



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO.2390 OF 2014

IN THE MATTER OF THE ESTATE OF THE WAITHAKA KUBIU (DECEASED)

LOICE NJERI NDUTA.....1ST OBJECTOR

PATRICK KAMAU WAITHAKA.....2ND OBJECTOR

VERSUS

ESTHER NJERI WAITHAKA.....RESPONDENT

RULING

1. By way of Summons for Revocation or Annulment of Grant, dated 28th August, 2014, the Objectors seek revocation or annulment of the Grant of Letters of Administration issued in respect of the Estate of Waithaka Kubiu (deceased) granted to Esther Njeri Waithaka and Daniel Kamau Waithaka and confirmed on 21st July, 1992 in the Chief Magistrates Court in Kiambu vide Succession Cause No. 250 of 1989.
2. The application is premised on the grounds that, the grant was fraudulently obtained by the administrators through concealment from court of material facts and secondly, that the deceased was an uncle to the Objectors herein whom they allege disinherited their mother, Sarah Nduta Kubiu (deceased) during the distribution of her deceased father's estate.
3. The Objectors jointly swore an affidavit in support of the summons dated 28th August, 2014. They also filed statements in support of the summons. It was averred that the Respondent herein was a wife to the deceased with whom they had eight children. That, the Objectors are children to one Sarah Nduta Kubiu (deceased) who was a sister to the deceased herein both being children of Waithaka Kubiu (deceased), the grandfather to the Objectors. The Objectors had five other siblings.
4. It was claimed that the Objector's mother was entitled to a share from their grandfather's (her father) estate which she was denied by her brother, the deceased herein. The Objectors claim that they had been living in their grandmother's home and had been entitled to that parcel of land whereupon the house was built. It was also alleged that upon the death of their mother Objectors were chased away from their grandmother's home Loise Njeri Kubiu (deceased) by the Respondent where they had been residing.
5. It is contended that the deceased's assets comprise of the two parcels namely; Kiambaa/Thimbigua/1810 and Kiambaa/Mucatha/T.522. The homestead where they have been residing as alleged was on land parcel Kiambaa/Thimbigua/1810. The property has been subdivided into seven parcels and the Objectors sought registration of a caution pending the hearing and determination of this application. It is their application that the grant should be revoked as it disinherits the Objectors who are children of the deceased sister who was excluded by the deceased during the distribution of her father's estate, the Objectors' grandfather.
6. The application was opposed by the Respondent who relied on the replying affidavit dated 2nd November, 2016. She affirmed that she was married to the deceased. That upon his death, he was survived by seven children. She also affirmed that the deceased was the registered proprietor to properties known as Kiambaa/Thimbigua/1810 and Kiambaa/Mucatha/T.522.
7. She contended that upon the death of her husband, she commenced succession proceedings at Kiambu in Succession Cause no. 250 of 1989 and the court issued letters of administration to herself and her son Daniel Kamau Waithaka which were later confirmed on 15th July, 1992. She averred that there was no objection from any party and the estate devolved to herself as the custodian for her children. Upon confirmation, she made an application to the Land Control Board to sub divide parcel no. 1810 into seven parcels. Her application was granted and the subdivision effected. Title deeds were issued in the names of herself and her children and they all took up possession.
8. She refuted the allegation that the Objectors and their mother resided on land owned by the deceased. She asserted that the Objector's mother was married to one Njau Nduma and they were living on his land at Waguthu. She averred that, the Objector's mother never made any claim to her husband's parcel of land during his lifetime or hers and therefore, the application had no basis. She affirmed that the grant was obtained regularly and she did not disinherit anyone since all beneficiaries to the deceased estate had been fully involved and catered for.

9. The matter proceeded by way of *viva voce* evidence. At the trial, the 1st objector reiterated the averments sworn in the affidavits in support of her application. Evidence adduced was that, prior to her mother's death, her relatives; Esther Njau and Joyce Wanjiku, all wives to her mother's brothers and the Respondent, all lived on the same parcel of land. That, her siblings and herself resided in their grandmother's house which had been left to them when she died. It was not until her mother's death that the Respondent and other relatives evicted them from their home.

10. It was her testimony that she reported the matter to the Chief who referred the matter to the District Officer. In a meeting by the D.O it was agreed that her aunts would excise a half acre from each of their portions and give it to her but the aunts refused to execute the agreement. Further, she stated that her mother had been married but separated from her husband and returned to her home. That, her uncles (Waithaka Kubi, the deceased herein and Francis Njuhiga) had refused to distribute the estate to her mother as was required.

11. On cross examination, her position was that she brought this application because the property distributed to the children of the deceased belonged to her grandfather and to which she and her siblings were entitled and not the deceased as alleged. It was her case that the deceased had illegally transferred the property to himself and his brother in exclusion of the objectors' mother. She admitted that she had not commenced succession proceedings on her mother's estate.

12. The 2nd objector's testimony mirrored the 1st objector's testimony. He affirmed that the Respondent evicted them from their grandmother's home and demolished the house. He also stated that they had not filed any succession case in respect of the estate of their father and mother.

13. In response, Esther Njeri Waithaka, reiterated the contents of her affidavit in response and also testified that the objectors herein were neither her husband's children nor heirs. Further, that the process of obtaining the grant was regular and the property available for distribution had been distributed to her children and some held in trust by herself. As regards the estate of her father-in-law, it was her testimony that she was never involved in the distribution of that estate. She claimed that the objectors had no claim over the deceased's estate. The deceased died six years after he had been registered as the owner of the property and within this time, neither the objectors nor their mother had ever brought a claim over the parcel against him. She also pointed out that the objectors had not brought a claim against the estate of their grandfather Kubi Waithaka.

14. On cross-examination by counsel, she confirmed that the objectors had been living in their grandmother's house but the house was situated on her brother-in-law's parcel of land and not the deceased's property. She also testified that her father-in-law distributed property to his two sons in exclusion of the daughters. She refuted the allegations that she demolished her mother-in-law's house.

15. Upon the close of the proceedings Counsels filed and exchanged written submissions which I considered to establish whether the application before me passes muster on the threshold set by sec 76 of the Law of succession Act. The issues that arise for determination are:

1. Whether the grant was fraudulently obtained by the administrators through concealment from court of material facts.
2. Whether the Applicant's mother was entitled to a share of her father's estate.
3. Whether there is an estate to be distributed to them.

16. Section 76 of the Succession Act provides that;

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 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;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow;

(ii) to proceed diligently with the administration of the estate;

or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

17. The grant sought to be revoked was confirmed on 21st July, 1992 in the Chief Magistrates Court in Kiambu vide Succession Cause No. 250 of 1989 and was granted to Esther Njeri Waitthaka and Daniel Kamau Waitthaka. The objectors aver that the grant in question was obtained fraudulently through concealment of material facts. It is their case that the distribution of the estate of the deceased was arrived at secretly by the administrators without involving the objectors or other beneficiaries of the estate. The Respondent refuted this allegation and claimed that the objectors had no interest in the estate of the deceased. That, all beneficiaries of the estate had been involved during the process of obtaining the grant.

18. **Rule 26 of the Probate & Administration Rules** makes provisions for the issuance of notice to interest parties during the process of obtaining letters of administration. It states:-

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

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the Applicant and such other evidence as the court may require.

19. The question that arises is whether the objectors are entitled to a share of the deceased's estate. From the evidence adduced, the deceased was an uncle to the objectors and a husband to the Respondent. The claim by the objectors is for the property the deceased inherited from his father and consequently disinherited the objectors' mother, a sister to the deceased. It is the objectors' case that they have an interest in the deceased's estate by virtue of being beneficiaries of their mother's estate. They also claimed to be dependants by virtue of residing in their grandfather's house which is alleged to be situated on property owned by the deceased.

20. The Respondent's evidence was that although the objectors were related to the deceased they were neither dependants nor entitled to any share of the deceased's property. It was not disputed that the Respondent was the deceased's wife and together they had eight children. She challenged the objectors to furnish evidence of dependency which was non-existent.

Section 29 of the Law of Succession Act defines a dependant as

"a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters; as were being maintained by the deceased immediately prior to his death; and c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death."

21. At the hearing, the 1st and 2nd objectors testified that they were niece and nephew of the deceased respectively. The objectors however failed to show dependency in any capacity to the deceased prior to his death. The issue of dependency was brought up during submissions and I consider it to be an afterthought. I therefore find no basis to deem the objectors as dependants by dint of residing in their grandfather's house, which in any case was in someone else's parcel of land and not the deceased herein.

22. On the issue of the property, the objectors alleged that after the deceased disinherited their mother, he illegally registered the property under his name. It was for this reason that they felt entitled to a share of the deceased's estate. However, no evidence has been adduced by the objectors to back this allegation. The assertion by the Respondent that, the objectors' mother never brought a claim against the deceased is not denied. It is my view that, if she felt disadvantaged, she ought to have at least followed up the matter with the deceased in her father's estate. No evidence has been adduced of any such undertaking. Without sufficient proof of disinheritance, the court finds that the objectors' allegations do not hold water.

23. The Respondent in her response contended that the objectors have no claim against the estate of the deceased. That, they should have staked their claim to the estate of their grandfather Kubiu Waitthaka, an argument which commends itself to my reasoning. Since the objectors are claiming a share of their grandfather's estate, the appropriate cause to seek redress from, should have been the estate of Kubiu Waitthaka and not the deceased herein. I find therefore that the objectors lacked locus standi to bring this claim.

24. The Respondent also argued that the objectors were aware of the entire process. This court notes that the grant of representation was made on 21st July 1992 but the application for revocation was made on 28th August, 2014 being over 22 years after the confirmation within which period neither the objectors nor their mother sought for the revocation of the grant. I am not convinced that they were unaware of the entire process.

25. Under Section 107 of the Evidence Act, the Objectors were duty bound to lead evidence, to establish that indeed the grant was obtained fraudulently by concealment from court of material facts. This they did not succeed in doing. They cannot then be said to have discharged the burden of proof imposed on them under Section 107 of the Evidence Act.

26. I say this because, from the evidence on record the objectors failed to show any irregularities perpetrated by the Respondent during the process of obtaining the grant. They also failed to show the interest they had in the deceased's estate. It is for this reason I find that the objectors have not fulfilled the conditions for revocation or annulment of grant as provided for under Section 76 of the Law of Succession Act.

27. The Summons dated 28th August, 2014 for revocation or annulment of grant is dismissed. Each party to bear their own costs.

SIGNED DATED AND DELIVERED IN OPEN COURT THIS 25TH DAY OF FEBRUARY, 2019.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Advocate for the Objectors

In the presence ofAdvocate for the Respondent