



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 1549 OF 2013**

**IN THE MATTER OF THE ESTATE OF MUIGAI KURIA NJAU (DECEASED)**

**JUDGMENT**

1. The deceased herein died on 25<sup>th</sup> April 2013. Representation to his estate initiated by way of citation issued at the instance of Paul Njuguna Njunge for service upon the widow of the deceased, Anne Nyambura Muigai, representing the 2<sup>nd</sup> house, and the children of the deceased from the 1<sup>st</sup> house: Simon Kuria, Jane Wairimu, Serah Wanjiku, Grace Wangari, Paul Njuguna, Esther Wanjiku and Walter Njau. Upon being served the citees entered appearance but did not take out proceedings for grant of probate, nor file affidavits in response, with the result that the court on 4<sup>th</sup> March 2014 granted leave to the citor to petition the court for administration of the estate. Pursuant to that leave, the citor filed a petition herein on 12<sup>th</sup> May 2014, of even date, seeking to be appointed the administrator in intestacy. He expressed the deceased to have been survived by eight individuals, being those listed in the citation as narrated hereabove. He was said to have died possessed of Kabete/Nyathuna/330 and 1674, and water pumping machines.

2. Seven of the survivors of the deceased - Anne Nyambura Muigai, Jane Wairimu, Serah Wanjiku, Grace Wangari, Esther Wanjiku, Jimmie Kuria and Walter Njau – lodged an objection in court on 5<sup>th</sup> June 2014, dated 4<sup>th</sup> June 2014. No answer to petition and a cross-application was filed as required by section 68(2) of the Law of Succession Act, Cap 160, Laws of Kenya, and a grant of letters of Administration intestate was made to the citor, hereafter referred to as the administrator, on 24<sup>th</sup> November 2014, in terms of section 69(1) of the Act. The administrator then moved the court by an application dated 11<sup>th</sup> August 2015, for confirmation of the grant.

3. That application is still pending as an application dated 21<sup>st</sup> August 2015 was lodged at the registry on 24<sup>th</sup> August 2015 seeking revocation the grant. The revocation application was at the instance of Walter Njau, claiming to be also acting on the authority of Anne Nyambura Muigai, Jane Wairimu, Serah Wanjiku, Grace Wangari, Esther Wanjiku and Jimmie Kuria. The applicant's principal complaint is that they were never served with the petition, contrary to the order made by the court on 4<sup>th</sup> March 2014. He states that they were subsequently served with the application for confirmation of grant. There is also an affidavit of protest sworn by the widow of the deceased on 1<sup>st</sup> October 2015. She states that the cause was filed without the rest of the family being consulted.

4. The administrator has responded by filing a replying affidavit sworn on 10<sup>th</sup> September 2015. He says that he did everything properly, and all the processes had been properly served on the applicant and his associates, but they chose to dilly dally. The administrator then filed another reply through an affidavit sworn on 28<sup>th</sup> October 2015. He delves into the background leading up to the death of the deceased. There are other replies by Esther Wanjiku, Grace Wangari and Jane Wairimu, both sworn on 5<sup>th</sup> February

2016. Both oppose the revocation application, arguing that it is in bad faith. They say that the administrator is capable of administering the estate, and accuse the applicant and Anne Nyambura of being the ones in exclusive control of the estate to the detriment of the other members of the family.

5. The applicant swore a supplementary affidavit on 22<sup>nd</sup> October 2015. He largely denies the allegations made against him in the replying affidavits. He insists that he was not served, and further argues that grant ought not to have been made without notice to them as they had filed an objection.

6. Directions were given on 14<sup>th</sup> October 2015 for disposal of the application by oral evidence. Evidence was taken from the applicant, Ann Nyambura Muigai, Grace Wangari, and Sarah Wanjiku. Their respective testimonies breathed life to the averments made in their respective affidavits.

7. The application is for revocation of grant. Under section 76 of the Law of Succession Act, a grant will be revoked on account of three general grounds. The first ground relates to the process of the making of the grant – where there are defects with the process or the grant is procured in fraudulent manner. The second ground focuses on the process of administration – where there is failure to exercise diligence in administration, or to apply for confirmation of grant within the stipulated period, or where the administrators fail to render accounts as required of them by the law. The last general ground is where the grant has become useless and inoperative on account of changed circumstances, such as the death of a sole administrator before completion of administration.

8. I have carefully perused through the application. It would appear to me that the applicant appears to say that there were issues with the manner that the grant was obtained. However, he has neither pleaded defects in the process nor fraud nor misrepresentation nor concealment of facts as envisaged in section 76(a) (b) and (c) of the Act.

9. The petition on record was filed in court after the court itself granted leave to the administrator to file it. Leave was granted after citations had issued for service upon the applicant and his allies, which were served and the citees entered appearance. Citations are provided for in Part VI of the Probate and Administration Rules. The citee is expected to respond to the citation one way or the other. He can apply for representation or file an affidavit to explain himself. Failure to respond one way or the other paves the way for the filing of the petition by the citor. It would appear that other than filing appearances, the citees did nothing else, hence leave granted to the administrator by the court to go ahead.

10. An issue has been raised about the leave order also requiring service of the petition on the citees. The petition was filed on 12<sup>th</sup> May 2014. It is not clear whether the petition was ever served as there is nothing on record to show that an affidavit of service was ever filed as proof of service, although the administrator pleads that he did serve and exhibits an affidavit of service dated 25<sup>th</sup> May 2014, which does not bear a court stamp. .

11. Curiously the citees lodged a caveat at the registry on 13<sup>th</sup> March 2014, just a day after the administrator filed his petition on 12<sup>th</sup> March 2014. The citees also filed an objection to making of grant on 5<sup>th</sup> June 2014. This was just about a week after the alleged affidavit of service sworn on 26<sup>th</sup> May 2014. Curiously, the objection was lodged at the registry before the petition had been gazetted on 3<sup>rd</sup> October 2014. Filing of objections is at the invitation made in the gazette notice. It is prompted by that notice. One wonders what prompted the citees to file objection before the gazette notice. I believe there is force in the administrator's allegation that he did serve the citees in May 2014 with the petition. It would appear that it was that notice that prompted the filing of the objection.

12. The applicant complains that the court should not have made the grant despite pendency of their objection. Two issues arise from this submission. Firstly, the objection on record was not procedural, for it was not in response to the gazette notice. Objections are filed at the prompting of the gazette notice. When the gazette notice did appear on 3<sup>rd</sup> October 2014, the citees took no step to as invited by that notice by filing a proper objection. Even if I were to hold that there was a proper objection on record, I would still hold that the court was entitled to ignore it. Under section 68 of the Act, the notice of

objection should be followed up by the filing of an answer to the petition and a cross application. According to section 69 the effect of default in filing an answer and a cross-application is that the court should proceed to make the grant. The only time the court is required to hear the parties is where there is an answer to the petition and a cross-application. The record before me indicates that the citees only filed a notice of objection, but did not file an answer to the petition and a cross-application. There was therefore nothing to stop the court from making the grant without any reference to the citees.

13. There is also the question of the caveat filed on 13<sup>th</sup> March 2014. I believe that the issues raised with respect to this are answered in the foregoing paragraphs. The applicant and his allies ought to have reacted to the gazette notice. More importantly, having filed a notice of objection they should have complied with the requirements of sections 68 and 69 of the Law of Succession Act, by filing an answer to the petition and a cross-application. The fact of the filing of a caveat does not suspend the application of sections 68 and 69 of the Act.

14. On the whole I am not satisfied that a case has been made out for revocation of the grant made herein. I shall accordingly dismiss the application, but I shall not order costs.

15. This is a family matter. I note that the deceased died a polygamist, and there are discernible divisions within the family. This would be a proper case for the court to appoint more than one administrator. Under section 56 of the Act, the court can appoint up to four administrators. I hereby accordingly direct that the survivors of the deceased herein to consult on appointment of three more administrators to co-administer the estate with the current administrator. This matter shall be mentioned after one (1) month for appointment of additional administrators.

16. The estate comprises of assets situated exclusively within Kiambu County. After appointment of additional administrators, the court file shall be transferred to the High Court of Kenya at Kiambu for final disposal.

**DATED, SIGNED and DELIVERED at NAIROBI this 29<sup>TH</sup> DAY OF SEPTEMBER, 2017.**

**W. MUSYOKA**

**JUDGE**