



IN THE HIGH COURT OF KENYA AT NAIROBI

IN THE MATTER OF THE ESTATE OF PETER NIGEL SMITH (DECEASED)

SUCCESSION CAUSE 3274 OF 2014

M K WAPPLICANT

VERSUS

R G M.....RESPONDENT

RULING

The Deceased died on 28th March 2014.

By an application filed on 23rd May 2016 the Applicant objected to the resealing of grant of the Deceased's estate in Kenya and sought revocation of the said grant under **Section 76 of Law of Succession Act** on the following grounds;

- 1) The Applicant alleged she was married to the deceased under customary law. The deceased supported her and her son as shown by the annexed documents of transfer of funds to her. They resided in the suit premises Maisonette No 4 Reference Number [particulars withheld] Nairobi as matrimonial home and is the subject of these proceedings.**
- 2) The Respondent withdrew all funds from the Barclays Bank account.**
- 3) The Applicant challenged the Power of Attorney issued to the Respondent and the process of resealing which in her opinion was not compliant with the legal requirements.**
- 4) The Will of the deceased is of 2001, the subject property was purchased in 2008 and therefore is not part of property in the Will and is not spelt out in the Will.**

The Respondent did not inform and or consult the Applicant on application for resealing the grant instead the Applicant learnt of this fact when prospective purchasers came to the premises seeking to inspect the said premises for the proposed sale.

The Respondent through the Power of Attorney issued to her on 3rd November 2014 by the executors and beneficiaries of the deceased's estate, filed petition for resealing of grant and attached to the petition, the grant issued by the High Court of Justice in Winchester which copy was also attached to the petition.

The Respondent alluded through Replying Affidavit filed on 20th June 2016 by J V O; one of the deceased's children that the petition was gazetted on 14th August 2015 and there was no objection filed within the prescribed period hence the issuance of the resealed grant on 22nd September 2015.

Therefore all the legal requirements as prescribed under **Section 77 Law of Succession Act Cap 160 and Rule 42(1) Probate and Administration Rules** were fulfilled. The Deponent of the Replying Affidavit J

V O further deposed that the deceased did not marry the Applicant and they knew the Applicant as housekeeper of the said suit premises.

The deceased was married to their mother on 14th March 1970 and were still married at the time she died on 7th October 2003.

The deceased is the sole registered proprietor of the suit premises and he purchased the same with the children's consents to use their mother's share of inheritance. The deceased obtained a mortgage and purchased the said house and was due to pay the same in 2014. They require to sell the house and settle the mortgage debt.

The Applicant's Supplementary Affidavit was filed on 31st August 2016. She deposed that she lived with the deceased in various parts of Nairobi as man and wife and the deceased's best friend R S swore an affidavit confirming that the deceased and Applicant were man and wife. She attached photographs that depict the deceased and herself with other guests in various social functions.

The Applicant resides in the suit premises to date and settles the utility bills for the house. She knew of the wife and children of the deceased and the deceased informed her that he was separated from her at the time prior to her death.

DETERMINATION

The issue is whether the resealed grant of 22nd September 2015 ought to be revoked under **Section 76 of Law of Succession Act Cap 160?**

The parties sought to canvass the application through written submissions. **Section 76 of the Law of Succession Act** provides for the annulment and revocation of Grants. It states that:

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.....

I find from the pleadings filed culminating to the issuance of resealed grant the Respondent as per the power of attorney issued by the executors of the deceased's Will complied with the required statutory provisions. Therefore the proceedings are not defective in substance

with regard to the other provisions of **Section 76 of Law of Succession Act**.

The issue of fraud and concealment of material facts can only be determined by **viva voce** evidence and veracity of the evidence tested through cross examination. As of now the pleadings pit one's word against the other.

Upon reading the pleadings this Court finds that to revoke the grant there must be on record cogent evidence of either fraud, false statement, concealment of material facts to the Court and/or untrue allegation of fact essential in point of law.

Therefore in spite of written submissions; the Applicant ought to prove customary marriage with the deceased as provided for by **Section 3 Law of Succession Act Cap 160** and/or contribution to purchase

of the suit premises and motor-vehicle in question.

On the other hand, the Executors ought to prove that they did not know the Applicant, and if they knew her, she was not wife to their father. Secondly they should prove the deceased took a mortgage and purchased the suit premises and /or that the deceased spent part of their late mother's inheritance to purchase the premises.

DISPOSITION

In a nutshell he who alleges must prove on a balance of probability the assertion he or she makes in compliance with **Section 107 of the Evidence Act Cap 80**. As of now and at this stage; the evidence on record is not sufficient to inform the Court of final fair and just decision on this issue. Parties to take hearing date for *interpartes* hearing.

DELIVERED SIGNED DATED IN OPEN COURT ON 12TH APRIL 2017.

M. W. MUIGAI

JUDGE