



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

IN THE MATTER OF THE ESTATE OF S K W (DECEASED)

SUCCESSION CAUSE NO. 1572 OF 2006

A M K.....APPLICANT

-V E R S U S-

H N K.....1ST RESPONDENT

S M K.....2ND RESPONDENT

JUDGMENT

The Application before Court is Summons for Revocation or Annulment of Grant by the Applicant dated the 30th March 2009. It mainly seeks the following order:-

i) That the grant of probate made to H N K and S M K in Nairobi High Court Succession Cause No. 1572 of 2006 be revoked.

The grounds upon which the application is based are that;

(a) 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.

(b) That in the interests of justice, fair play and the very sacred tenets of natural justice, this Honourable Court ought to find in the applicant's favour and grant the orders sought.

A M K (hereinafter 'A') in her further supporting affidavit she averred that the deceased S K W died on the 18th day of May 2004, and a grant of probate was made to H N K and S M K both of P.O. Box [Particulars Withheld]-00300 Nairobi by the Honourable Court on the 13th day of November 2007. She stated that she met and married the deceased under Kikuyu Customary Law in the year 1991 where her and the deceased proceeded to cohabit at their matrimonial home on Land Parcel No. Loc [particulars withheld], and they were blessed with four issues namely; M N born in 1989, S N born in 1993 (now deceased), G K born in 1996 (now deceased) and M N born in 1999. She stated that their cohabitation was disrupted by the 1st Respondent's entry into their matrimonial relationship with the deceased. She deponed that her and her children continued to reside at the aforesaid abode to date, suffice it to say that their two deceased children, are interred at this very parcel of land.

A went on to state that despite knowledge of all aforesaid, the Respondent went on to take out the grant of probate herein issue without notice to her or at all and to the obvious exclusion of her children and her in the Petition and distribution of her said husband's estate. Annexed to her affidavit is a copy of a letter by the Chief Kariua Sub-Location confirming this state of affairs. A only learnt of this Succession Cause on the 10th March 2009 when the Respondents served her with pleadings in **Muranga Principal Magistrate's Cause No. 54 of 2009**. Annexed thereto are copies of the Complaint and Memorandum of Appearance aforesaid.

A further stated that the deceased had a vast estate which included among others:-

i) L.R. No. Kakuzi/Kiririri Block [particulars withheld]

ii) Loc. [particulars withheld] (**Matrimonial home**)

- iii) Loc. [particulars withheld]
- iv) Loc. [particulars withheld]
- v) Plot No. [particulars withheld] **Kariua Miriukia F.C.S Ltd**
- vi) Ruiru/Mugutha Block 1/T [particulars withheld]
- vii) Ruiru/Mugutha Block 1/T [particulars withheld]
- viii) Motor Cycle Reg. No. [particulars withheld]
- ix) NSSF dues

A averred that neither her children nor her have been afforded the benefit of any of the assets listed above, hence her effort to restrict the dealings in any of the said lands.

She stated that through her frantic efforts to salvage at least a portion of what is left of the estate in issue, she filed a complaint against the Respondent with the **Muranga South Land Dispute Tribunal**, and which cause is coming up for hearing on the **16th April 2009**.

The Respondents/Applicants filed a Chamber Summons application dated 22nd October 2009 and presented to this court on 26th October 2009 seeking the following orders:-

a) That pending the hearing and determination of this application the Objector herein, A M K be restrained either by herself, her servants and/or agents from entering upon or in any way interfering with the Applicants' quiet enjoyment, possession and use of the parcel of land more particularly described as Land Parcel No. Loc [particulars withheld].

b) That the Objector herein A M K be restrained either by herself, her servants and/or agents from entering upon or in any way interfering with the Applicant's quiet enjoyment, possession and user of the parcel of land more particularly described as Land Parcel No. Loc [particulars withheld] pending the hearing and determination of the objectors application dated 30th March, 2009.

The Applicant/Respondent **H N K** (hereinafter 'H'), based her application on the following grounds:-

- a) The Applicants are the administrators of the estate of the late S K W.*
- b) The objector herein is an estranged wife of the deceased who has since re-married.*
- c) The objector herein has filed an application to challenge the grant issued to the applicants.*
- d) The Objector herein has before the determination of her Summons for Revocation of Grant started cultivating and cutting trees on the parcel of land belonging to the Applicants by virtue of the said grant.*
- e) It is only fair and just that restraining orders be issued against the objector pending the hearing and determination of the application for revocation of grant.*

In her supporting affidavit H stated that she is the lawful wife to the late S K W and that the deceased died on the 18th day of May, 2004 and therefore they applied for Letters of Administration and a grant thereof was issued on 16th October 2006. She stated that the said grant was issued to her and her son, the 2nd Respondent herein and the same was confirmed on 13th November 2007 and copy of the Certificate of Confirmation to that effect was issued.

She avers that A the Applicant/Objector herein used to cohabit with the deceased between 1991 to 1997 when she deserted the matrimonial home. She states that A re-married almost immediately after deserting the matrimonial home and since then the Applicant/Objector herein has never been seen and/or visited the matrimonial home.

H said that A did not even attend the burial of the deceased. She stated that A came back to the matrimonial home being **Land Parcel No. [particulars withheld]** in **January 2009** and started cultivating and cutting trees and therefore on 31st March 2009 she filed an application to revoke the grant of probate issued to them.

H stated that A was summoned to the District Commissioner's office to find out why she was interfering with the estate of the deceased but the same did not bear any fruit as evidenced by a copy of the Objector's Advocate's letter dated 15th September 2009. She further stated that on or about the 10th October, 2009 A locked her matrimonial house with her own padlock claiming that he said house belonged to her.

HEARING

On 15th March 2016 A M K PW1 testified and reiterated the substance of her pleadings filed in Court. The she and deceased met in 1989

were married in 1991 under Kikuyu customary law. They lived on suit property Loc [particulars withheld] and had 4 children. In 2000, they had a dispute and separated. The deceased died in 2004 and she came back. She sought that the Court grants orders to reverse the title document from the Respondent's name to her name.

H N K DW 1 testified and reiterated the contents of her pleadings filed in Court. The deceased and her were married in 1984 and had 3 children and they disagreed and parted and she left home. The deceased came to her home with elders and married her under Kikuyu customary Law. They lived together until his death in 2004. When they parted, the deceased lived with the Objector PW1 and they separated. She was married to another man.

DW1 stated that her late husband was sick for many years and slept in various hospitals and their son dropped from school and took care of him until his death. They struggled and the Objector was not there to assist in any way and she did not attend the deceased's funeral.

After the funeral, A came back and evicted her from the property, destroyed her crops and entered her house. She reported the matter to the Chief and D.O/D.C and though they agreed with her, the Objector did not move out.

DW2 J K K stated that he was/is from the same clan 'K' family as deceased. He married DW1 H N and he accompanied the deceased among other parties to wife's home and paid dowry.

In 1991, the deceased brought another wife, A M K PW1 and they lived together until 1997 when the deceased found M with a man called C in their house. The deceased brought A to the clan meeting. The deceased was very annoyed and he said that A was never to get anything he owned it is all for H and his 3 children only. The deceased took A home and told her to take anything she wanted and leave the home.

The deceased died in 2004 and by that time he had brought back home the 1st wife, H N K. In 2006, PW1 came to the clan and asked to come back to the deceased's home. PW1 came with 2 elders and DW1 with 2 elders and he was there with 3 other elders of the clan, he was the only surviving elder of the clan. After deliberations, the clan decided that A was not to come back to the deceased's home, they did not want to be cursed.

A PW1, after she left the deceased's home she was married to one C and they lived together and had other children. Of her 4 children, only the 2 who are deceased were from/by the deceased.

SUBMISSIONS

APPLICANT

On 9th June 2017 counsel for the Applicant filed written submissions where he relied on the settled law on revocation and /or annulment of grant viz:-

Section 76: 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) ...

(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) ...”

Counsel further submitted that it is not for the Petitioner to decide what or whom to exclude at the time of presenting the Petition. There must be full disclosure concerning the deceased's estate. The Respondent DW1 admitted over and over again in her testimony that the Applicant was the deceased's second wife and had been taken in after the Respondent and the deceased had disagreed and she left.

If the testimony of DW1 and DW2 emphasized the applicant's relationship to the deceased and the mention of children belonging to such said relationship, Why was this information not reflected in the Petition? The Applicant relied on the following authorities to buttress her case as presented: **MUSA NYARIBARI GEKONE & 2 OTHERS –vs- PETER MIYIERIDA & ANOTHER [2015]eKLR, JAMLECK MAINA NJOROGE –vs- MARY WANJIRU MWANGI [2015]eKLR and In the matter of the Estate of Muiruri Muchoro (deceased) [2014]eKLR.**

Counsel further submitted that the Applicant's Summons herein is defective having not met all the ingredients enumerated under the stipulated section of the Law of Succession Act, to the extent that;

(a) ***The Petitioner (now administratrix) fraudulently concealed the fact that the applicant and her children were beneficiaries to the deceased's estate as a matter of right.***

(b) ***By fraudulently leaving out of the Petition, other property belonging to the estate, so as to secretly deal with the same as though it did not form part of the deceased's estate.***

RESPONDENTS

On 26th September 2017 Counsel for the Respondent filed his written submissions. Counsel submitted whether the Respondents made any false statements and conceal material information to the court at the time they applied for the grant? Counsel asserts that the deceased passed on on the 18th May 2004, at Aga Khan Hospital. The 1st Respondent in her testimony stated that the Applicant did not even attend the funeral of the deceased yet she lived very close nearby. The 1st Respondent claimed that the Applicant had since remarried and that the children who had been born in the temporary cohabitation with the deceased had since passed on, stated in her testimony that she dutifully followed process in informing the court of the dependants to the estate of the deceased. This was done two (2) years after the death of the deceased and the Applicant only came to the court five (5) years after the death of the deceased. The Applicant in her testimony did not explain the reason for the delay; instead she stated she only knew of the Cause after she was served with pleadings in the year 2009. Counsel reiterated that the Respondents had not made any false statements or concealed any vital information in their application for grant of letters of administration.

Counsel further asserts whether the actions of the Applicant towards the deceased bar her from being a dependant in the estate of the deceased? The 1st Respondent in her affidavit stated that the Applicant had an illicit affair which led to her being chased away by the deceased. It was further adduced by DWII that there was a meeting by the clan elders that deliberated after the deceased had previously brought the case of adultery by the Applicant with a man known as C K, which he confided to the clan elders that due to this act, the Applicant should not inherit anything pertaining to him. The minutes of the said meeting were annexed in the Respondents affidavit. She also failed to attend the burial of the deceased who was buried at the home she alleged in her affidavit in support of the summons or revocation of grant (paragraph 7 of the affidavit) of the affidavit) that she still lived in even after his death. She has only come to revoke the grant five years after the death of the deceased; she was not interested in the administration and preservation of the estate of the deceased after his death and is now seeking to enrich herself unjustly.

ISSUES

Having considered the submissions by both counsel. The issue for determination is whether the grant of probate made to H N K and S M K should be revoked and whether A M K was legally married to the deceased?

Section 76 of the Law of Succession Act the court is empowered to revoke or annul a grant on the application of any interested party or of its own motion.

From the evidence on record, the deceased was involved to and married both PW1 and DW1 and lived with each of them at different times; first with DW1 and then they separated and he lived with PW1 and they separated and he went back to his 1st wife whom he lived with till his death. DW1 had 3 children with deceased. PW1 claimed they had 4 children with deceased but DW2 stated that only 2 of the children were by the deceased and they are deceased. They are S N (deceased) born in 1993 and G K (deceased) born in 1996.

Part 3 on provision for dependents under Law of Succession Act Cap 160 Section 27, 28 & 29 defines dependents and provides for the discretion of the Court in making such provision for dependents and outlines the circumstances to be taken into account in making the order for provision for dependents as follows;

Section 27 Law of Succession Act provides;

“In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.”

Section 28 Law of Succession Act provides;

“In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—

- a) the nature and amount of the deceased’s property;***
- b) any past, present or future capital or income from any source of the defendant;***
- c) the existing and future means and needs of the dependant;***
- d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;***
- e) the conduct of the dependant in relation to the deceased;***
- f) the situation and circumstances of the deceased’s other dependants and the beneficiaries under any will;***
- g) the general circumstances of the case, including, so far as can be ascertained, the testator’s reasons for not making provision for the dependant.”***

Section 29 Law of Succession Act provides;

“For the purposes of this Part, “dependant” means—

a) *the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;*

b) *such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and*

c) *where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.*

Therefore from the above provisions and the evidence on record; this Court is satisfied that H N K and 3 children are dependants of the deceased.

However, with regard to A M K, although she was married under customary law and they separated with the deceased and therefore qualifies as deceased's wife and/or former wife; there is uncontroverted evidence that the deceased and herself separated because during their marriage the deceased found her with a man called C in their home. The matter was deliberated in the clan meeting. After, she left their home she was married to one G who works at the [Particulars Withheld] Department. The evidence was not controverted by any other evidence. Secondly, it was contested that all 4 children did not belong to the deceased except for 2 of them who are deceased.

Therefore, although PW1 and the 4 children qualify as dependents, from the evidence on record, this Court shall not exercise its discretion to provide for them as beneficiaries and dependents from the deceased's estate due to PW1's conduct in relation to the deceased contrary to **Section 28 (e) and Section 35 proviso Law of Succession Act Cap 160**. PW1 separated from her husband due to her misconduct in their marriage and the matter was discussed by the clan and it was agreed that it was over between them and she would not get anything from him or his estate. There is evidence on record she remarried after she separated with the deceased. For these reasons the Objection raised is dismissed and the Petition, grant and confirmed grant upheld in favour of the Petitioner and 3 children as beneficiaries of deceased's estate.

DELIVERED, DATED & SIGNED IN OPEN COURT ON 24TH OCTOBER 2018.

M.W.MUIGAI

JUDGE -FAMILY DIVISION-HIGH COURT

IN THE PRESENCE OF:

MR.SICHANGI FOR RESPONDENTS

MR.NJUGI FOR APPLICANT