



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT SUCCESSION CAUSE NO.283 OF 2011

IN THE MATTER OF ESTATE OF JOHN MURAGE MUGUONGO (DECEASED)

FRANCIS NDEGWA MURAGE.....PROTESTER

-VERSUS-

ERASTUS NJOGU MURAGE.....PETITIONER/RESPONDENT

J U D G M E N T

JOHN MURAGE MUGUONGO died on 5th December 1999 at the age of 91 years old. On 18th March 2011 FRANCIS NDEGWA MURAGE lodged the succession cause and filed citation to the other beneficiaries. This was accompanied by an affidavit sworn on the same date, seeking to be allowed to proceed with the cause without the chief's letter. He stated that he had, vide a letter dated 14th February 2011, through his advocates, requested the Chief Ruringu Location, to supply him with a letter giving the particulars of the deceased, his assets and beneficiaries but the chief had refused.

Somehow, on 27th June 2011 ERASTUS NJOGU MURAGE filed form P&A 12 'AFFIDAVIT OF JUSTIFICATION OF PROPOSED ADMINISTRATOR'. He had obtained the letter from the Ruringu Location Ag Chief's letter dated 26th January 2010, showing that the deceased was survived by: -

1. Christine Kirigo Murage Widow, 89 years
2. Erastus Njogu Murage son, 68 years
3. Samuel Mbichi Murage son, 62 years
4. Rose Wairimu Ndirangu daughter, 61 years
5. Francis Ndegwa Murage son, 58 years
6. Jenneys Wangui Ndirangu daughter, 52 years
7. Joan Wambui Gichuki daughter, 48 years

It also stated that he was the proprietor of title L.R NO.AGUTHI/MURUGURU/142.

Together with the petition he filed an undated 'CONSENT TO THE MAKING OF A GRANT OF ADMINISTRATION INTESTATE TO PERSON OF EQUAL OR LESSER PRIORITY'. It indicates that it is SIMON MBICHI MURAGE who is giving his consent and appears to have been signed by all the beneficiaries and thumb printed by the widow. The protestor herein, Francis Ndegwa Murage's signature is not on it.

On the basis of the foregoing documents, Erastus Njogu was issued with grant of letters of administration intestate on 24th January 2012. On 13th August 2013 he filed the summons for confirmation of the grant dated 12th August 2013 It was supported by his affidavit sworn on 13th August 2013 and a 'CONSENT TO CONFIRMATION OF GRANT GENERAL FORM R40 (8)' dated the same day. This form bears the signatures of the beneficiaries and the thumb print of the widow. He proposed to distribute the estate equally among the sons with each one of them getting 1.60 acres. There was no provision for the widow or the sisters.

The record shows that on 18th December 2013, Francis Ndegwa Murage wrote to the Deputy Registrar a letter dated 11th December 2013

headed;

“SUCCESSION CAUSE NO.283 OF 2011 ESTATE OF JOHN MURAGE MUGUONGO

ADVANCE NOTE IN OBJECTION TO CONFIRMATION OF A GRANT MADE TO ERASTUS NJOGU MURAGE”

This is to bring to your attention my objection to letters of administration being granted solely to the above Erastus Njogu Murage.

I wish to inform you that the “General Form R40(8)” submitted to you is a forgery as indicated on the annexure hereto.

Kindly note that my signature is as hereunder and NOT the forgery on the submitted form; further Christina Kirigo Murage could not have appended her thumb-print therein as she was long since dead at the time of submission of the said form. I have information, that the deceased has other assets which have been deliberately concealed by the intended administrator. Finally, in the dictates of common decency all stakeholders need to be consulted unlike this case. It is in the light of the foregoing acts of mischief, interalia, by the intended administrator, hence my objection.

Please be advised accordingly, thanking you in advance for your co-operation.

The letter was copied to among others the petitioner and one of the beneficiaries Simon Mbichi Murage .

The record further shows that on 27th December 2013, the Summons for Confirmation of Grant dated 12th August was fixed for hearing on the 20th March 2014. It was not heard and a fresh date of 5th June 2014 was given. Again, it was not heard and was fixed for 25th September 2014, when once again a fresh date of 11th December 2014 was given.

On the 11th December 2014, the matter was placed before the Judge, who, having seen the protester’s letter, noted that one of the beneficiaries had objected to the grant on the basis that his signature had been forged. Since there was no evidence that he was served, the court directed that fresh dates be taken in the registry, and the objector be served.

On 18th December 2014, the record shows that Simon Mbichi Murage filed a letter dated 17th December 2014 complaining the Summons for Confirmation scheduled for confirmation on the 11th December 2014 had ‘failed’ yet they had not been supplied with a copy of the protest or objection.

When the matter came before the Judge on the 12th April 2017 C.M King’ori Advocate for the petitioner indicated the possibility of the parties recording a consent. That did not come through. Francis Ndegwa was given time to file his affidavit of protest, but the court still left the ‘consent window’ open to the parties.

On 26th April 2017, he filed the affidavit of protest. He deponed that it is he who had lodged the cause in court but while he was away, the petitioner and another brother had forged his signature and their deceased mother’s thumb print to get the grant of letters of administration intestate. That in addition, the petitioner had concealed from the court other properties that belonged to the deceased. That the deceased in his lifetime had used the petitioner’s Post Office Box for his correspondences and thereafter even after his death, the petitioner continued to receive the deceased’s mail. That the petitioner had not accounted for the deceased’s pension, cash in bank, the deceased’s shares in East African Breweries Ltd. That the petitioner had secretly disposed off some of the properties belonging to the Estate.

In an apparent reaction to this protest the Petitioner filed “NOTICE OF AMENDMENT OF APPLICATION FOR GRANT” on the 23rd May 2017. It is noteworthy that the filing of this document was not minuted in the file record although it was properly filed and paid for. The notice was accompanied by two annexures.

The Notice states;

“TAKE NOTICE that I ERASTUS NJOGU MURAGE of P.O Box no 398 Nyeri have applied to this Honorable Court for grant of representation of the above JOHN MURAGE MUGUONGO who died on the 5TH DECEMBER 1999 hereby amend such application in the following manner;

- 1. That the parcel of land L.R No.EUASO NYIRO/NAROMORU WEST BLOCK 1/184 and EABL shares be included as the deceased properties copies annexed hereto marked (E1 ‘a’ and ‘b’)*
- 2. that costs be in the cause*

AND I HEREBY MAKE OATH AND SAY what is stated in my original application as so amended is true to the best of my knowledge, information and belief’

Sworn at Nyeri by the said

Erastus Njogu Murage

.....

Drawn by:

C.M KING'ORI ADVOCATES

.....”

Annexed to this NOTICE is a copy of title deed for EUASO NYIRO/NAROMORU WEST BLOCK 1/184 dated 16th June 1987 and DIVIDEND NOTICE dated 23rd June 2016 in the name of MR. JOHN MARAGE MUGUONGO (DEC'D) for Kshs.4309/20 from East African Breweries Limited.

When the matter came for mention on the 24th May 2017, this new development was not brought to the attention of the court but the petitioner sought leave to file a supplementary affidavit. Leave was granted. He filed a supplementary affidavit on the 11th October 2017, in which he mentioned that he had filed a 'Notice of Amendment' to his application to include the two properties, and sought that the two be shared equally among the brothers.

It is in this state that the matter was placed before me on 18.10.17. The protestor sought time to take the matter back to the elders at home to deal with certain preliminaries.

This was objected to by counsel for the petitioner on the ground that the issues the protestor had raised with regard to the properties had been settled by the application to amend the application for confirmation of the grant. That the only reason for his application was to delay the matter for personal gain.

The protestor's response was that his protest was not about the subdivision of the estate but about the petitioner being the administrator of the Estate. He pointed out that the petitioner had refused to discuss an out of court settlement. Well, following that submission parties took directions to dispose of the protest by way of written submissions.

On 16th January 2018, the protestor filed a supplementary affidavit in response to the petitioner's supplementary affidavit. He reiterated the fact the petitioner was still concealing the deceased's assets and had not responded to the issues raised in the protest.

Each party filed written submissions.

I have carefully considered the written submissions. The petitioner submits that the protest does not contain any lawful challenge. That the identification of the beneficiaries and the properties belonging to the deceased has been settled. That section 38 of the Law of Succession Act is the applicable law in that the deceased herein died leaving no spouse and hence the estate ought to be share equally among the children. That the applicant has complied with the law, and the protest ought to be dismissed.

In his submissions the protestor points out that he was away from home for 35 years and returned in 2010. His father died in 1999, and when his mother died in 2011 he came to court and lodged this cause after he realized that his father's written will could not be traced. That neither he nor his mother could have signed the General Form 40(8) dated 13th August 2013, because he was away in Mombasa and his mother was already deceased. That upon the deceased's retirement from employment in 1977, he used the petitioner's Post Office Box 398 Nyeri, and it was through this that the petitioner had concealed correspondence on the deceased's assets. That the deceased in his life time in 1980, had allocated each son his portion which each had developed in their own way.

Of great importance, the protestor pointed out the petitioner's failure/ refusal to respond to all the claims in the affidavit of protest with regard to the forgery of their deceased mother's thumb print, and the protestor's signature, secondly about the deceased's other assets e.g. Cash in Bank, pension due to their mother, shares, land.

The P& A rules define a "protestor" to mean ' a person who has filed a protest under rule 40(6) against the confirmation of a grant';

Rule 41 provides for the procedure in hearing the summons and the protest and at 41(2) what the court can do upon such hearing.

41. Hearing of application for confirmation

(1) At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been file and shall then hear the applicant and each protestor and any other person interested, whether such persons appear personally or by advocate or by a representative.

(2) The court may either confirm the grant or refer it back for further consideration by the applicant or adjourn the hearing for further evidence to be adduced or make any other order necessary for satisfying itself as to the expediency of confirming the applicant as the holder of the grant or concerning the identities, shares and interests of the persons beneficially entitled and any other issue which has arisen including the interpretation of any will.

On the first part, parties agreed to proceed by way of written submissions.

On the second part, as I went through the record it became increasingly evidently doubtful that any of the beneficiaries had given their consent for the appointment of the petitioner to be the administrator of the estate. The record shows that the protestor began to raise the issues for forgery in 2013 but the petitioner has never responded to any of them. The petitioner has not disputed that the signature of the protestor and the thumb print of his mother were forged on the consent dated 13th August to facilitate the confirmation of the grant. To say the least that reeks of criminality, and the protestor has every right to raise the issue with the relevant authorities.

As if that is not enough, the petitioner in reaction to the protestor's claims of concealing the deceased's assets, sneaked in a notice of amendment of the grant. Really, without a single explanation of the source of that information or why he had not included the assets in the first place. That 'notice' just went on to confirm that there could be some truth in the allegations made by the protestor. In fact, it appears to have been filed in that fashion, it was not served, and was not intended to be contested by the other beneficiaries. The petitioner expected it to be taken for the truth, the whole truth and nothing but the truth and not to be questioned. It was not supported by any affidavit and was an obvious abuse of the court process.

In as much as the protestor has no issue with the distribution of the estate he has raised very serious allegations against the petitioner, which the petitioner has more or less conceded to.

As a court I am enjoined to do whatever is necessary to protect the process of court from abuse. The Petitioner has demonstrated that he cannot be trusted.

The circumstances of this case, as they speak for themselves, direct me as the court dealing with this to '*... make any other order necessary for satisfying itself as to the expediency of confirming the applicant as the holder of the grant or concerning the identities, shares and interests of the persons beneficially entitled and any other issue which has arisen...*' (emphasis added)

I find that it is necessary to establish the extent of the deceased's estate, to establish the beneficiaries to the estate, to hear the beneficiaries, and whether really the petitioner is suitable as an administrator of this estate.

Hence in the interests of justice, I find it fair to make the following orders:

1. The grant issued to the petitioner on 24th January 2012 be and is hereby revoked.
2. A fresh grant to issue in the joint names of the petitioner and protestor. But each of them be at liberty to file summons for confirmation of the grant.
3. The petitioner is directed to give an account of how he came across the two assets he sought to add through the notice of amendment.
4. The petitioner is ordered to give an account of the entire estate of the deceased, including land, bank accounts, shares and dividends, pension or retirement benefits.
5. Orders 3 and 4 be complied with within 45 days hereof
6. The petitioner/ respondent to bear the costs of this application.

Dated, signed and delivered this 23rd February 2018.

Teresia M Matheka

Judge

In the presence of:

Court Assistant: Hariet

February 2018.

and delivered this 23rd.

ent benefits. make the following orders: f this estate. The Petitioner has demonstrated the pFrancis Ndegwa Murage: Protester present

N/A for the Petitioner

Muthee for Petitioner

Mention on 2nd May 2018 to confirm compliance.

RULING ON ORDERS ISSUED ON 23RD FEBRUARY 2018

Further to the orders I made above the petitioner filed an affidavit on the 22nd May 2018 sworn on the same date. He reiterated that he had disclosed everything he knew about the Estate of the deceased. That he had not deliberately left out any properties and the ones he added later, he knew about them from the protester.

The protester despite being served did not file any response neither did he have anything to add. He appeared satisfied with the petitioner's response.

Parties are at liberty to file summons for Confirmation of the grant.

The Summons for confirmation of the grant be filed within 30 days hereof

Parties to fix date in the registry.

Dated, delivered, signed at Nyeri this 25th January 2019.

Mumbua T Matheka

Judge

In the presence of;

CA Jerusha

Ms. Mwikali holding brief for Mr. Muthee for applicant /petitioner

Protester/Respondent in person

Judge