



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 278 OF 2018

(IN THE MATTER OF THE ESTATE OF IBRAHIM WACHIRA MAHIU alias WACHIRA S/O MAHIU)

TABITHA NYAMBURA THUKU.....1ST APPLICANT

JOHN MWANGI WACHIRA AMEHIHU.....2ND APPLICANT

JOSEPH NDERITU NGUNJIRI.....3RD APPLICANT

ESTHER WARUGURURU NJOROGE.....4TH APPLICANT

JANE WAIRIMU NGUNJIRI.....5TH APPLICANT

-VERSUS-

SIMON MWANIKI GATERU.....1ST RESPONDENT

MARY WANJIRU MWANIKI.....2ND RESPONDENT

RULING

The applicants filed a summons for revocation or annulment of grant dated 1st December, 2016. Alongside this summons, they also filed summons in general form under Rule 73 of the Probate and Administration Rules seeking for an injunction against the respondents to restrain them from mainly alienating the estate of Ibrahim Wachira Mahiu (deceased) who died on 1st December, 1980 initially pending the hearing of the summons inter partes but ultimately pending the hearing and determination of the main summons for revocation of grant.

According to the affidavit sworn by Tabitha Nyambura Thuku in support of the summons, the deceased was survived by his two sons named Isaack Kiai Wachira and John Mwangi Amehihu, the 2nd applicant. Isaack subsequently died but was survived by his children who constitute the rest of the applicants.

The respondents petitioned for grant of letters of administration on the basis that they are respectively grandson and granddaughter of the deceased yet they were either remotely related to the deceased or were not related to him in any way; at any rate, they were not the deceased's grandchildren as it is purported in the affidavit in support of the petition.

The 1st applicant deposed further that the 1st respondent only found his way into this cause when he was requested to assist the applicants petition for the grant of letters of administration in their own names since they were ignorant of the processes involved in obtaining such a grant. The 1st respondent was approached primarily because he was the husband of the 2nd respondent who happens to be the sister to the 1st applicant's late husband. Rather than help them, the respondents took advantage of the applicants' ignorance and not only petitioned for the grant of letters to themselves but they also had it confirmed and, in the process, got a share of the deceased's estate. The grant was thus made and the estate distributed on the basis of deliberate misrepresentations by the respondents on their true identity and relationship to the deceased.

It is the applicants' case that the grant should be revoked or annulled in light of these misrepresentations. In technical terms, I understand them to be saying 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"* (see section 76(b) of the Act). Before the revocation or annulment, the applicants want the estate preserved.

There is an affidavit sworn on 19th September, 2017 and filed on 2nd October, 2017 purportedly in response to the applicant's summons. I say it is a purported replying affidavit because while it is represented as a joint affidavit sworn by the respondents and four of the applicants, it is only signed by the 1st respondent alone contrary to the provisions of Order 19 (formerly Order XVIII) of the Civil Procedure Rules, 2010

which applies to the proceedings under the Law of Succession Act by virtue of Rule 63(1) of the Probate & Administration Rules; the rule in the Civil Procedure Rules contemplates that the an affidavit must always be signed by the deponent or deponents; in my humble view, the omission to sign is not an irregularity in form or technicality that can be excused under Order 19 Rule 7 of the Rules but an error that goes to the substance of the affidavit itself. If an affidavit is not signed by the deponent, there is simply no affidavit. The net effect of the respondents' purported affidavit replying to the applicants' application is that there is no response to the applicants' allegations of fact.

Even if the respondents' affidavit was to be admitted as regular in every respect, none of the depositions made in that affidavit has specifically answered the pertinent questions raised about the false statements made by the respondent or their concealment from the court something material to the petition of grant of letters of administration. To be specific, the respondents have not denied that they are not the deceased's grand children or are not related to him in any way.

Based on the material before me, I am convinced that the applicants have not only made case for an injunction but I am satisfied that the grant made to the respondents is not sustainable. It is clear 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. Based on the same facts, it is also true that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant. There is no evidence that the allegation in issue was made in ignorance or inadvertently but even if it was that in itself would not justify the grant being made to the applicant.

For these reasons and in exercise of the powers with which this court is clothed under section 47 and Rule 73 of the Probate and Administration Rules, I hereby revoke the grant made to the respondents on 12th May, 2014 and confirmed on 30th June, 2015; in my humble view, it would be a waste of judicious time to keep the summons for revocation of grant in abeyance when the grounds upon which a grant can be revoked under section 76(b) and (c) are clearly apparent from the affidavit evidence.

For completeness of record, I appoint the deceased's only surviving son, John Mwangi Wachira Amehihu as the administrator of the deceased's estate. I also direct that he files the summons for conformation of grant within 30 days of the date of the delivery of this ruling. Meanwhile, parties will bear their respective costs. It is so ordered.

Signed, dated and delivered in open court this 21st day of September, 2018.

Ngaah Jairus

JUDGE