



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

SUCCESSION CAUSE NO. 2756 OF 2015

IN THE MATTER OF THE ESTATE OF GRACE NYAMBURA WAWERU (DECEASED)

RULING

1. Grace Nyambura Waweru the deceased person to whose estate the proceedings herein relate died intestate on 26th October, 2014 leaving behind survivors and or dependants listed as hereunder

- (a) Mary Wanjiru Waweru (daughter)**
- (b) Hannah Waithira Waweru (daughter)**
- (c) Margaret Ng'endo Mungai (daughter)**
- (d) Edith Wairimu Waweru (daughter)**
- (e) Stephen Kamau Waweru (son)**
- (f) Joseph Nganga Waweru (son)**
- (g) Joyce Wanja Mburu (daughter)**
- (h) Peter Munugu Mburu (grandson)**
- (i) John Waweru Wanjiku (grandson)**
- (j) Edwin Gaturu Wanjiku (grandson)**
- (k) Kevin Kamau Wanjiku (grandson)**

2. Following disagreements amongst the dependants as to who was to petition the court for a grant of representation, Edith Wairimu Waweru vide citation dated 18th November, 2015 but filed in court on 10th November, 2015 cited the objectors (siblings) herein Mary Wanjiru Waweru, Hannah Waithira Waweru, Stephen Kamau and Joseph Nganga Waweru requiring them to cause an appearance within 15 days and accept or refuse letters of administration of all the estate which by law devolves to and vests in the personal representative of the deceased or show cause why the same should not be granted to the said Edith Wairimu Waweru together with Margaret Ng'endo Mungai, Joyce Wanja Mburu and Peter Munugu Wanjiku.

3. Despite service of the said citation, the citees did not bother to enter appearance nor file any response. Subsequently, the citor appeared before Justice Muchelule for the hearing of the citation. Since the citation (application) was not opposed, the court gave citors 30 days within which to petition for a full grant which they did on 31st May, 2016 with Margaret Ng'endo Mungai, Edith Wairimu Waweru and Joyce Wanja Mburu as the petitioners.

4. On 8th July, 2016, the estate was gazetted vide gazette notice No. 5222 of 2016 paving way for issuance of a grant of letters of administration intestate to the petitioners.

5. Before issuance of the grant of letters of administration intestate, Mary Wanjiru Waweru, Hannah Waithira Waweru, Stephen Kamau Waweru and Joseph Nganga Waweru lodged an objection dated 14th July, 2016 and filed in court on 15th July, 2016 objecting to the issuance of a grant of letters of administration intestate to the petitioners.

6. The objection was supported by an affidavit deposed on 14th July, 2016 by the four objectors jointly alleging that, by a family meeting held 6th November, 2014, it was agreed that Stephen Kamau Waweru and Hannah Waithira Waweru were to hold the estate of their late mother in trust for the rest of the beneficiaries and therefore the right people to petition for a grant of representation.

7. Secondly, the objectors denied that the citation herein above referred was ever served upon them and that they got to know of the existence of this cause through rumours. They vehemently denied having been notified by the petitioners of the existence of this cause and that their consent was not sought.

8. In reply to the objection, Edith Wairimu Waweru on her behalf and that of her co-petitioners, swore an affidavit dated 19th April, 2017 and filed on 20th April, 2017 stating that the petition herein was sanctioned by the court after the objectors failed to respond to the citation.

9. The respondents (petitioners) averred that, the objectors were not keen in petitioning for a grant of representation since they were comfortable in plundering the estate thereby collecting rent from rental houses without accounting for the same. They insisted that the citation dated 18th November, 2015 was duly served upon the objectors as evidenced by a return of service hence their failure to appear was deliberate. The objectors therefore urged the court to dismiss the objection as the same was not accompanied with answer and cross petition as required under Sections 68 and 69 of the Law of Succession.

10. In their submissions filed on 5th May, 2017 by the firm of Kimani Wakimaa appearing for the objectors, the petition herein was filed without the knowledge and consent of the objectors and that the citation referred to herein was never served upon them.

11. Counsel reiterated averments contained in the affidavit in support of the objection urging the court to ignore technicalities raised in the affidavit in reply to the effect that the objection is overtaken by events bearing in mind that it was the court that authorized those petitioners to petition for a full grant. Secondly, counsel urged the court to further apply its discretion under Article 159 of the constitution and rule 73 of P & A rules in allowing the objection even though it was not accompanied with an answer and cross petition as required in law and that the omission is not fatal.

12. In support of their argument, counsel cited the case of **Lucy Kibaba and another vs Lucy Wanjiru Muchene (2003)eKLR** wherein Judge G.B.M. Kariuki held that technicalities of procedure in a succession matter are treated less seriously than in civil matters because of the nature of succession proceedings.

13. On the other hand, the firm of Lubulellah and Associates for the respondents, filed their submissions on 17th May, 2017 urging the court to dismiss the objection on grounds that it contravenes rule 17 of the P and A rules in that the objection is time barred as it was not filed within 30 days from the date of

gazettement of the estate.

14. Secondly, counsel submitted that the objection contravenes Sections 68 and 69 which requires that, where a notice of objection has been lodged but no answer and no cross petition has been filed, a grant may be made in accordance with the original application. Learned counsel asserted that, in the absence of an answer and cross petition, the objection must fail.

15. To buttress his argument, counsel for the petitioner cited a case in respect of the estate of **Amar Kaur Matharu (deceased) (2014)eKLR** and the **estate of M'rwito Manga (deceased) (2005)eKLR**.

16. I have considered the objection herein, supporting affidavit, affidavit in reply and submissions by both counsels. There is no dispute that the petitioners herein were granted 30 days by the court to petition for a full grant after the objectors failed to respond to the citation dated 18th November, 2015.

17. Although the objectors are denying having been served with the citation, the return of service filed by the process server one Josephat Kutekha Khatikwi is self explanatory. In any event, the claim by the objectors that they came to learn through rumours is not convincing. Nobody requested for the process server to appear for cross examination on the veracity of his affidavit. I am sufficiently persuaded the same way Justice Muchelule was convinced on 3rd May, 2017 that the objectors were duly served and went on to direct the petitioners to file for a full grant.

18. Is the objection time barred? Is the objection improperly filed and in contravention of Sections 68 and 69 of the Law of Succession? With regard to time factor in lodging objections to the grant of representation, rules 7 (4) and rules 17 of the Probate and Administration rules come to play. Rule 17 provides as follows:

“Any person who has not applied for a grant to the estate of a deceased and wishes to object to the making of a grant which has been already applied for by another person may do so by lodging within the period specified in the notice of the application published under rule 7 (4) or such longer period as the court may allow, either in the registry in which the pending application has been made or in the principal registry,.....an objection in form 76 or 77 in triplicate stating his full name and address for service, his relationship if any to the deceased and the grounds of his objection”.

19. From the above wording of rule 17, the filing of an objection against issuance of a grant is not couched in mandatory terms. It is left to the discretion of the court to decide and in application of its inherent powers conferred under rule 73 of the P & A may upon application grant leave and allow such objection to be filed out of time.

20. To that extent, I do not agree with Mr. Mutara for the petitioner that the 30 days requirement is mandatory and that it cannot be extended. As regards the filing of answer and cross petition as provided under Sections 68 and Section 69 of the Law of Succession the same is mandatory but again the court is left with unfettered powers or discretion to extend such time. Filing of an answer and cross petition can be done outside time with the leave of the court.

21. For avoidance of doubt, Section 68(1) provides as follows:

“Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by notice or such longer period as the court may allow. Sub-Section (2) – where notice of objection has been lodged under Sub-Section (1), the court shall give notice to the objector to file an answer to the applicant and cross application within a specified period.

Section 69 (1) goes further to provide:

“where notice of objection has been lodged under Sub Section (1) of Section 68, but no answer

or no cross-application has been filed as required under Sub-Section (2) of the said Section, a grant may be made in accordance with the original application. Sub-Section 2 – where an answer and cross petition have been filed under Sub Section 2 of Section 68, the court shall proceed to determine the dispute.

22. According to the petitioner (respondent), the objection was not filed within 30 days nor was leave sought to extend time beyond 30 days for purposes of filing an objection. To that extent, I do agree with the respondent that the objection was filed outside 30 days provided in the gazette notice and since leave was not sought from the court, the objection herein is time barred.

23. In the instant case, no sufficient reasons have been given as to why no answer to the application for a grant nor cross petition was filed as required under Sections 68 and 69 of the Law of Succession. I do agree with Justice Sitati when she struck out an objection in the estate of **Mirwito (deceased) (2005)eKLR** by finding as follows:

“no sufficient cause has been shown by the objector as to why the answer to petition was never filed. It has also not been shown by the objector why no steps were taken to file an application under rule 17 (2) of the P & A rules for extension of time within which to file the answer to the petition”.

24. The objectors in this case have relied on Section 73 of the Probate and Administration rules and Article 159 of the Constitution besieging the court to apply its discretion and disregard of technicalities in allowing the objection. Section 73 and Article 159 is not an escape route for the indolent and a savior to all manner of omissions and commissions including disobedience to substantive statutory provisions. If courts were to allow every such omission and commission in the name of Article 159 of the Constitution, then statutory provisions and procedural rules will be rendered obsolete and or irrelevant. In any event, the objectors will not suffer any prejudice by having the petitioners who are their sisters being the administrators of the estate.

25. For the above reasons stated, the objection herein fails and the same is hereby dismissed with no order as to costs. However, considering the animosity manifested between the petitioners and the objectors who are their siblings, and in the spirit of harmonious co-existence in the family, and further in application of Section 66 of the Law of Succession which confers unfettered powers, final say and discretion upon the court as to whom a grant of letters of administration shall issue, I do hereby direct that a grant of letters of administration intestate in respect of the estate herein do issue jointly to the three petitioners herein together with Stephen Kamau Waweru and the same be confirmed after six months from the date of delivery of this ruling.

26. The petitioners shall henceforth take full charge of the administration management, collection and preservation of the estate and cause a full account of the same as and when required.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF SEPTEMBER, 2017.

J.N. ONYIEGO (JUDGE)

In the presence of

..... Counsel for the Objector

.....Counsel for the Respondents

.....Court Assistant