REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

SUCCESSION CAUSE NO.112 OF 2017

IN THE MATTER OF THE ESTATE OF AMOS MWANGI GITHIGA (DECEASED)

A N D –

JOSEPH KARANJA MWANGI.....PETITIONER/RESPONDENT

- V E R S U S -

JANE NYAMBURA MWANGI.....1ST OBJECTOR/APPLICANT

ESTHER GATHONI MWANGI.....2ND RESPONDENT

R U L I N G

This matter relates to the estate of Amos Mwangi Githigia (deceased) who died on 10/1/2015. The objector/applicant herein is Jane Nyambura Mwangi a wife to the deceased. The respondents Joseph Karanja Mwangi and Esther Gathoni Mwangi are children of the deceased by his first wife who died in 1966, before the applicant got married to the deceased.

Before me for consideration is the application dated 22/9/2016 filed by Munene Chege, counsel for the applicant. The application sought the following prayers:

> **1. spent;**
>
> **2. spent;**
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> **3. That the Hon. Court be pleased to declare the Will dated 29/5/2008 as fraudulent and/or illegal hence null and void ab initio;**
>
> **4. spent;**
>
> **5. The cost of the application be provided for.**

On 17/10/2016, the parties recorded a consent to this effect:

> **"By consent, the applicant withdraws prayers 1, 2, 4 and 5. Prayer 3 be disposed of by way of oral evidence. Witness statements be exchanged within 30 days."**

The court made a further order:

> **"The consent is adopted as an order of the court. All other properties with the exception of Nyandarua/Oraimutia/306 be preserved."**

Before the application was heard, the 2nd respondent filed a notice of preliminary objection dated 6/10/2018 through the firm of Karanja Mbugua Advocates. The Preliminary Objection is three fold.

1. That this court sitting at Nakuru, Hon. Justice A.K. Ndungu expunged from these proceedings the second respondent's parcel of land known as Nyandarua Oraimutia/306; the second respondent had been included in the cause on the basis of the said land hence the need to expunge and remove the 2nd respondent's names from the cause, 'Esther Gathoni Mwangi';

2. That there is no grant of letters of administration with will annexed that has ever been issued to any party in this cause hence prayer 4 of the summons for revocation or annulment of grant dated 22/9/2016 has no basis and should be struck out;

3. That there is no jurisdiction to litigate prayers 2, 3 of the summons for revocation or annulment of the grant dated 22/9/2016 in support of the said preliminary objection.

Ms. Mwangi submitted that she was joined to these proceedings because of Plot No.Nyandarua/Oraimutia/306 because the land was registered in her name and that of 1st respondent, but it was expunged from the record by J. Ndungu; that since she is neither an executor nor petitioner in this cause, she should not remain as the 2nd respondent in this cause; that the executor Joseph Karanja Mwangi died in February, 2018 and the applicant's counsel wrote to the 2nd respondent inviting her to be a petitioner but she declined. The second respondent contends that the father left 16 children and she is the 6th and that it is upto the children to decide who will be the administrator to prove the will or file an intestate.

As regards prayer 4 of the summons dated 22/9/2016, the 2nd respondent urged that the executor, Peter Karanja filed summons for limited grant to pursue a court case on behalf of the estate and thereafter applied for letters of administration with written Will by the petition dated 16/10/2015 but no grant has ever been issued. She urged the court to dismiss the application because there is nothing to be revoked. The 2nd respondent also urged that since the objector alleges that there is no will, she has the option of filing another intestate cause.

The 2nd respondent addressed the grounds filed in reply to the preliminary objection and confirmed that indeed that J. Ndung'u laid to rest the issues raised in the said grounds and she wonders why she is still regarded as an executor or petitioner in the cause.

The 2nd respondent urged that under Section 73 of the Laws of Succession Act, the court has inherent powers to substitute but she is not interested to be considered as an administrator of the deceased's estate.

Mr. Mbugua, counsel for the applicant filed grounds of opposition to the preliminary objection.

Mr. Mbugua submitted that grant of letters of administration were issued pursuant to the application dated 16/10/2005 and that the Will was plucked from the record and they were advised to go for the full grant of representation; that when the court recorded the consent on 17/10/2016, the Judge was alive to the application for letters of administration with annexed Will and that is why he directed that the issue of the contested Will be disposed of by way of oral evidence; that the judge must have been aware of the existence of a will in the matter; that this court gave directions as to the hearing following J. Ndung'u's orders and when it came up for hearing, the 2nd respondent was not prepared and is using the preliminary objection as a shield for noncompliance. He asked the court to invoke its inherent powers under Section 73 of the Laws of Succession Act. Counsel relied on the decision in the ***Estate of George Ragui Karanja (2006) eKLR*** on the powers of the court where the representative dies; counsel further submitted that the 2nd respondent is from the 1st house and an important person to the estate and should remain on record during the hearing of the application for revocation.

In response, the 2nd respondent referred to the 1st petitioner's affidavit dated 7/10/2016 where the Judge declined to release any money to the 1st respondent till a grant was issued.

I have considered the notice of preliminary objection and submissions made by both counsel.

Having carefully perused the court file, the 1st respondent/petitioner Joseph Karanja Mwangi petitioned for letters of administration with written will annexed on 16/10/2015. On the file, I have also seen a petition for letters of administration ad litem which the court granted vide its ruling dated 20/11/2015. The grant of letters ad litem was issued for purposes of prosecuting HCA.184/2010. It seems there is a record of 20/11/2015 but it is incomplete.

The next proceedings on the file were on 21/3/2016 in which J. Ndungu observed that the applicant had obtained letters of administration ad litem for purposes of prosecuting HCCA.184/2010. The court further noted that the limited grant did not give the applicant powers to deal with disposal of any asset. The court also noted that the applicant had filed a petition for letters of administration with written Will annexed and directed the applicant to follow up with the letters of administration so that he would gather the estate and have proof of liabilities and organize for their settlement.

There is no evidence that the 1st respondent, Joseph Karanja Mwangi ever obtained a grant of probate. This is because on 22/9/2010, the objector Jane Nyambura filed the instant application, dated 22/9/2010 seeking revocation of grant.

As properly pointed out by the 2nd respondent, although the objector insists that a grant had been issued to the 1st respondent, there is no evidence of when it was issued. Indeed in the application dated 22/9/2016, the date when the grant which is sought to be revoked was issued, is not mentioned. I agree with the 2nd respondent that so far, all that the petitioner was issued with was a limited grant for purposes of prosecuting HCRA.184/2010. Even in his replying affidavit sworn on 7/6/2016, the 1st respondent clearly indicated that when he filed Misc.237/2015 for limited grant ad litem for purposes of defending HCA.184/2010, he was asked to file suit for a full grant and that is when he filed this suit and in it, applied for limited grant. He even made an application dated 10/3/2016 seeking to withdraw some money for payment to the advocates defending HCCA.184/2010 but the court declined to grant the 1st respondent's application.

The executor (1st respondent) was asked to file responses to the application dated 22/9/2016. However, the parties recorded the consent of 17/10/2016. I am in agreement that there is no grant that has been issued in this matter. I wish to point out to the 2nd respondent that the issue of revocation of grant was laid to rest in the consent. All that was left for consideration is prayer 3, to prove whether or not the Will is fraudulent.

The 2nd respondent prays that she be removed from the record as an administrator because she is not the executor/administrator, nor is she interested in being an administrator. The 2nd respondent contends that she was drawn into this matter because of parcel of land Nyandarua/Oraimutia/306 which had been included as part of the deceased's estate by the applicant in the application dated 22/9/2016 in which the applicant alleged inter alia, that the respondents were forcefully evicting her from the said parcel of land, Nyandarua/Oraimutia/306 which was her matrimonial home. By the consent recorded in 17/10/2016, the applicant withdrew prayers 1, 2, 4 and 5 of the application dated 22/9/2016. In prayer 2, the applicant had sought an injunction to restrain the respondents from, in any way interfering with her occupation of the land Nyandarua/Oraimutia/306. In the 1st respondent's replying affidavit, he had deponed that the said land plot 306 was given to them by the deceased in 1992 and transferred to the respondents in 2001 well before the deceased died. A green card (JKMI) was exhibited and it showed that Nyandarua/Oraimutia/306 was indeed transferred to the two respondents on 11/3/2014, that is before the deceased died. By withdrawing prayer 2, it means that the applicant no longer laid claim on the land Nyandarua/Oraimutia/306. The question therefore is whether the 2nd respondent should remain in this cause. The 2nd respondent has vehemently opposed to being included in the proceedings as administrator.

One reason that the 2nd respondent gives is that the deceased had many children who should be appointed as administrators, 6 in the first house and 10 in the second house and since she is the last in the first house, any other person should be appointed as an administrator including the applicant who was the deceased wife.

As observed earlier, no grant was issued to the 1st respondent and therefore Section 73 of the Laws of Succession Act does not apply. The Section reads as follows:

> **"The court shall within one year from the date of any grant of representation, give notice to the holder of the grant to apply for confirmation thereof."**

The court could only exercise its inherent powers under the above Section if there was a grant of representation.

The executor of the estate is deceased. The 2nd respondent was brought in these proceedings though she had not been appointed as an executor with the 1st respondent or an administrator. As matters stand, there is no executor or administrator of the deceased's estate and the court cannot impose it on the 2nd respondent. I will uphold the 2nd respondent's objection to the extent that she is not an administrator of the estate. It means that, the court cannot therefore proceed to hear the application dated 22/9/2019 without administrators.

But the estate cannot be left without administrators because the estate can be wasted. It is worth noting that the estate is still intact since the deceased's death in 2015.

I notice that there will be two opposing sides in this matter. The deceased's first house are of the view that there existed a Will. That is why Joseph Karanja (1st respondent) had filed this petition with a Will annexed. On the other hand, the 2nd house, through the applicant contend that there was no Will. It is evident from the application dated 22/ / 2016.

The executor having died, this court will be guided by Section 66 of the Laws of Succession Act which provides as follows:

> **"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;**
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> **b. other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;**
>
> **c. the Public Trustee; and**
>
> **d. creditors**
>
> **Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will."**

The above Section guides the court in appointment of administrators. Priority is given to surviving spouses, followed by other beneficiaries as set out in Part V of the Act. In this case, the applicant being the deceased's spouse, will be given priority to be administrator of the estate followed by other beneficiaries. Since there are two houses and there is already a dispute as to whether there was a Will or not, I think that the best way to go is allow the beneficiaries to get together and agree on who will be the administrators with each house providing a representative. If they fail to agree, then the court will exercise its discretion and appoint for them administrators.

In the end, the court grants the following orders:

1. That the 2nd respondent's objection is upheld and Esther Mwangi is released from the proceedings as she is neither an executor nor administrator;

2. The application dated 22/9/2016 cannot proceed in the absence of an executor and or administrator to proceed as testate or intestate;

3. The beneficiaries of the estate to agree on the administrators failing which the court will appoint;

4. Costs to be in the cause;

4. Mention on 5/7/2019.

Dated, Signed and **Delivered** at **NYAHURURU** this ***30th*** day of ***May,*** 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Mbugua for objector/applicant

Mr. Sigilai for the 2nd respondent