



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**P&A CAUSE NO. 911 OF 2013**

**IN THE ESTATE OF THE LATE NICHOLAS NZIOKA NDETI ALIAS NZIOKA MUTHEKA NDETI (DECEASED)**

SABINA NDUKU TOM.....1<sup>ST</sup> ADMINISTRATOR

MARGARET NG'ONDU NDETI..2<sup>ND</sup> ADMINISTRATOR/APPLICANT

**RULING**

1. The 2nd Petitioner herein Margaret Ng'onde Ndeti filed a summons for revocation of grant dated 4<sup>th</sup> July, 2017 seeking for the following reliefs namely:-

***(a) That the grant of letters of administration intestate issued to the Petitioners/Applicants herein dated 14<sup>th</sup> February, 2016 be revoked and/or annulled.***

***(b) That the costs of the Application be paid out of the estate.***

2. The Application is supported by the affidavit of the 2<sup>nd</sup> Petitioner/Applicant sworn on even date and further on the grounds on the face of the Application. The main gist of the Application is that this petition had been filed under the mistaken belief that the deceased herein had died intestate while the true position is that he had left behind a valid will (testate) and in the circumstances the grant ought to be revoked and/or annulled and the estate of the deceased be administered according to the wishes of the deceased vide the Will.

3. The Application was strenuously opposed by the 1<sup>st</sup> Petitioner Sabina Nduku Tom who raised several grounds of objection vide her replying affidavit sworn on 6/6/2018 *inter alia*: that she is the second wife of the deceased herein having gotten married on the 10/09/2013; that the grant of letters of administration were properly obtained as there was no concealment of material facts as alleged by the Applicant; that the deceased did not leave behind any valid Will capable of being executed or at all; that the alleged Will was drawn and signed by the Testator on 29/3/2011 whereas the deceased married the 1<sup>st</sup> Petitioner on the 10/09/2013 and were blessed with one child; that by operation of law the said will stood revoked by the testator's marriage to the 1<sup>st</sup> Petitioner; that the application is an afterthought since the 2nd Petitioner allegedly witnessed the Will and knew its consequences but kept quiet upto now to turn around and feign ignorance; that the deceased died intestate and hence the applicable law is that of intestacy.

4. The application was canvassed by way of oral submissions. However, it is only counsel for the 1<sup>st</sup> Petitioner/Respondent who made submissions. It was submitted by Mr. Ayieko for the 1<sup>st</sup> Petitioner that the alleged Will stood extinguished upon the deceased marrying the 1<sup>st</sup> Petitioner on the 10/09/2013 and further there was no provision in the Will for the contemplation of the marriage to the 1<sup>st</sup> Petitioner. It was also submitted that the 2<sup>nd</sup> Petitioner/Applicant having been a witness to the said Will should not have kept quiet all along yet she knew of the same only to raise the issue now at this stage. Further, it was submitted that the said will was not witnessed by the competent witnesses in view of the fact that the 2<sup>nd</sup> Petitioner was a beneficiary contrary to Section 13 of the Law of Succession Act. Learned Counsel finally submitted that the estate is an intestate one and could only be administered as such.

5. I have considered the Application together with the rival affidavits as well as the oral submissions of Counsel for the 1<sup>st</sup> Petitioner and the applicable law. Revocation and annulment of grants is provided for under Section 76 of the Law of Succession Act as follows:-

“A grant of representation whether or not confirmed may at any time be revoked or annulled if the court decides either on application by any interested party or of its own motion:-

***(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.***

.....”

The sole ground raised by the 2<sup>nd</sup> Petitioner/Applicant herein is that the deceased herein Nicholas Nzioka Ndeti alias Nzioka Matheka Ndeti who was her father had in fact made a Will and therefore he had died testate with the result that the estate shall be administered as proposed in the Will. I have perused the said Will dated 20<sup>th</sup> November, 2011 and note that the 2<sup>nd</sup> Petitioner/Applicant herein is a beneficiary as well as a witness therein. The deceased is reported to have entered into another marriage with the 1<sup>st</sup> Petitioner herein on the 10/09/2013 and were blessed with one child of the union. The 1<sup>st</sup> Petitioner has presented a marriage certificate Number 172516 confirming the said marriage. The efficacy of the said Will by the deceased as contested by the 1<sup>st</sup> Petitioner will be tested against the provisions of Section 13 and 19 of the law of Succession Act as follows:-

***Section 13(1) A will shall not be considered as insufficiently attested by reason of any benefit thereby given, either by way of bequest or by way of appointment to any person affecting it, or to his or her spouse.***

***(2) A bequest to an attesting witness (including any direction as to payment of costs or charges) or a bequest to his or her spouse shall be void, unless the Will is also attested by at least two additional competent and independent witnesses in which case the bequest shall be valid.***

***Section 19 A will shall be revoked by the marriage of the maker, but where a Will expressed to be made in contemplation of marriage with a specified person, it shall not be revoked by the marriage so contemplated.***

From the above provisions, it is quite clear that the will made by the deceased is beset with many obstacles. Firstly, the said Will had been witnessed by the 2<sup>nd</sup> Petitioner/Applicant who was also a beneficiary in the Will but that there are no two competent and independent witnesses as provided for under Section 13 of the aforesaid Act. The 2<sup>nd</sup> Petitioner having been a beneficiary and attested the Will kept this information to herself and did not inform her co-administrators only to spring it up at this stage. I find the conduct of the 2<sup>nd</sup> Petitioner in feigning ignorance to the existence of the said Will and only raising it at this stage even after having agreed to be an administrator in the intestate proceedings smacks of bad faith. The only likely reason behind this turn of events is the 2<sup>nd</sup> Petitioner's intention to lock out the 1<sup>st</sup> Petitioner from benefitting from the estate of the deceased. The 2<sup>nd</sup> Petitioner has been aware that the 1<sup>st</sup> Petitioner does not feature in the Will and hence the filing of the present Application was meant to edge her out of the deceased's estate. I find the 2<sup>nd</sup> Petitioner has indeed come to this court with unclean hands. As the Will was not witnessed by two other competent and independent witnesses, the said Will is void for all intents and purposes.

Secondly the action of the deceased marrying the 1<sup>st</sup> Petitioner herein two years after the making of the Will renders the said Will void. Indeed the Will is silent on the issue that the deceased expressed an intention of marrying the 1<sup>st</sup> Petitioner specifically and as such the Will must be revoked and the 2<sup>nd</sup> Petitioner cannot rely on the same in these proceedings.

6. In view of the foregoing observation, I come to the finding that the Will allegedly made by the deceased stood revoked by his marriage to the 1<sup>st</sup> Petitioner herein and further the same had not been properly attested. Hence I find the estate of the deceased is an intestate one and can only be administered as such. The 2<sup>nd</sup> Petitioner's Summons dated 4<sup>th</sup> July 2017 lacks merit and is ordered dismissed with no order as to costs. The Petitioners are hereby directed to proceed and file the requisite summons for confirmation of the grant as a matter of priority.

Orders accordingly.

**Dated and delivered at Machakos this 24<sup>th</sup> day of October, 2018.**

**D.K. KEMEI**

**JUDGE**