



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

SUCCESSION CAUSE NO.56 OF 2017

IN THE MATTER OF THE ESTATE OF ELIJAH NJENGA NGANGA (DECEASED)

A N D

GRACE NJERI NGANGA.....PETITIONER

V E R S U S

DAVID KARIUKI NJENGA.....OBJECTOR/RESPONDENT

PHILOMENA WAITHERA NJENGA.....BENEFICIARY/APPLICANT

R U L I N G

The summons dated 8/8/2018 was filed by Philomena Waithera Nyaga, seeking an order that the court be pleased to review and set aside the orders made on 20/7/2017 and costs be provided for.

The grounds upon which the application is brought are that there is an error on the record as the objector/respondent's case was not heard so as to warrant the grant of the orders of 20/7/2018; that the objector/respondent will not suffer any prejudice if the orders are reviewed; that there are sufficient reasons to warrant the said review.

In her affidavit in support of the application, the applicant deponed that by the time her mother died on 27/6/2017, she had not yet been appointed administrator of the deceased's estate and that the objector, David Kariuki lodged an objection to the appointment; that upon her mother's death, she applied to be substituted as a petitioner through the summons dated 28/3/2018; that before hearing the objection, this court proceeded to appoint her and Kariuki as joint administrators which decision was premature as the objection had not been dispensed with; that the court in its ruling relied on the Chief's Letter which was exhibited by the objector yet the applicant's argument is that only one letter was issued by the Chief to confirm who the dependants of the deceased are and the letter by the DC dated 13/2/2014 directed the chief to issue a letter to her family as the rightful dependants; that the court erred in granting the orders of 20/7/2018.

The application was opposed and David Kariuki Njenga, the objector, filed a Replying Affidavit dated 9/10/2018. He has deponed that the application is incompetent and bad in law as it is meant to delay the conclusion of the case since the applicant has not denied that he is the deceased's son and hence a beneficiary of the estate; that the applicant failed to respond to the objection that was filed by the objector in any event.

This application is expressed to be brought under Rule 63(1) and 49 of the Probate and Administration Rules and Order 45(1)(1) Civil Procedure Rules 2010. For an order for review to issue under Order 45 Civil Procedure Rule 2010:

“There should be discovery of new and important matter or evidence, mistake or error apparent on the face of the record.”

The applicant's reason for seeking review is that there is an error apparent on the face of the record in that the objector's application is yet to be heard yet the court went ahead in its ruling to determine that the applicant and objector were beneficiaries of the deceased's estate.

It must be clarified that the court never determined the issue of who the heirs of the deceased are. The court observed that both the applicant and objector claim to be the children of the deceased and although the court issued letters of administration to the objector and appellant, in the last paragraph of the ruling, the court observed that:

“the other issue of who the deceased's dependants are or their entitlement will be determined at a later stage.”

This court acknowledges that indeed the objector filed an objection to the appointment of Grace Njeri Njenga as an administrator and cross petitioned for appointment as an administrator. Directions were given on 22/7/2015 that the matter do proceed by way of viva voce evidence which had not been done. The issue of whether the deceased had 2 houses was therefore supposed to be determined by way of viva voce evidence.

This court was only supposed to enjoin the applicant to these proceedings to take over from her deceased mother. Grace Njeri Njenga, to enable the court proceed with the hearing and determination of the objection proceedings. The court recognizes that it erred when it appointed the applicant and objector as joint administrators of the deceased's estate because that was premature.

For the above reason, the court hereby sets aside its order of 20/7/2018 appointing the applicant and objector as joint administrators of the deceased's estate. Instead, the court allows the applicant's prayer that the applicant be and is hereby substituted as petitioner in the estate of Elijah Njenga in place of Grace Njeri Njenga.

The other issues will be determined during the hearing of the objection pleadings by way of viva voce evidence.

Costs to be in the cause.

Dated, Signed and Delivered at NYAHURURU this 24th day of May, 2019.

R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Ng'ethe holding brief for Njeri Njagua for Applicant

Objector – absent

Soi – Court assistant