



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 420 OF 2007

IN THE MATTER OF THE ESTATE OF M'NJARA M'BAGINE (DECEASED)

CHARITY GAITI MWAMBA..... PETITIONER

VS

ISAIAH KIAMBI MWAMBA.....1ST INTERESTED PARTY

STEPHEN M. MWAMBA.....2ND INTERESTED PARTY

REBECCA MWARI..... 3RD INTERESTED PARTY

JUDGMENT

[1] **M'NJARA M'BAGINE ("the deceased)** to whom this Succession Cause relates, died on 15th January 1987. Through the Chief's letter of introduction dated 13th September 2007 he introduced the survivors as:

1. Charity Gaiti Mwamba - Widow
2. Isaya Kiambi Mwamba - Son
3. Charles Kirimi Mwamba - Son
4. James Mitwiri Mwamba - Son

The petitioner petitioned for the grant of letters of administration where she listed the deceased's asset as L.R. Parcel NO. MARIENE/UPPER ABOTHUCUGHI/707.

[2] On 11th March 2008 the petitioner was issued with the grant of letters of administration intestate. On 2nd May 2008 an objection was raised through summons for revocation of the grant pursuant to **Section 71(b) and 76 (b) and (c) of the Law of Succession Act and Rules 44 and 73 of the Probate and Administration Rules**. The grounds which the application is premised upon are in the application, supporting and supplementary affidavit of Stephen Magaju Mwamba sworn on 2nd May and 22nd July 2008 respectively. The statements of Isaiah Kiambi Mwamba and Rebecca Mwari dated 19th April 2018 also adumbrate the grounds. It is contended that the deceased had two houses as he had two wives that is:

First House

- a) Rebecca Mwari - Wife
- b) Sabera Munyange - Daughter
- c) Stephen Magaju Mwamba - Son
- d) Isaiah Kiambi Mwamba - Son

Second House

- a) Charity Gaiti Mwamba - Wife
- b) Charles Kirimi Mwamba - Son
- c) James Mutwiri Mwamba - Son

Further, they argued that the petitioner filed the cause secretly without consulting them or getting their consent. The 3rd Interested Party and the deceased never divorced but did not live well because of the problems caused by the petitioner although she never remarried. The 1st and 2nd Interested Parties are sons of the deceased who were brought up on the same land with the petitioner. They stated that the deceased did not only have L. R. NO. MARIENE/UPPER ABOTHUGUCHI/707 but also NANYUKI PLOT NO. 416.

[3] This application was opposed vide the replying affidavit of Charity Gaiti Mwamba sworn on 30th June 2008. She asserted that the cause was not filed secretly as she had no reason to inform the 2nd and 3rd Interested parties as they are not beneficiaries. The 3rd Interested Party is the mother to the 1st and 2nd Interested Party. She and the deceased were once married and had a son, the 1st Interested Party whom she left and was taken care of by the Petitioner. When she left she got married to the father of the 2nd Interested Party whom she left and got married again. She affirmed that the 2nd and 3rd Interested Parties are driven by greed in their quest to get a share of the estate. But as for the 1st Interested Party the deceased wished that his estate be distributed amongst him, Charles Kirimi and James Mutwiri.

[4] This matter was canvassed by way of written submissions. The Interested Parties in their submissions submitted that the actions of the Petitioner are an affront of the law as she has violated provisions of the Law of Succession Act. The Petitioner did not file any submissions.

ANALYSIS AND DETERMINATION

[5] Having considered the application, affidavits, statements, submissions and the record in its entirety the issue of determination is *whether or not to revoke and or annul the grant of letters of administration intestate issued to the petitioner on 11th March 2008.*

[6] **Section 76 of the Law of Succession Act** provides the circumstances under which a grant may be revoked or annulled. In this cause, the Interested Parties seek revocation of the grant based on the fact that the grant was obtained fraudulently by making a false statement by the concealment from the court of something material to the case as well as obtained by means of untrue allegation of a fact essential in point of law.

[7] First and foremost, is to establish what comprises as the assets of the deceased. From the record a green card has been produced in relation to L. R NO. MARIENE/UPPER ABOTHUGUCHI/707 which shows that the owner is the deceased. This was the only listed asset by the petitioner. The Interested Parties however allege that the deceased also owns Nanyuki Plot No. 416. From the record there is no evidence that shows this is the case. No documentation has been produced to ascertain this fact. As a result this court cannot rely on an unsubstantiated claim. Hence, the asset proved to belong to the deceased is only L. R NO. MARIENE/UPPER ABOTHUGUCHI/707.

[8] The Interested Parties sought to have the grant revoked for the cause was filed secretly without their knowledge or consent. According to the Petitioner, the 3rd Interested Party was indeed married to the deceased and conceived the 1st Interested Party whom she raised and included among the survivors. However, she remarried and bore the 2nd Interested Party therefore the two are not beneficiaries of the estate. This allegation has been refuted by the 3rd Interested Party who stated that she is wife of the deceased in spite of being separated and that the 2nd Interested Party is the deceased's son.

[9] **Section 29 of the Law of Succession** defines the meaning of dependant's as follows:

“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;

...”

[10] It is not in dispute that the 3rd Interested Party and the deceased married and bore the 1st Interested Party. The Petitioner however contends that the 3rd Interested Party remarried and born the 2nd Interested Party with another man. This is an allegation she has raised but has failed to prove for whoever alleges must prove. Alternatively, even though the 3rd Interested Party and the deceased had separated she is still considered a dependant of the deceased by virtue of **Section 29 of the said Act**. As a result I am of the view that the Interested Parties are indeed dependants of the estate.

[11] The Petitioner stated the 1st Interested Party was aware as he was present when the family gathered at the Chief's office and is also listed as a beneficiary as required by the law. However from the consent Form 38 it can be seen that she did not get his consent. Neither did she get the consent or inform the 2nd and 3rd Interested Parties whom she alleged not to be beneficiaries of the estate.

[12] It is worth pointing out that, all children are regarded as equals under the eyes of the law. No child ought to be discriminated upon based on their sex. Parties should keep in mind that it is trite law that daughters are allowed to inherit their parents' estate. If they wish not to then renunciation of their rights ought to be presented before this court.

[13] From the foregoing, I am satisfied that the application has merit. Thus, the grant of letters of administration intestate issued to the petitioner on 11th March 2008 is hereby revoked. Fresh grant letters of administration shall be issued to Charity Gaiti Mwamba and Rebecca Mwari. Guided by Section 40 and 38 of the Law of Succession Act, the estate property shall be shared equally amongst:

- a. *Charity Gaiti Mwamba* - *Widow*
- b. *Isaya Kiambi Mwamba* - *Son*
- c. *Charles Kirimi Mwamba* - *Son*
- d. *James Mitwiri Mwamba* - *Son*
- e. *Stephen M. Mwamba- Son*
- f. *Rebecca Mwari- Widow*

I also confirm the grant in the foregoing terms.

Dated, signed and delivered in open court at Meru this 20th day of December, 2018

F. GIKONYO

JUDGE

In presence of:-

M/S Wanjohi for rimita for Objector

Nyamweya for petitioner

F. GIKONYO

JUDGE