



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NUMBER 2409 OF 2015

IN THE MATTER OF THE ESTATE OF JOHN KIHARA NJAU alias KIHARA JOHN ELTON

MIRIAM NDUTA KIHARA.....APPLICANT

VERSUS

HANNAH NJERI KIHARA.....RESPONDENT

RULING

The Application

1. This application was brought through a Notice of Motion dated 27th July, 2015 filed in court on the 25th of September 2015 pursuant to **Rule 44** of the **Probate and Administration Rules** and **Section 76** of the **Law of Succession Act** by the Applicant seeking among other orders:-

i. That the Grant of letters of Administration Intestate made to Hannah Njeri Kihara (the Respondent) in Succession Cause No. 465 of 2013 at Thika in respect to the Estate of John Kihara Njau (deceased) be revoked.

2. In the grounds of the application the Applicant alleged that the Grant was obtained fraudulently by making of false statements and concealment from the court of facts material to the case; that the Grant was obtained by means of untrue allegations that the Respondent Hannah Njeri Kihara was the only beneficiary of the deceased's estate; lastly that the Respondent obtained the Grant secretly without including or involving the Applicant and, therefore the proceedings to obtain the grant were defective in the circumstance.

Applicant's submissions

3. On the question of fraud Mr. Wakahu learned counsel for the Applicant submitted that the Law of Succession Act under **Section 76** lays out the circumstances in which a grant could be revoked. Specifically, **sub-section (b)** provides for what constitutes fraud and which includes the making of a false statement, or the concealment of material facts from the Court that would be crucial for the case.

4. Counsel submitted that in the matter before court, the Respondent while applying for the grant of letters of administration, informed the Court that she was the sole beneficiary to the estate of the deceased, and that she was the deceased's wife, facts she knew not to be true because she was the daughter of the deceased and had a sister who is the Applicant.

5. Counsel referred the Court to the case of **Lucia Wangechi vs Francis Mburu Njii (2014)eKLR**, in

which Ngaah J revoked the grant issued, on the grounds that it was obtained fraudulently by making of a false statement and the concealment from the court of material facts to the case. The Respondent had misrepresented his own son as the deceased's son in the petition, amongst other false statements of facts intended to obtain the grant fraudulently.

6. Counsel stated that the Respondent concealed from the Court the fact that there was another beneficiary who was her sister and who was legally entitled to benefit from the estate. Further that the Respondent also did not obtain the consent of the Applicant in applying for the grant and for that reason the grant was obtained fraudulently.

7. Counsel addressed the question of the daughters whether married or unmarried being entitled to inherit the deceased's estate and submitted that the definition of a child in **Section 3(2) of the Law of Succession Act** does not discriminate on account of sex. Counsel pointed out that **Section 38** provides that the net intestate estate shall be subject to **Section 41 and 42** of the Act and shall be equally divided among the surviving children. That by virtue of **Section 76 of the Law of Succession Act**, the grant herein having been obtained fraudulently, it ought to be revoked.

8. Counsel relied on the case of **Moses Ole Senja vs William Ole Senja (2016) eKLR** where Okwany J revoked the grant issued to the Respondent who had concealed from the court, information regarding the assets of the deceased. He also cited the decision in the **Estate of Mwangi Macharia Kanyatte (deceased) Succession Cause No. 1510 of 2001** wherein Koome J ordered the grant issued to the Respondent revoked and a new grant issued to the Respondent and the Applicant jointly because the existence of the Applicant whom the court found to be a second wife, had been concealed from the court at the time of obtaining the grant.

9. Counsel also brought to the attention of the court, the fact that the Respondent had neither executed the consent filed in court on 2nd February, 2016, where she agreed to transfer five (5) plots to her sister, nor had she contested it. He urged the court to rule on the basis of the said consent.

Respondent's Submissions

10. The Respondent filed a replying affidavit dated 12th April, 2016 opposing the application. She deposed that she did inform the Applicant of her intention to apply for Letters of Administration for the Estate of their deceased father, but that the Applicant showed no interest in obtaining the grant or inheriting the estate. Mr. Machua learned Counsel submitted for the Respondent that she subsequently filed for letters of administration as the sole beneficiary to their father's estate in Succession Cause No. 465 of 2013 when his sister showed no interest. The grant was issued to her and it was confirmed on 9th September 2014.

11. Counsel argued that the Applicant had failed to establish that the Respondent did not inform her of the application for the letters of Administration and further that the Applicant did not object to the issuance of the grant nor the confirmation thereof, yet the application for the grant was gazetted on 13th September 2013, and was within her knowledge as captured in her application. Counsel stated that the main reason why Causes are gazetted is to notify members of the public that such an application was made and for any objections to be raised either to the issuance or confirmation of the grant.

12. Counsel submitted that it is trite law that the standard of proof in succession matters is on a balance of probabilities; that he who alleges must prove; that a party is bound by its evidence and that equity helps the vigilant and not the indolent. It was his view that none of the circumstances set out in **Section 76 of the Law of Succession Act** had been proved by the Applicant to warrant revocation of the grant. He relied on the following authorities:

i. Murang'a High Court Succession Cause No. 95 of 2014 Jesse Karaya Gatimu v Mary Wanjiku Githinji by Ngaah Jairus J.

ii. Kerugoya High Court Succession Cause No. 376 of 2012 Mary Wangari Njega v Jane Wanjiku Mbiti in which R.K Limo J.

iii. Nyeri High Court Succession Cause No. 1141 of 2011 In Re Estate of Murimi Kennedy Njogu- Deceased in which Mativo J.

13. Counsel contended that the Applicant had failed to discharge her evidentiary burden of proof against the Respondent. It was his view that the only inference that could be drawn was that the grant was properly issued to the Respondent, and that this suit was based on pure ignorance on the part of the Applicant. He therefore urged the Court to dismiss the suit with costs to the Applicant.

Analysis and determination

14. Upon consideration of the grounds of application and the affidavits herein the issues that come up for determination are whether:

- i. the Grant was obtained by means of untrue allegations, and concealment of material facts to the cause by the Respondent;
- ii. the Applicant had notice of the petition for grant.

It is the findings of the court on these issues that will form a basis as to whether the grant of Letters of Administration issued to the Respondent in relation to the estate of John Kihara Njau ought to, or ought not to be revoked and/or annulled.

15. It is imperative to note that the law gives this court wide discretion to revoke or annul a grant issued by the court, whether the said grant has been confirmed or not. **Section 76** of the Law of **Succession Act, Cap 160 Laws of Kenya** establishes the grounds upon which a grant of representation may be revoked thus:

“A grant of representation whether or not confirmed may at any time be revoked or annulled if the court decides, either on the 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 in advertently.

(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 court within the time prescribed any such inventory or account of administration as is required by the provisions of a paragraph (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular.

(e) That the grant has become useless and in operative through subsequent circumstances.

The grounds for revocation of a grant of representation are therefore well provided for statutorily, as outlined above.

16. In the case before me, it is not disputed that the deceased who died on 8th May, 1991 was survived by two daughters being the Applicant and the Respondent. It is also not disputed that in her Affidavit in support of the petition the Respondent did represented herself as the wife of the deceased and also as the sole beneficiary of the estate of the deceased.

17. The Respondent in her replying affidavit attributed the misrepresentation of her relationship with the deceased to an error on the face of the application for temporary grant, stemming from the chief's letter dated 10th July, 2013 which error she was not aware of, and in which she was referred to as the wife of the deceased.

18. She protested that she did not misrepresent herself as has been alleged by the Applicant in her affidavit, as the wife of the deceased as evidenced by the DO's letter dated 16th August 2010 and the chief's letter dated 11th August, 2010 which was to be used in subsequent letters from the chief's office. The Respondent urged that the grant issued on 8th August, 2014 should not be revoked due to what she termed as **“mere technicalities on the face of the application”**.

19. This case brings to mind the words of Nyakundi J in **Succession Cause No.14 of 2015 In the matter of Estate of Oisesoi Tipango, (deceased)** to wit;

“The law is very vigilant that a grant which is issued in contravention of the law is useless and inoperative for all intent and purposes. In my view when I evaluate this case, I could see a conduct bordering an intent to commit a criminal offence of obtaining letters of grant through false pretense by the petitioners. The averments in their affidavit while petitioning for letters of grant in the year 2000 at Nairobi and the affidavit at Machakos High Court attest to this fact. Reliance by the petitioners on a restriction order is neither here nor there. That contention does not afford them a defence to this application under Section 76 of the Succession Act.”

20. The Respondent's contention that the Applicant insisted that she was not interested in the administration of their father's estate, or that she renounced her share is not backed by any evidence. The law of succession is very clear on who a dependant is. The word **“dependant”** is defined in **section 29** of the **Law of Succession Act** in the following terms:-

“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.”

Under the scheme of legal entitlement as provided in **Section 29** of the **Law of Succession Act** therefore, the children of the deceased, whether or not maintained by the deceased immediately prior to his death, are dependants for purposes of succession and are beneficially entitled to a share of the Estate of the deceased.

21. There is abundant evidence on record to show that the Respondent obtained the Grant of Letters of

Administration Intestate in relation to the estate of John Kihara Njau through false misrepresentation of facts in a manner that was fraudulent. In Form P&A 5, being the Affidavit in Support of the Petition for Letters of Administration Intestate, the Respondent clearly misrepresented herself not only as the wife of the deceased but also as the only dependant who survived the deceased and therefore the sole beneficiary to the deceased's estate.

22. These facts were not correct as she was a daughter to the deceased and she had a sister (the Applicant herein) who also survived the deceased. In the premise and as correctly submitted by Mr. Wakahu the applicant is also entitled to be preferentially granted Letters of Administration intestate in respect of the intestate estate of their late father. From the record the Respondent did not take any steps to rectify what she calls "mere technicalities on the face of the application", in any of the documents she filed in court. These include the affidavit in support of the summons for confirmation of grant.

23. The argument by the Respondent that she informed the Applicant of her intention to petition for the Letters of Administration of the estate of their deceased father and that the Applicant indicated her disinterest in obtaining the grant, or inheriting their father's property notwithstanding, the Respondent was under duty to present the true facts to the court as they were.

24. On the issue of notice the Respondent submitted that she informed the Applicant of her intention to apply for letters of administration to their father's estate, and that the Applicant was not interested. The Respondent then went ahead to petition for the grant of letters of administration in Succession Cause No. 465 of 2013 at Thika Law Courts. She argued that she presented herself as the only beneficiary because her sister had renounced her right to the estate of her father.

25. There is no evidence on record that the Respondent gave notice or obtained the consent of her sister who was equal in priority for applying for the grant. **Section 51(1)(g)** of the Succession Act as read together with **Rule 26(1)** of the **Probate and Administration Rules**, provide in mandatory terms that:

"Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant."

Accordingly, I find and hold that the grant as obtained herein offends the provisions of **Section 51(1)(g)** of the Succession Act as read together with **Rule 26(1)** of the **Probate and Administration Rules**.

26. The Respondent having thus proved that on her own she may not look out for her sisters' best interest the court has recourse to the provisions of **Section 66 Law of Succession**. Under the said provisions where 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. The court shall however, without prejudice to the said discretion, accept as a general guide the order of preference provided under this section.

27. The cases cited by the Respondent were not of much assistance to this court in determining this cause and are distinguishable from the facts of the present case. **Murang'a High Court Succession Cause No. 95 of 2014 Jesse Karaya Gatimu v Mary Wanjiku Githinji by Ngaah Jairus J.** – The Applicant in the summons did not have the requisite capacity to lodge the proceedings in the guise of Danson Mwangi Thiongo's shadow. Neither could he initiate any proceedings against the deceased's estate, or claim any benefit thereof in his own right because there was no evidence that he was a survivor of the deceased, a dependant or a beneficiary of his estate.

28. In **Kerugoya High Court Succession Cause No. 376 of 2012 Mary Wangari Njega v Jane Wanjiku Mbiti** in R. K Limo J found that the Objector did not place any material before the court to call for the invoking of the provisions of Section 76 of the Act. None of the grounds contained therein was demonstrated on a balance of probability.

29. In Nyeri **High Court Succession Cause No. 1141 of 2011 In Re Estate of Murimi Kennedy Njogu - Deceased** Mativo J found that the deceased made reasonable provisions for all his children and that the

Objection by the Objector in the proceedings was without merit. Clearly then the cases cited above have little or no relationship with the cause before me.

30. There is also the matter of the consent that the parties entered into on 30th January 2016 and filed in court. This was a consent by which the Respondent was to relinquish 5 plots and transfer them to the Applicant. The Respondent has neither executed the said transfer nor has she contested the consent in her reply. Notwithstanding that the consent was not adopted as an order of the court, there is nothing to prevent the parties from adopting it as a mode of distribution in the summons for confirmation of grant.

31. After a careful consideration of the counter arguments placed before me on each issue in this cause, I am satisfied that a case has been established under **Section 76 of the Law of Succession Act** for the revocation of the grant herein. In the premise I allow the Application dated 27th July 2015 with the following orders:

- i. That the grant of Letters of Administration issued to Hannah Njeri Kihara, the Respondent herein by the Chief Magistrates Court Thika in Succession Cause No.465 of 2008 on 20th November 2013 and confirmed on the 2nd of July 2014 in the estate of the late John Kihara Njau be and is hereby revoked.
- ii. Succession Cause No. 465 of 2013 Thika be and is hereby consolidated with this succession cause No. 2409 of 2015 High Court Nairobi.
- iii. There being now a petition in this cause by virtue of the consolidation of the two causes, a fresh grant is hereby issued to the Applicant and the Respondent jointly, being the only beneficiaries to the estate herein.
- iv. Summons for confirmation of grant be filed in court within 30 days of this ruling.

The costs of this application be borne by the Respondent.

It is so ordered.

SIGNED DATED and DELIVERED in open court this **24th day of April, 2017**

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L.ACHODE

JUDGE

In the presence of: