

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 1966 OF 2012

(CONSOLIDATED WITH SUCCESSION CAUSE NO. 942 OF 2012)

IN THE MATTER OF THE ESTATE OF S H D (DECEASED)

N D.....APPLICANT

VERSUS

N S I.....1ST RESPONDENT

A H.....2ND RESPONDENT

JUDGMENT

1. The applicant filed this application dated 22nd December 2014 seeking the revocation and/or annulment of the grant issued to the respondents on 28th January 2013 and confirmed on 13th November 2013. The grant was in respect of the deceased S H D who died on 30th July 2011 at the Aga Khan Hospital in Nairobi. Following the death, the respondents petitioned this court for, and were issued with, grant of letters of administration intestate. The grant was confirmed to them. The basis upon which they were issued with the grant was that the 1st respondent was the widow of the deceased. The 1st respondent indicated that she had a minor son with the deceased. The son was shown as N I. In the confirmed grant the 1st respondent was given all the deceased's shares in [particulars withheld] Insurance Company Ltd to hold in trust for the child until he was of age, the proceeds of Account Number [particulars withheld] Bank Ltd Westlands to hold in trust of the child until he was of age and to get land parcel Sipili/Ndonyoloip [particulars withheld] in Laikipia absolutely.
2. The applicant's case was that she was the only wife of the deceased with whom she had three children. The deceased left a will ('BD3') in which she was appointed the executrix. Upon his death, she petitioned the High Court of England and on 29th December 2011 she was granted probate ('ND4'). She came to Kenya and filed High Court Succession Cause No. [particulars withheld] of 2012 in which the grant was resealed ('ND5'). It was while she was now tracing the property of the deceased that she found that the respondents had obtained the grant subject of this case. She denied that the deceased died intestate. She stated that the 1st respondent was an employee in the deceased's company and that she (the 1st respondent) had adopted the minor. Lastly, her case was that the 1st respondent was aware of the fact that the deceased was married to her and they had children and yet went ahead to obtain the grant and distribute the estate without reference to her. The application under **section 76 of the Law of Succession Act (Cap 160)** and **rule 44 of the Probate and Administration Rules** was grounded on fraud, material non disclosure and the fact that this was a testate matter.
3. The application was served but did not elicit any response.

4. It is evident that the deceased left a will whose executrix was the applicant. This was therefore not an intestate succession. By the time this Court was issuing grant on 28th January 2013 to the respondents the applicant was already a holder of grant of probate from England. The estate was therefore not available for intestate succession. Secondly, the sworn evidence that the respondents knew that the deceased was married to the applicant with whom he had children was not challenged. Even if they (respondents) were entitled to petition for the grant, they were supposed to include the applicant, or at least cite her as she was equally entitled to petition. For these reasons, I revoke the grant that was issued to the respondents on 28th January 2013 and confirmed on 13th January 2013.
5. The deceased had left Sipili/Donyoloip Block [particulars withheld] , shares in [particulars withheld] Insurance Company Ltd and proceeds in A/C [particulars withheld] Bank Ltd at Westlands. I direct that all this property reverts back to the deceased so that it can eventually devolve in accordance with the will when the grant of probate is confirmed. The respondents had no claim to the property of the deceased, and could not therefore sell or transfer any portion of it under **section 93(1) of the Act**, or at all (**Jane Gachoki Gathecha –v-s Priscilla Nyawira Gitingu and Another [2008]UCC NeKLR**).
6. Costs of the application shall be paid by the respondents.

DATED and DELIVERED at NAIROBI this 18TH JANUARY 2016

A.O. MUCHELULE

JUDGE