



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HIGH COURT SUCCESSION NO. 155 OF 2015

IN THE MATTER OF THE ESTATE OF

CHRISTOPHER RUBINGA MWANIKI.....DECEASED

ALICE WAKUTHII CHRISTOPHER.....PETITIONER

V E R S U S

JOHNSON NJINE MWANIKI.....1ST PROTESTOR

MICHAEL MUTHIKE MWANIKI.....2ND PROTESTOR

JUDGMENT

This matter relates to the estate of Christopher Rubinga Mwaniki (deceased) who died on 14/4/2012.

The petitioner Alice Wakuthii Christopher was issued with letters of administration of the estate of the deceased Christopher Rubinga Mwaniki on 25/09/2015. The petitioner applied for Confirmation of Grant on 31/10/2016 stating that the deceased was survived by his son Eliud Kinyua Rubinga and herself as the widow and proposed that the deceased estate **Kabare/Nyagati/5407** be given to her.

Subsequently the applicant John Njine Mwaniki proceeded to file an application for revocation of grant dated 07/11/2016 claiming that the grant was obtained fraudulently by making false statement or concealment of something material. That she was not the widow of the deceased and neither was Eliud Kinyua Rubinga the deceased's son. That she did not obtain consent of all persons of equal or superior priority to her who is entitled to petition for the grant. In addition, no citation was issued to the applicant or all persons entitled to the grant to accept or refuse to petition.

In response, the petitioner filed a replying affidavit claiming that the application for reinstatement of the Letters of Administration were duly served on the applicant together with the hearing notice but he did not attend court. That the applicant did not appeal against the ruling delivered on 12/10/2016. That the applicant secretly moved the court together with his brother with an intention to succeed her late husband. They claimed that the chief had refused to issue them with letter to commence the succession cause and that the title deed of the estate could not be traced.

In response to the affidavit, the applicant attached a Chief's letter stating that the petitioner had separated with her husband Nguru Kanyua and went to live with the deceased from 1989 to 1998 when she went back to her husband. They had one child with the deceased but she passed away and with her husband she has two children Peter Kanyua Nguru and Eliud Nyamu Nguru. That the title of the estate was stolen by Eliud Nyamu when he went to visit his brother.

The petitioner attached Birth Notification of Eliud Kinyua Rubinga indicating he was born on 20/10/1990.

Directions were given that the summons for revocation of grant to proceed by way of oral evidence in court.

A brief background is that the petitioner filed succession proceedings in the estate of her deceased husband. The Letters of Administration were issued to her on 25/9/2015.

The applicants had also secretly moved to court and filed a Succession Cause No. 248/2014 in Kerugoya High Court. They could however not be issued with Letters of Administration as the notice had already been issued.

When this was brought to the notice of the court, the Judge '**suo moto**' cancelled the Letters of Administration issued to the petitioner. The petitioner moved to court vide an application dated 22/2/16 and sought for an order to reinstate the grant of Grant of Letters

Administration issued on 25/9/2015. The applicants did not oppose the application. The application was allowed and the petitioner was allowed to proceed with the Successions proceedings.

The petitioner filed the application for confirmation of grant but the applicants filed application dated 7/11/16 for orders that the grant be revoked.

The Evidence:

PW-1- Johnson Njine Mwaniki who is the 1st applicant testified that the deceased is his brother. He testified that the petitioner was married to the deceased and they had two children. One of the children is deceased. The surviving child is Eliud Kinyua Rubinga. That the petitioner had separated with the deceased before he died. That the petitioner cannot get the estate of his brother when she is living with another husband. That Eliud Nyamu is the son of the deceased.

The petitioner testified that the deceased was her husband and they had two children. One of them Susan Wanjiku Nguru is deceased and is buried on the deceased's parcel of land. The other child is Eliud Nyamu. She testified that though she had separated with the deceased, she never re-married. She had lived with the deceased on land Parcel No. Kabare/Nyangati/5407 which he inherited from his father.

Determination:

The issue before this court is whether the grant issued to the petitioner should be revoked.

A party wishing to have a grant revoked should tender evidence before court to prove that the proceedings to obtain the grant were defective in substance. The grant was obtained fraudulently by making of a false statement or by concealing to the court something material to the case. Further that the grant was obtained by means of an untrue allegation. This is well settled under the **Law of Succession Act**.

Section 76 of the Law of Succession Act Cap 160 states;

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

In **Jamleck Maina Njoroge v Mary Wanjiru Mwangi [2015] eKLR**

The court stated;

The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.

The petitioner filed the succession cause as the surviving widow of the deceased and mentioned Eliud Nyamu as his surviving child. The cause was published in the Kenya Gazette and no objection was filed within the stipulated period.

Section 29 of the Law Succession Act states;

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.

Section 66 of the Law of Succession Act gives the order of preference and names surviving spouse or spouses with or without association of other beneficiaries.

The petitioner being a wife of the deceased had priority in his estate. The applicants alleged that she remarried. However the petitioner testified though they had separated, she never re-married. This was confirmed by DW-2- George Muriithi Muriuki the Area Assistant Chief who testified that he knew the deceased and the petitioner. He is the one who issued the petitioner with a letter to file the succession **Exhibit D-1** and he confirmed that she was the wife of the deceased and she had one surviving son Eliud Kinyua Rubinga.

I find that the applicants have not proved that the grant was obtained fraudulently or by concealment of material facts from the court. The applicant had no claim to the estate of the deceased. The claim by the petitioner and her child has priority. The applicants have not proved any of the matters set out under **Section 76 of the Law of Succession Act** which are the only grounds upon which the court can order a revocation of grant. The petitioner and her child are the only rightful beneficiaries to the estate of the deceased. The child Eliud Kinyua consented to the whole estate being given to the petitioner.

Conclusion:

The application for revocation of grant is without merits. I order that the application be dismissed. Costs to the petitioner. The grant shall be confirmed as per the application dated 18/10/16.

Dated at Kerugoya this 22nd day of November 2018.

L. W. GITARI

JUDGE