr. Kugwa referred, the Court of Appeal (Tunoi, Githinji & Waki JJ A) stated thus:

"There is otherwise no express prohibition against an advocate who of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client. So too an advocate who cannot readily find his client but has information the sources of which he can disclose and state the grounds for believing the information...The affidavit in reply in Kenya Horticultural Exporters Ltd Case (supra) was sworn by an advocate. It was however not struck out for that reason, but because the advocate could not prove all the statements of information and belief that he had stated even if he was to be cross-examined on them."

29. On this, **Halsbury's Laws of England, 3rd Edition, Paragraph 845** states as follows:

"Affidavits filed in the High Court must deal only with facts which the witness can prove of his own knowledge, except that, in interlocutory proceedings or with leave, statements as to a deponent's information or belief are admitted, provided the sources and grounds thereof are stated...For the purpose of this rule, those applications only are considered interlocutory which do not decide the rights of the parties but are made for the purpose of keeping things in status quo till the right can be decided, or for the purpose of obtaining some direction of the court as to the conduct of the cause."

30. It is noteworthy that under **rule 8 of the Advocates (Practice) Rules 1966**, advocates are not permitted to swear affidavits in contentious matters. However not all matters deposed to by Ms. Odero are contentious. The only paragraphs of her affidavit which are contentious are paragraphs 4, 5, 7, 8 and 9 the gist of which is that the Respondents obtained a grant in respect of the deceased's estate fraudulently in Succession Cause 345 of 2001. From the contents of the paragraphs, this court determines that the said portions were sworn by Ms. Odero based on information received from the Applicants herein, who were her clients at the time.

31. In the premise therefore, and guided by the decision of the Court of Appeal in the **Kamlesh Pattni** case cited above, I will allow the affidavit of Ms. Odero to the exclusion of the offending portions, being paragraphs 4, 5, 7, 8 and 9. It is evident that Ms. Odero was possessed of the facts stated in the remaining portions of her affidavit sworn on 5th May, 2016 in support of the present application.

32. Ms. Odero stressed the need for reconstruction of the file based on the documents annexed to her affidavit stating that it would be in the interest of justice. I note that there is attached to the affidavit a letter dated 3rd May, 2016 by the Principal Executive Officer of the Family Division indicating that the original file had not been traced at that date, and recommending reconstruction of the file.

33. I am alive to the fact that all the parties to a case should be involved in the reconstruction of a missing file. I however note that the Respondents have not addressed this issue in the replying affidavit filed in response to the application, or in the submissions filed in opposition to the application. Several documents attached to the affidavit in support of the application provide sufficient cause to warrant the grant of an order for reconstruction. In the circumstances therefore, I find it prudent to allow the reconstruction of the file in the interest of justice for purposes of hearing and determining the main application which is for revocation of grant.

34. In sum, I find that the application dated 28th April, 2016 is meritorious and grant the prayers sought in the following terms:

(i.) The court file in respect of this suit be reconstructed.

(ii.) A conservatory order is hereby granted restraining the Respondents whether by themselves, their agents and or servants from offering for sale, selling, disposing, leasing or in any manner interfering with the property known as Nairobi/Block 122/30 pending the hearing and determination of this succession cause.

(iii.) The file be kept in the strong room for safe keeping.

(iv.) Each party shall bear their own costs.

SIGNED DATED and DELIVERED in open court this **28th day of January, 2019.**

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Applicants/Objectors.

In the presence ofAdvocate for the Respondents.