REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 559 OF 2009

(IN THE MATTER OF THE ESTATE OF PHYLISS WAMAHIGA MBUTHIA

(DECEASED)

ROSEBELL NYAGUTHI MBUTHIA……………………..1ST APPLICANT

ESTHER NYAMBURA GATHECHA……………………..2ND APPLICANT

VERSUS

MARY WANGECI KIAMA…………………………………RESPONDENT

JUDGMENT

Parties in this cause are daughters of the late Phyliss Wamahiga Mbuthia who died on 5 December 2008 aged 98. The deceased hailed from Kihatha sublocation, Kamakwa location in Nyeri County and was domiciled in the Republic of Kenya.

Apart from these parties, the deceased was survived by four other children; they have been named as follows:

1. Gladys Wangui Ndungu
2. Loise Wanjiku Murithi
3. Gladys Wambui Mwangi
4. Alice Muthoni Mbuthia.

As at July 2009 when the petition for grant of letters of administration intestate for the deceased's estate was lodged, the youngest of these children was aged 45; it is thus safe to conclude that they are all elderly.

The grant of letters of administration of the deceased's estate was made to the respondent on 30 December 2009. It was subsequently confirmed on 3 November 2010. The schedule to the certificate of confirmation of grant shows that the deceased's only asset which is land Title No. Tetu/Kiriti/764 measuring approximately 1.70 hectares was distributed equally amongst her seven children.

Eight years later, more particularly on October 9, 2018, the applicants filed the present application by way of summons for revocation of grant seeking to have the grant made to their sister revoked or annulled on the ground that it was fraudulently obtained; the respondent is alleged to have failed to disclose material facts and also that she did not obtain the chief's letter before she filed the petition. They invoked section 76 of the Law of succession Act, cap. 160.

The respondent filed grounds of objection dated November, 2018 in response to the summons contending that the summons is an abuse of the process of the court being made only after the respondent secured the authority of this court for the deputy registrar to execute the transmission documents. This, apparently, was after the applicants declined to co-operate and execute the necessary documents for completion of the administration of the estate.

I have considered the applicants' affidavit in support of the summons and their testimony together with that of their witnesses and I have come to the conclusion that their case is quite different from what is represented in the application. In other words, the major bone of contention is not that the grant was obtained fraudulently as alleged, but that the first applicant ought to have a larger share of the estate than the rest of the deceased's children; as a matter of fact, the applicants have alleged that it was the deceased's wish that her estate devolves upon the first applicant and Alice Muthoni Mbuthia; however, since the latter is deceased, she should get the entire estate.

Considering the course the applicants have adopted, it should be apparent from the very outset that none of the grounds upon which a grant can be revoked or annulled has been demonstrated.

The record shows that the respondent not only listed all her siblings as having survived the deceased but she also distributed the estate amongst them equally. As far as the chief's letter is concerned, there is an affidavit on record sworn by the respondent on 19 June 2009, to the effect that she had made several attempts to obtain the letter from either the chief or the assistant of the location from which the deceased hailed without any success. In any event the chief's letter is only supposed to introduce the deceased's kin to the court and since none of them was omitted from the petition failure to produce the letter cannot be termed as fatal.

There is also evidence on record that the applicants were cited and an affidavit of service showing that they were served; if they had any ground why they thought the respondent should not be appointed as the administratrix of the deceased's estate they ought to have raised it at the opportune time.

The concern raised about the distribution of the estate is not valid; as much as the applicants rely on what they have regarded as the deceased's wishes to contest equal distribution of the deceased's estate amongst her children, there is no evidence of any will of any sort, whether written or oral, representing the deceased's so-called wishes. In the absence of such evidence, the court is entitled to assume that the deceased died intestate and therefore the intestacy provisions of the Law of Succession Act ought to apply to the distribution of her estate. Section 38 of that Act is clear that where a deceased dies without a spouse his or her estate devolves upon their child or children. For better understanding, it is necessary that I reproduce it here;

> ***38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.***

The scheme proposed by the respondent for the distribution of the deceased's estate and eventually adopted by the court is consistent with this provision of the law. Put differently, there is no basis upon which the estate can be distributed other than as prescribed in section 38 of the Act.

The upshot is that the applicants' application is not tenable; it is hereby dismissed. Parties will bear their respective costs.

Dated, signed and delivered in open court this 20 December, 2019

Ngaah Jairus

<u>JUDGE</u>