



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 534 OF 2009

N THE MATTER OF THE ESTATE OF MUSYOKA MUNYOKI NDULU (DECEASED)

JOYCE KOKI MUSYOKA.....APPLICANT

VERSUS

PATRICIA MUENI MULI

DAVID MUSYOKA MUNYWOKI.....RESPONDENTS

RULING

The Summons

The Applicant herein is the widow of the deceased Musyoka Munyoki Ndulu (hereinafter referred to as “the deceased”), who died on 3rd October 2006. The Applicant has filed a Summons for Revocation dated 6th November 2015 seeking an order that the Certificate of Confirmation of Grant issued herein to the Respondents on 7th November 2011 be revoked, and a new Certificate of Confirmation of grant reflecting the right petitioners be issued. The grounds for the application are that the Petitioner filed this Succession Cause together with a deceased son of the deceased, namely the late Jackson Muli Musyoka, and that their Petition was duly gazetted and a grant of letters of administration issued in their joint names on 24th September 2009. However, that confirmation of the grant was subsequently obtained irregularly by the Respondents.

The particulars of the irregularity and defects in the proceedings leading to the issue of the Certificate of Confirmation of grant were that firstly, the Respondents irregularly obtained a second grant of representation intestate herein on 18th November 2010 whilst there was in existence and on record an earlier similar grant made on 16th September 2009. Secondly, that the Certificate of Confirmation of grant was obtained fraudulently by the making of false statements or by the concealment from the court of things material to the case, in that the Respondents forged documents filed in Court, and did not seek consent from some of the beneficiaries of the estate of the deceased who include the Applicant.

The Applicant in a supporting affidavit she swore on 6th November 2015 averred that the 1st and 2nd Respondents are her daughter-in-law and son respectively, and that they applied for and obtained an order for substitution of the late Jackson Muli Musyoka and herself thereby wrongfully removing her as the administratrix of the estate of her late husband. The Applicant annexed copies of the Respondent’s summons for substitution and confirmation, and of the grant and certificate of confirmation of grant arising from the Respondents' application.

She further stated that the affidavit she purportedly swore on 26th July 2010 and which was instrumental to the purported substitution and replacement was either forged or her thumb print obtained through

misrepresentation, as she never consented to her replacement as administratrix of the estate of her husband. Therefore, that unless the certificate of confirmation of grant issued to the Respondents on 7th November 2011 is revoked or annulled, this Court will have been misled into perfecting a fraud to the Applicant's detriment and to the detriment of other beneficiaries of the estate.

The Respondents did not file any response to the Petitioner's application, despite being served with the application and given opportunity to respond in several hearings held by the Court. The Applicant's learned counsel, Mr. Kyalo, who was holding brief for F.M. Mulwa Advocates submitted that he would rely on the summons and supporting affidavit and documents filed.

The Issues and Determination

I have read and carefully considered the pleadings filed by the Applicant. The issues to be decided are firstly, whether the Respondents are culpable of non-disclosure of material facts, untrue statements and forgery as alleged; and secondly whether the Grant of Letters Administration Intestate and Certificate of Confirmation of Grant issued to the Respondents should be revoked. Section 76 of the Law of Succession Act (Chapter 160 of the Laws of Kenya) which provides as follows in this regard:

“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;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

The Applicant provided evidence of the summons for substitution dated 26th July 2010 filed by the Respondents in this cause on 27th July 2010 and supporting affidavit alleged to have been sworn by her in support. However, as regards the ground that the Applicant's thumbprint being a forgery, this is an allegation that must be strictly proved by forensic evidence from a document examiner, particularly since the allegation borders on an accusation of commission of a criminal offence, as was held in **Re Micheal Mwangi Githinji (Deceased), (2009) e KLR** and **In Re the Estate of P.W.M. (Deceased), (2013) e KLR**. No such forensic evidence was tendered by the Applicant.

This finding notwithstanding, I note that there is a possibility of material non-disclosure as the Applicant's averments as to the making of false statements by the Respondents, and the lack of consent by the Applicant to both the substitution of administrators and confirmation of grant are not disputed or

contested.

In addition, this Court notes that as between the Applicant and Respondents, the Applicant has priority in a contest as to who should be the administrator of the estate of the deceased. Section 66 of the Law of Succession Act provides a general guide as to those who will be preferred to administer the estate of a deceased as follows-

-“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will. “

The ranking of beneficiaries of an intestate is provided under Part V of the Act, and section 36 of this part specifically provides that where an intestate has left a surviving child or children but no spouse as in this application, the net intestate estate shall be equally divided among the surviving children. It is only where an intestate has left no surviving spouse or children, that the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority under section 39 of the Act-

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

It is notable from these provisions that while relatives by marriage such as the 1st Respondent can inherit and be administrators of an deceased intestate, they are the last in line in priority among a deceased's relatives in both respects, and only in the event that the deceased intestate has no surviving spouse and children, and even then only to the sixth degree of consanguinity. Applying the above cited provisions of the law, the Petitioner, being the surviving widow of the deceased ranks in priority to both Respondents to be an administrator of the deceased's estate. The confirmed grant issued to the Respondents is thus liable to revocation.

The prayers in the Applicant's Summons for Revocation of Grant dated Summons for Revocation dated 6th November 2015 are therefore allowed for the foregoing reasons and it is accordingly ordered as follows:

1. The grant of letters of administration intestate issued herein to David Musyoka Munywoki and

Patricia Mueni Muli on 4th November 2010 with respect to the estate of Musyoka Munywoki Ndulu (Deceased) be and is hereby revoked.

2. The certificate of Confirmation of Grant issued herein to David Musyoka Munywoki and Patricia Mueni Muli on 7th November 2011 with respect to the estate of Musyoka Munywoki Ndulu (Deceased) be and is hereby revoked.

3. The Summons for Confirmation of Grant dated 25th March 2011 filed herein by the Respondents on 26th March 2011 be and is hereby expunged from the Record.

4. A new grant of letters of administration intestate shall issue herein to Joyce Koki Musyoka and David Musyoka Munywoki as joint administrators of the estate of Musyoka Munywoki Ndulu (Deceased)

5. The joint Administrators shall file and serve a fresh summons for confirmation of grant within 60 days of the date of this ruling.

6. There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 31st day of January 2017.

P. NYAMWEYA

JUDGE