



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 546 OF 2012

IN THE MATTER OF THE ESTATE OF DAVID MUSILA MBITHI (DECEASED)

JANET KANINI MBITHI.....PETITIONER

VERSUS

JOHN BOSCO MUENDO.....APPLICANT

RULING

A grant of letters of administration intestate was issued on 10th December 2012 to the Petitioner herein with respect to the estate of David Musila Mbithi (hereinafter referred to as “the Deceased”). The Petitioner is a wife of the Deceased. The Applicant thereafter filed a summons for revocation of grant dated 17th November 2014 seeking orders that the grant issued to the Petitioner be revoked. The Court directed that the Applicant’s summons be heard by way of written submissions. John M. Mwangangi Advocates for the Applicant filed submissions dated 21st December 2016, while Nzei & Company Advocates for the Petitioner filed submissions dated 21st April 2017.

The grounds in support of the application are that the Petitioner obtained the grant through fraud, making of false statements and concealing to the court material facts to the case. The Applicant in his affidavit in support of the application sworn on 17th November 2014 explained that he and his mother, Hellena Wayua Mbithi (who died on 13.9.2014) together with his elder siblings had intended to petition for the letters of administration to the estate of the deceased, and had on 24/5/2012, obtained a letter from the area chief, Kimutwa Location, showing the names of the beneficiaries to the estate of the deceased. A copy of the said letter was annexed.

Further, that after collecting and preparing all the necessary documents for petitioning, he learnt from the court registry that the Petitioners had already secretly filed this petition and failed to disclose all the material facts. In particular, that she failed to recognize and disclose that the Applicant’s mother and all her children were also beneficiaries of the estate of the deceased, as well as the fact that there existed other assets belonging to the deceased, for example, L. R. No. MBOONI/IIANI/300. He annexed a copy of the title to the said parcel of land showing that it was registered in the Deceased’s name. The Applicant averred that although the Deceased and his mother had separated, no divorce had been procured by either party, and in any event, such a divorce could not have disinherited him and his siblings.

The Applicant admitted that the Deceased and his mother had several court cases in Machakos HCCC NO. 29 of 2005 and Machakos District Magistrate’s Court Maintenance Cause No.2 of 1987, in which he averred that it was judicially found as a matter of fact that his parents were married which finding of fact has never been challenged. The Applicant also filed a further Affidavit filed in court on 6/9/2016 to which he annexed two other Affidavits by his sisters explaining the circumstances under which the

deceased and their mother separated.

Lastly, on the argument that the Petitioner has priority over the Applicant, the Applicant submitted that the law does not expressly say that only the Petitioner could be granted letters of administration, and that this Court is given discretion on who and on what terms a grant may issue.

The Response

The Petitioner opposed the aforesaid application, and filed an affidavit in reply thereto that she swore on 31st May 2016. According to the Petitioner, the Applicant is not a beneficiary of the deceased's estate, and even if he was assumed to be one, he would still not rank in priority over the Petitioner who is the deceased's wife/widow, on administration of the deceased's estate. Further, that the Applicant should wait until the Petitioner files Summons for Confirmation of the Grant issued to her herein, upon which he can file the appropriate protests for determination by this Court.

The Petitioner in her submissions urged that from the documents filed in Court the issue of whether or not the said Helena Wayua (the Applicant's mother) was a wife of the deceased was/ is a contested matter, and that the Deceased prior to his death, had sued the said Helena Wayua and several clan elders over his (the deceased's) land/property vide Machakos HCCC NO. 29 of 2005, and this Court issued orders of injunction restraining the said Helena Wayua and the said clan elders from moving into the deceased's land and home pending hearing and determination of the said suit.

However, that the deceased died before the aforesaid suit could be heard and determined, and that upto the point of his death, the deceased maintained that the said Helena Wayua and her children were not part of his family. Therefore, evidence will have to be taken before this Court can make a decision on whether or not the applicant has an interest in the deceased's estate, and whether he can benefit from it after the Petitioner files summon for confirmation of grant.

Reference was also made to the subordinate court's judgment in Machakos District Magistrate's Court Maintenance Cause No.2 of 1987, and it was submitted that the said court is shown to have observed that the Applicant was born in 1973, and the Applicant's mother and her children had been away from the deceased for more than fourteen (14) years (as at the year 1988 when the said judgment was delivered). It was submitted that the Applicant will therefore have to prove that he is, indeed, a child of the deceased.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the Petitioner and Applicant. The issue to be decided is whether the grant issued to the Petitioners should be revoked. The grounds for revocation of a grant are provided in section 76 of the Law of Succession as follows:

“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 asks for revocation of the grant on account of non-disclosure of his and his siblings status as the Deceased’s children. However, after perusing the documents filed by both the Applicant and Petitioner as regards the cases filed by the Deceased and/or Hellen Wayua, I note that this was a position that was contested by the Deceased himself. In the circumstances it is my view that revocation of grant is not the appropriate remedy in the circumstances, as the status of the Applicant as a child of the Deceased is in dispute and he cannot thereby be an administrator of his Estate.

In addition, the Petitioner status as widow of the deceased is not disputed, and she also has priority over the Objector under section 66 of the Law of Succession Act,. Section 66 provides as follows in this regard:

“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 concerns raised by the Applicant as regards his interest in the deceased’s estate can in my view be more appropriately and adequately addressed in confirmation proceedings by way of an affidavit of protest, as provided for by Rule 40 (6) and (7) of the Probate and Administration Rules, which is the appropriate procedure when one is contesting distribution proposals made in a summons for confirmation of grant. Rule 40(6) (7) and (8) of the Probate and Administration Rules provide as follows in this respect:

“(6) Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection.

(7) The registrar shall without delay forward to the applicant a copy of each protest filed in the cause under subrule (5) or (6).

(8) Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be

beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit.”

The Objector’s summons for revocation of grant dated 17th November 2014 is thereby dismissed. This Court consequently gives the following directions, arising from the findings herein:

1. The Petitioner herein shall file and serve the Applicant with a Summons for Confirmation of Grant within 30 days of the date of this Ruling.
2. The Applicant shall file and serve his Affidavit of Protest, if need be, to the said Summons for Confirmation of Grant within 30 days of service of the said Summons, failing which the Summons for Confirmation of Grant shall proceed to hearing.
3. **The *status quo* that shall obtain as regards the properties and assets belonging to the estate of David Musila Mbithi (Deceased) pending the confirmation of grant of administration shall be that the Petitioner, Applicant and Beneficiaries shall continue to be in possession and occupation of the properties and assets they currently occupy as at the date of this ruling; and that the Petitioner, Applicant and Beneficiaries of the estate of the deceased shall not sell, transfer, lease, undertake any further developments on, or in any manner dispose of or waste the said properties and assets.**
4. There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 1st day of August 2017.

P. NYAMWEYA

JUDGE