



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

SUCCESSION CAUSE NO. 479 OF 2006

IN THE MATTER OF THE ESTATE OF THOMAS NJUE NJINE WACHIRA *Alias* IRERI MUTHUNGA.....DECEASED

BETWEEN

SALESIO NJERU THOMAS

IRENE KANINI NJOROGI

MARGARET MUTITU GICHOVI.....APPLICANTS

VERSUS

THE PUBLIC TRUSTEE.....RESPONDENT

RULING

The deceased in this case died testate on 21/12/2013. In his written will dated 08/04/1997, he made his son **CYRUS WACHIRA THOMAS** and the Public Trustee as the executors. On 28/09/2006, CYRUS WACHIRA denounced his right of executorship in the will leaving the Public Trustee as the sole executor.

It is imperative that the background facts of this cause be summarily stated. The Public Trustee filed these proceedings on 02/10/2006 and was issued with a grant of probate on 20/04/2009. This was preceded by the dismissal by the court of an objection by one **JAMES KARURU THOMAS**, a son of the deceased.

At the time the grant of probate was first issued, this cause had not been gazette as required by the law. The Public Trustee applied for revocation and annulment of the initial grant which was by any means unprocedural. The gazette had already been done by the time the application for revocation was filed. The outcome was that the initial grant was annulled and issued afresh issued to the Public Trustee on 01/02/2012.

This was followed by an application for confirmation filed by the Public Trustee grant dated 09/03/2012 and filed on 24/04/2012. There was no protest or any application for dependency under Section 26 pending at that time.

There being no objection or other proceedings the court confirmed the grant on 20/12/2012. The distribution of the assets was ordered to be in accordance with the written will of the deceased.

Thereafter, the applicants filed this application dated *14th June, 2018** for revocation/annulment of grant. The first applicant describes himself as the son of the deceased, the 2nd as the daughter in-law and the 3rd as the daughter.

The grounds supporting the application are that the Public Trustee did not involve the beneficiaries of the deceased in these proceedings. The applicants also state that there are two grants one issued on 20/04/2009 and the other issued on 01/04/2012 and it is not clear which of the two grants were confirmed by the court.

In its ruling delivered on 14/02/2008 the court had directed that the Public Trustee proves the will which the applicant contends was not done. It is also stated that the will of the deceased was contested. It is further argued that the estate of the deceased was gazetted as intestate instead of testate. Most of the beneficiaries were disinherited and only 5 out of 13 were provided for.

The application was opposed by a beneficiary one **CYRUS WACHIRA THOMAS** and by the Public Trustee in their replying affidavits. It is

deposed by **CYRUS** that the 1st applicant **SALESIO NJERU THOMAS** a son of the deceased was provided for in the will but the 2nd and 3rd applicants are strangers and have no legal interest in the estate. It is also argued that a will that is annexed to the proceedings need not be proved. He further states that the applicant ought to have contested the will before confirmation of the grant which they failed to do.

It is further contended that the cause having been gazette invited any person interested in the estate to lodge their objection or protests.

The Public Trustee relying on the affidavit of Maureen Nyabochoa states that the family of the deceased met before Manyatta District Officer to discuss the family succession matters and failed to agree. Thereafter, the District Commissioner referred the succession dispute to the Public Trustee with the consent of the beneficiaries. It is important to note that the Public Trustee was the executor of the deceased's will. At that time there was only one grant in existence which was the one issued on 01/02/2012 and confirmed on 20/12/2012 for the initial one had been revoked by the court.

It is further argued that the Kenya Gazette notice was valid despite the typing error by Government Printers referring to the estate as "*Intestate*" instead of "*testate*". The respondent further states that the family had given consent to the respondent and needed not be summoned to court or notified of any further proceedings.

Parties filed submissions in support of their arguments through their advocates. Messrs Morris Njage & Co. Advocates represented the applicants while Messrs Eddie Njiru and Co. represented a beneficiary **CYRUS WACHIRA THOMAS**. The respondent was represented by Ms. Sanita a State Counsel.

The application is brought under Section 76 of the Succession Act that provides for the following grounds one of which if proved would lead to revocation or annulment of a grant.

"(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow;
or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or...."

I now proceed to examine the provisions of Section 76 of the Act, *vis a vis* the issues raised by the applicants of the alleged defective proceedings. I have already said in the introductory paragraphs of this ruling that the record shows that the first grant issued on 20/04/2009 was nullified by the respondent as borne by the proceedings of 4/08/2011.

The respondent moved the court after learning that the grant was issued before gazette was done. This defect was rectified and a fresh grant issued on 01/02/2012 in accordance with the law.

The application of the respondent dated 09/03/2012 clearly indicate that the application before the court was to confirm the grant of probate of written will issued on 01/02/2012. The grant issued on 01/02/2012 was issued in accordance with the law and cannot be said to be defective. It is therefore clear that this is the grant that was confirmed by the court. The earlier grant having been revoked/annulled does not exist. The applicants are well aware of this fact that is borne by the court record.

The issue of the form of the grant was raised by the applicants as well as the error in the Kenya Gazette referring to the deceased as having died "*intestate*" instead of "*testate*". In this regard, I find the provisions of Article 159(2) as relevant herein.

"In exercising Judicial Authority, the courts and Tribunals shall be guided by the following principles-

(d) Justice shall be administered without undue regard to procedural technicalities..."

The Constitution calls upon the court not to have undue regard to procedural technicalities in administration of justice but rather focus on the substantive justice. The will of the deceased was within the knowledge of all the beneficiaries from the time this case was filed. It was contested by one of the beneficiaries one **JAMES KARURU THOMAS** in the initial stages of these proceedings.

As explained by the respondent in their supporting affidavit, the beneficiaries congregated before the District Officer Manyatta to discuss the subject of the written will. The letter of the District Commissioner dated 24th March, 2004 confirms that all beneficiaries were aware of the

existence of the will even before the matter was filed in court. With this knowledge, the error of the word “*intestate*” in the Kenya Gazette would not have affected the response of any of the beneficiaries to the Gazette Notice. Neither would it have caused any confusion to any member of the deceased’s family since they all had prior knowledge of the written will.

I am of the considered opinion that the error in the Kenya Gazette was minor and did not affect the substance or the validity of the notice. The negligible error did not render the proceedings defective in substance in any way and I so find.

The issue of the deceased having four “*alias*” names was raised. In these proceedings, he is referred to as **THOMAS NJINE WACHIRA Alias IRERI MUTHUNGA**. His identity card bears the names of **IRERI MUTHUNGA** ID No.3794916. His marriage certificate bears the name of **THOMAS IRERI MUTHUNGA**, the Chief’s letter bears the names of **THOMAS NJINE MUTHUNGA** and the death certificate bears the name of **THOMAS NJIRE WACHIRA**.

One of the beneficiary **CYRUS WACHIRA THOMAS** in his affidavit sworn on 24/11/2014 has explained that the names in all the said documents and in these proceedings refer to one and the same person. The area Chief’s letter dated 20/11/2017 attached to the affidavit explains that the deceased was known by more than one name. The applicants did not present any evidence on oath to controvert these averments.

I take judicial notice that it is common in the African Society for people to be known by different names for various reasons. Such names may be given by peers, by parents, by elders in the community or any person or group of persons. These names are normally clarified by swearing an affidavit for official purposes for example, in legal or other official transactions. It is my considered view that the affidavit of the son of the deceased **CYRUS WACHIRA THOMAS** suffices to confirm that the deceased was known by all these names given in the affidavit. This state of affairs does not render the proceedings defective in any way as the applicants argued in this application. It was contended that the applicants were not involved by the respondent in these proceedings.

The affidavit of Maureen Nyabochoa Senior State Counsel in the respondent’s office sworn on 28/04/14 states that all the beneficiaries had a meeting on 20/12/2005 to discuss the dispute concerning the deceased’s will before the District Officer Manyatta Division. There was no agreement reached by the family and the District Commissioner referred the matter to the Public Trustee who was the executor of the will. The beneficiaries having participated in the meetings were aware of the contents of the will and the decision to refer the matter to the Public Trustee.

The respondent also states that after these proceedings commenced in 2006, this cause has been gazette twice which was sufficient notice to the beneficiaries or any other interested party.

The applicants argue that they ought to have been served with the two applications one for revocation/annulment of grant and the other for confirmation of grant. In this regard, the applicants relied on Rules 41 and 46 of the Probate and Administration Rules.

Rule 41 deals with the mode of hearing an application for confirmation of a grant in that any written protests or any interested party must be heard before the confirmation of the grant. In this case, there were no protests filed and the court had every reason to confirm the grant for there were no pending applications. In any case, this is a “*testate*” succession and the right manner the applicants to register their interests was by making an application for a provision under Section 26 of the Act.

Rule 45 provides the form in which an application under Section 26 shall be made either by summons or by the petition depending on the stage the case has reached.

Rule 46 deals with applications under Section 35 of the Act in an intestate succession and has no relevance to testate succession.

The District Commissioner’s letter dated 24th March, 2004 named the three applicants among others as interested parties in the estate of the deceased. The parties had all appeared before the District Officer Manyatta and failed to agree. This is the reason why the matter was referred to the sole executor of the will being the respondent herein.

The applicants were also named as beneficiaries by one **JAMES KALULU THOMAS** the initial objector in this case whose objection was dismissed on 14/2/2008. It is important to note that most of the issues raised herein had been raised in the initial objection but were all considered by the court and found to have no merit.

In his affidavit sworn on 25/04/2014 one of the beneficiaries’ states in paragraph 9 that the first applicant is a beneficiary in the deceased’s will and that his name appears in the confirmed grant. Indeed, this is the correct position in that his son **SALESIO NJERU** was all along involved in these proceedings. **THOMAS GITONGA** who was given **LR. NGANDORI/NGUYIU 2310** in the will is the son of **SALESIO NJERU THOMAS**. The reason why the deceased chose to give his grandson a share instead of his own son is not known.

This cause was gazetted twice in a span of seven (7) years. This was on 23/07/2004 and on 22/03/2011. This was a testate but not an *intestate* succession where the shares and the beneficiaries had been identified in the written will. The contents of the said will and all the beneficiaries named in the written will were within the knowledge of the applicants from the year 2004 when the parties sought the help of the local administration to resolve the dispute if not earlier.

I reach a conclusion that service on the applicants with the two applications was not necessary since all the matters in this cause were within their knowledge.

If the applicants disputed the will or required to make an application under Section 26, they ought to have taken the necessary steps in good time before the grant was confirmed.

Rule 48(8) provides that where there is no affidavit of protest filed, the court will proceed to confirm the grant.

The applicants urged this court to strike out the affidavit of the State Counsel Catherine Mutuku sworn on 13/12/2017 arguing that it was filed without leave of the court contrary to the Rules.

Rule 66 of the Probate and Administration Rules provide as follows:-

“Where provision is made in any rule for the filing by any person of an affidavit for a specific purpose that provision shall be construed as enabling that person in a proper case to file more affidavits than one for that purpose”.

I reach a conclusion that by virtue of the provisions of this rule, the affidavit of **CATHERINE MUTUKU** was properly filed. In succession proceedings, there is no requirement for leave or for a court order to file a further affidavit.

The issue of *locus standi* was raised on part of the 2nd and 3rd applicants who are not children of the deceased as per the affidavit of **CYRUS WACHIRA**. In this regard, I agree with the averments of the applicants that they were named as beneficiaries in the letter of the District Commissioner which gives them a standing as interested parties in this cause provided they could prove dependency in the manner provided by the law. I therefore find no legal or factual basis of the argument that the 2nd and 3rd applicants have no *locus standi* in this application.

The applicants have relied on some authorities in this application. The case of **NDOLO VS NDOLO** was an appeal against orders of the superior court revoking the grant on grounds that it was obtained by means of fraudulent representation in that the written will was a forgery. The facts in this case are not relevant to the case before me in that the appellants had already filed an application under Section 26 of the Act in the superior court which had been heard and determined. No such application was filed by the applicants herein. One of the issues for determination before the superior court were whether the will presented to court was indeed valid. The Court of Appeal found that the will was valid and that the trial Judge was wrong in revoking the grant.

In the cause before me, the main issue for determination is whether the applicants have established the grounds set out under Section 76 of the Act to justify revocation of grant. There was no application filed in this cause under Section 26 of the Act and no leave to do so has been sought.

The issue of the validity of the will in this cause was determined by a Judge of this court and no appeal was filed. This court cannot sit on appeal on the decision of a judge of equal jurisdiction.

I am in agreement with the applicant's submission that the will is not absolute and may be reviewed to make provisions under S.26 of the Act as was held in **RE-ESTATE OF NGETICH (2003) KLR**. However, in this case, no contention existed at the time of confirming the grant. The court in this cause was within the law to proceed with the confirmation of the grant.

Section 30 of the Act provides that:-

“No application under this Part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by [section 71](#)”

As I have said earlier, the applicants ought to have filed an application for provision under Section 26 of the Act before the grant was confirmed. The applicants who have not explained delay in filing this application are time-barred as provided by the law having come to court several years after the confirmation of the grant.

The applicants alleged that the respondent was biased against them in these proceedings and that the office did not act within the dictates of the law.

The Public Trustee is not an individual but an office with several officers working as a team to deliver services to the public on behalf of the Government of Kenya. These officers are not permanently based in one place and keep on rotating to different stations in pursuance to Civil Service regulations.

Since this cause was filed in court in 2006, it has been handled by more than four State Counsels who have sworn affidavits, appeared in court or played other roles. This is for a period of over twelve years since 2006. The applicants did not single out any of the officers concerned as having been biased against them. Neither did they cite any incident where such bias was shown against them.

I find the allegation of bias on the part of the respondent a very wild allegation that is baseless and to a certain extent malicious.

The Public Trustee was the only executor of the will since the second one **CYRUS WACHIRA THOMAS** renounced his right before these proceedings were filed. The respondent was authorized by the law to do all that was required for the execution of the will. It is my considered opinion that the respondent acted within the law and on the dictates of the written will of the deceased.

It was further alleged that the affidavit of **MAUREEN NYABOCHOA** the Assistant Public Trustee consisted of information not within her knowledge and that such an affidavit ought to have been sworn by a beneficiary in the family of the deceased. It must be appreciated that the Public Trustee was the sole executor of the will after **CYRUS WACHIRA** renounced his rights of executorship. In that capacity, it is my considered opinion that **MAUREEN NYABOCHOA**, **CATHERINE MUTUKU** or any other state counsel in the office of the Public Trustee were authorized to swear affidavits in this cause for the matters in issue were within their knowledge. The matters in the said affidavits were based on information within their knowledge acquired in the course of their official duties as the office executing the written will of the

deceased.

The other issue raised by the respondents was that this court is *functus officio* in that it made a ruling on the validity of the will in the objection of **JAMES KALULU THOMAS**. It was argued that the said subject cannot be re-opened in this application.

The respondent further contended that it is on record that the objection of James was dismissed for lack of merit by Khaminwa, J (as she then was) in her ruling delivered on 14/02/2008. The subject of the validity of the will cannot be revisited for it was determined by a court of equal and competent jurisdiction and that the decision is still in force.

However, I wish to take note of the fact that the application before me is one of revocation/annulment of grant brought under Section 76 of the Act.

My considered view is that this application is properly before the court for the provisions of the relevant law allow the applicants to bring it after confirmation of the grant.

It must be noted that the applicants in their pleadings digressed to issues that are not relevant to this application. These include the validity of the will and that of heirs allegedly left out in the will.

I have already stated that the issue of the interests of the applicants was a subject that ought to be interrogated in an application under Section 26 of the Act.

The applicant also argued that the will of the deceased was not proved by the respondent as directed by Khaminwa, J in the ruling delivered on 14/02/2008. I have perused the ruling and take the cognizance of the directions given by the Judge which reads “*the Public Trustee shall prove the will and carry it into effect according to the law*”.

This was pronounced after dismissing the objection of **JAMES KALULU THOMAS**. The law does not require proof of a written will unless there is a question of its validity raised by an interested party or there exists some form of ambiguity. In this case, there was no such issues at the time the grant was confirmed. The pronouncement of the court was projected to the future and based on the assumption that a conflict may arise. Fortunately, no such a thing occurred in this cause up to the stage of confirmation. Neither did the need to prove the will arose in these proceedings.

Having considered the numerous issues raised in this application I now make reference to the relevant law under which this application is brought albeit Section 76 of the Act. The applicant relied on only one ground under the provision, namely that “***the proceedings to obtain the grant were defective in substance***”

In view of the foregoing analysis, I find that this ground has not been proved. For this reason, the application for revocation/annulment of grant must fail.

Consequently, I dismiss the application for lack of merit. This being a succession cause and considering all the circumstances I direct each party meet their own costs.

It is hereby so ordered.

DATED, SIGNED AND DELIVERED AT EMBU THIS 26TH DAY OF SEPTEMBER, 2018.

F. MUCHEMI

JUDGE