



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO. 1291 OF 2017
IN THE MATTER OF THE ESTATE OF CHARLES MUTHIKE GACHOKI (DECEASED)

NELIUS WANGUI MUTHIKE.....APPLICANT

VERSUS

LYDIA WANJIKU MUTHIKE.....RESPONDENT

RULING

1. The deceased Charles Muthike Gachoki died on 8th May 2016 at Nairobi West Hospital. On 23rd October 2017 the respondent Lydiah Wanjiku Muthike petitioned this court for the grant of letters of administration intestate. In support of the application she swore that she was the deceased's widow and, with him, they got a daughter Iddah Karimi Muthike. The deceased's estate comprised Plot No. 105 at Bahati in Nairobi; Kajiado/Kaputiei North/37903; Noonkopir T. Centre Plot No. 2364; Baragwi/Guama/2539; two bank accounts, at Barclays Bank Nkrumah Branch and at Equity Bank Buruburu Branch; shares a Safaricom and an insurance policy No. 137/2367 at Britam.
2. The grant was issued on 10th April 2018, and confirmed on 22nd October 2018. All the estate was ordered to go to the respondent absolutely in the certificate of confirmation that was dated 22nd October 2018.
3. In an application dated 13th November 2018 the applicant Nelius Wangui Muthike filed application through Begi's Law office & Chambers seeking to have the grant issued and confirmed to the respondent revoked and/or annulled. Her case was that she and her sister Alice Wambui Muthike were children of the deceased and yet the respondent had not informed them of the petition, grant and distribution of the estate; that they had, as a result, been disinherited. She pleaded that the actions by the respondent to exclude them from the proceedings were fraudulent. She annexed her birth certificate and that of her sister to show that indeed they were children of the deceased.
4. The respondent denied that the applicant and her sister were children of the deceased, and cast doubt on the authenticity of the birth certificates.
5. The application came for hearing on 12th February 2019. The respondent was represented. The applicant and her advocate were absent. At request of counsel for the respondent, the application was dismissed with costs for non-attendance.
6. On 29th March 2019 the applicant, through Ali & Co. Advocate, filed the present application seeking to have the order dismissing her application for non-attendance set aside and to have the application reinstated for hearing. She swore a supporting affidavit to state that when the application came up for hearing on 26th November 2018 her advocate informed her. On that day the matter did not proceed as the respondent had not been served. Her advocate informed her that the application would be heard on 19th February 2019. Come that day, she came to court but the matter was not on the cause list. She asked her advocate who said he would follow up the matter and advise her. She kept inquiring from her advocate who did not let her know the position of her case. She was forced to instruct her present lawyers who went to check the court file only to find that the application had come up on 12th February 2019 and had been dismissed for non-attendance. She stated that it was not her fault that she was not in court on 12th February 2019. She blamed her then advocates. She stated that she would suffer irreparably if the matter is not re-opened.
7. The respondent opposed the application in a replying affidavit filed on 18th June 2019. Her case was that, first, the applicant was not the deceased daughter and, secondly, she had not demonstrated that she had been misadvised by her advocates.

8. I asked counsel for the parties to file written submission which was done.

9. It is trite that the court has unfettered discretion to set aside orders obtained following the dismissal of an application for non-attendance of the applicant or his advocate, the main concern of the court being to do justice between the parties (**Patel –v- E.A. Cargo Handling Services Ltd [1974] EA 75**). The court has to consider the nature of the dispute, the explanation given by the applicant why he did not attend the hearing, whether there was delay in bringing the application to set aside, and whether the respondent can reasonably be compensated by costs. The court will bear in mind that it exists to do substantial justice to the parties, and that such justice can only be done, and be seen to be done, where the application has been heard and determined on merits (**Philip & Another –v- Augustine Kubende [1982-88]KLR 103**).

10. In the instant case, the applicant states that she was failed by her advocate than on record. What she stated was not materially challenged. One can see that when her advocates were not forthcoming on the status of the application she immediately hired new advocates who, on finding from the court record that the application had been dismissed for non-attendance, immediately filed the present application. It is evident that there was no design or intention on the part of the applicant to delay or evade justice. I accept her explanation for non-attendance.

11. Regarding the nature of the dispute, the applicant stated that she was the daughter of the deceased and therefore beneficiary who had not renounced her claim and yet had been disinherited. She produced her birth certificate that indicated the deceased to be her father.

12. Under **section 51(2)(g)** of the **Law of Succession Act (Cap. 160)** a petition for grant of letters of administration intestate should include the names and addresses of the children of the deceased. Under **section 71** of the **Act**, in the application for the confirmation of the grant, the applicant has to include all the persons beneficially entitled to the estate. The applicant is saying that she was not included in the petition and the distribution and yet the deceased was her father. In the instant application the applicant is looking for an opportunity to show that she was the deceased's daughter and that the process undertaken by the respondent had disinherited her. If the application is not allowed, and her application for revocation not reinstated, she will miss out on the estate. This, according to her, will occasion her irreparable hard.

13. I have considered all the facts that the application has presented. I find that justice will be better served if the application is allowed, and the respondent be compensated by way of costs for the inconvenience caused.

14. Consequently, the order dismissing with costs the application for revocation and/or annulment dated and filed on 13th November 2018 by the applicant is reviewed and set aside. The application is hereby reinstated. The respondent shall be paid the costs of this application.

DATED and DELIVERED at NAIROBI this 28TH OCTOBER 2019.

A.O. MUCHELULE

JUDGE