REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NUMBER 18 OF 2009

IN THE MATTER OF THE ESTATE OF RUTH WAMBUI KANG'ARA

ELIZABETH WARUKIRA WACHIRA..............1ST APPLICANT

LEAH NJERI KAMAU....................................2ND APPLICANT

-VERSUS-

MARGARET WANJIRU MAINA

BEATRICE WANGU NGUTHIRU

MARY MUTHONI KARANI

GRACE WAMBU KARURU

MARGARET WAITHIEGENI MUTA..................RESPONDENT

ANNE WANGECHI MWANGI............INTERESTED PARTIES

AND

GATUMWA MACHARIA.....................................PROTESTER

JUDGMENT

Before me is the summons for revocation of grant dated 19th November 2015 brought under sections 47 and 76 of the Law of Succession Act CAP 160 Laws of Kenya and rules 44and 73 of the Probate and Administration rules.

It seeks orders that;

> (1). The grant of letters of administration intestate in respect of the estate of RUTH WAMBUI KANG'ARA (deceased) issued to Benjamin Muta King'ara on 30th June 1999 vide Karatina RMC Succession Cause number 60 of 1998 be revoked,
>
> (2). That the fresh grant of letters of administration intestate in respect of the deceased estate be jointly made to Elizabeth Warukira Wachira and Leah Njeri Kamau.
>
> (3). The costs of this application be in the cause.

The application is based on the joint affidavit of Elizabeth Warukira Wachira and Leah Njeri Kamau sworn on 19th November 2015.

In summary the two deponed that the deceased who was their mother died on 22nd August 1979 and the grant of letters of administration

intestate was made to Benjamin Muta King'ara, their brother on 30th June 1999, who died on 8th July 2013 before the grant was confirmed. As a result, thereof the grant had been rendered useless and inoperative. That his widow Margaret Waithiegeni Muta had subsequently filed an application for substitution dated the 16 February 2015 but the same was dismissed on 30th June 2015 for non-attendance. The applicant's application of 13th September 2013 had also been withdrawn.

The applicants deponed that they are the only surviving children and heirs of the deceased with priority to all other persons in applying for appointment as administrators of their mother's estate. They made a commitment that should they be appointed they shall administer the estate of the deceased in accordance with the law.

Annexed to the affidavit is the grant of letters intestate issued on 30 June 1999 and the certificate of death for Benjamin Muta confirming that he died on 8 July 2013.

The application is opposed through the replying affidavit of Margaret Waithiegeni Muta. She deponed that the estate comprises of Nyeri/Mweiga /423 registered in the name of the Settlement Fund Trustees but which she and the deceased had exclusive occupation since 1984, that her husband had been issued with a grant and had made the necessary application for confirmation of grant with the necessary consenting party by the name of Sebastien Laban Kibiriti. That the beneficiaries to the estate had distributed the estate, only that the petitioner and Sebastian were both now deceased. That the current applicants were busybodies who were not beneficiaries and who appeared only after the death of the petitioner, and in any event they were not parties to the original proceedings. That she was the only one solely entitled to be issued with fresh letters of administration.

I did not see any response filed by counsel for the interested parties or for the protester.

It would appear to me that this application was between the applicants and the said Margaret Waithiegeni Muta.

Counsel for the applicants Mr. Gakuhi Chege and for the respondent Mr. Muhoho Gichimu filed and exchanged written Submissions. Mr. Wahome Gikonyo for the interested parties did not file any despite six adjournments not objected to by other counsel to give him time to so.

It appears to me that the interested parties may not have had any interest in who was granted letters of administration.

I have carefully considered the rival submissions.

The record shows that the late Benjamin Muta, the late Sebastian Laban Kibiriti and the applicants herein are brothers and sisters and children of the deceased, who survived her.

Benjamin was appointed administrator to the deceased's estate but he died before he could complete the administration of this estate hence this application.

In the submissions opposing the application the respondent's counsel framed 2 issues

1. whether the grant should be revoked

2. to whom the grant should be granted if the present one is revoked.

Relying on section 2(2) of the Law of Succession Act, he submitted that the deceased herein died before the commencement of the Act and therefore her estate subject only to written laws and customs, and any revocation sought cannot be done under the Law of Succession Act but in the interests of justice.

Secondly that the applicants are daughters of the deceased and according to Kikuyu customary law they are not entitled to benefit from the estate of the parents. That the Kikuyu customary system being patrilineal daughters cannot be granted rights to administer property.

Hence the respondent being the wife of the surviving son who was the administrator of the estate before his demise is the only person entitled to administer the estate.

The applicants argue that as the surviving children of the deceased they rank in priority to any other person in the administration of the estate is provided for under section 66 as read with section 38 of the Law of Succession Act, and in any event they have no objection to being co administrators of the estate with their sister in law.

With regard to section 2(2) of the Act counsel for the applicants argues that although the deceased died before the enactment of the Law of Succession Act, the same applies to the cause to the estate that remained unadministered at the commencement of act.

That section states

> "*the estates of persons dying before commencement of this act are subject to the written laws and customs applying at the date of death but nevertheless the administration of the estate shall commence or proceed so far as possible in accordance with this act*".

In counsel's view the law of succession act applies even to estate person died before its commencement.

It is also argued that any custom that is discriminatory is not acceptable in-law of Succession and the current Constitutional dispensation. That the law of succession act views all children equal.

With regard to the application of customary law, Counsel for the applicant's cited the case of **In RE ESTATE OF MUGO WANDIA (DECEASED) [2009] eKLR where** the court ruled that the application of Kikuyu customary law in a manner that was discriminatory as falling short of the requirements of the Judicature Act, and being inconsistent with that section 82 of the then Constitution in which the discrimination on the basis of sex was prohibited. The court went on to cite the Universal declaration of Human Rights (UDHR) Article 1 and CEDAW the Convention on the Elimination of all forms of Discrimination Against Women, the government's efforts to eradicate poverty by putting I in place equitable policies and programmes of development, as a guiding spirit against which the court should not go, by upholding unsubstantiated custom that provided for the differential treatment of parties.

In support of the foregoing argument counsel relied on the case

NAKURU H.C SUCCESSION CAUSE NO. 126 OF 2000: IN THE MATTER OF THE ESTATE OF RAHAB WARUGURU MWANGI (DECEASED) and the holding of Maraga J as he then was. He refused to accept the argument by the objector in that case that his sisters could not inherit simply because they were married. He stated inter alia" this contention has absolutely no legal basis. I agree with counsel for the petitioner's that to disinherit the 2nd and 3rd petitioners would not only be unconstitutional but also in breach of the clear provisions of the law of succession act… I also agree with counsel for the petitioners that the law of succession does not discriminate against any person on account of their marital status…"

Counsel also cited the provisions of article 27 of the Constitution of Kenya 2010 which provides for the quality of all persons before the law and prohibits any form of discrimination.

A perusal of the file revealed that vide an application dated 14th March 2012 the deceased Benjamin Muta had actually sought to have his two sisters, the applicants herein joined in the cause as co administrators to the estate to assist him in the process of administration on account of his failing health. He had sworn an affidavit on the same dates and annexed the 2 applicants' consents. By that time his brother was already deceased.

So, the issue to be determined is; whether on the basis of the submissions before me the grant issued to Benjamin Muta ought to be revoked.

There is no question that following the death of the sole administrator, the grant has become useless and inoperative as captured under s. 76 (e) of the Law of succession act.

To whom should a fresh grant issue?

The irony here is the argument that the applicants are prohibited by a patrilineal customary law from any rights to administer the estate herein, yet the estate in question is that of a woman, their mother. How can that be if it is not evidence of the depth of the roots of patriarchy? this is the argument is raised by the respondent against her fellow sisters that it is only their brother by the mere fact of his being a male person who can administer their mother's estate, and in his absence, it is only through him that those powers can pass to the female person joined to him by virtue of marriage. In my mind, that is a twisted argument that has no legal basis, and which, held against the light of the Law of succession the Constitution of Kenya and the host of authorities on the issue, led by the celebrated case of **RONO VS RONO AND ANOTHER (2008) 1 KLR (G&F),** has no life other than to disintegrate into a pile of dust blown away into the nothingness that it is.

Customary law is not bad per se. Customary law is a living law, that has been and is being influenced and infused with numerous nuances from our education, religion, inter-customary interactions, adherence to women and human rights, and the quest for gender equity and equality, the need to deal with the negatives of patriarchy, while retaining the good; there are good things that can be retained from our customs, traditions and cultures e.g. the value of the family and extended family, the community of respect and acceptance, respect for the place of each one of us in the family, the recognition of the importance of the community vis- a -vis the individual. This kind of discrimination on the basis of marriage is not a good thing.

Having said the foregoing, I find the argument by the respondent that the two applicants are busy bodies who came into the picture only after the death of her husband untenable.

The death of the sole administrator puts before he completed his task puts the grant up for revocation. His two sisters, the applicants rank higher in priority to their sister in law but unlike her, they recognize her place in the family and are willing to share the task of administering their mother's estate.

The grant is and is hereby revoked. A fresh grant to issue in the names of the applicants **Elizabeth Warukira Wachira** and **Leah Njeri Kamau** and the respondent **Margaret Waithiegeni Muta**

Each party has 30 days within which to file Summons for confirmation of the grant.

Costs in the cause.

Dated, delivered and signed at Nyeri this 22nd day of May 2018.

Mumbua T. Matheka

Judge

In the presence of

Court Assistant Albert

Kinuthia holding brief for Wahome Gikonyo for interested parties

Muhoho for the respondent N/A

Gakuhi Chege for the applicants’ N/A

Parties N/A