



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 171 OF 2007

IN THE MATTER OF THE ESTATE OF THE LATE LUKA KANYIRI RUTHIBU-DECEASED

ANDREA RUTHIBU R. KANYIRI.....
.....PETITIONER

VERSUS

TERESIA NJOKI MBUGU.....OBJECTOR

RULING

Luka Kanyiri Ruithibu (hereinafter referred to as the deceased) died intestate on 9th September 1975 at the prime age of 90 years. On 13th April 2007, **Andrea Ruithibu Kanyiri** took out citations and served **Baptisa Mukere Kanyiri, Grace Wangui Wanyiri & Njoki Mbugu**. No entry of appearance to the citation appears to have been filed but on 18th September 2007, the petitioner petitioned for letters of administration to the deceased's estate and named himself and the above persons as the persons beneficiary entitled to the deceased's estate.

On 3rd October 2007, the applicant herein **Teresia Njoki Mbugu** filed an objection to making the grant and on 13th October 2008, both the petitioner and the objector were appointed joint administrators to the deceased's estate and the grant was confirmed on 9th October 2009. By an application dated 9th November 2012, the subject of this ruling the applicant seeks orders that:-

- a. ***That*** the orders made on 9th October 2009 confirming the said grant be set aside on grounds that the same were obtained irregularly, fraudulently and unlawfully especially in the part on the mode of distribution.
- b. ***That*** the grant made to the parties herein on 30th January 2009 be confirmed and the mode of distribution proposed by the applicant in her affidavit be adopted.

Andrea Ruithibu R. Kanyiri one of the co-administrators died on 11th July 2009 and this prompted the applicant herein to file the application dated 12th February 2015 seeking orders *inter alia* to substitute the name of the deceased administrator. The said application is still pending in court. **Mr. Kamata**, counsel for the applicant insisted on proceeding with the present application arguing that its determination will equally determine the other applications pending in this cause. It is also important to point out that, the person who was proposed to be substituted a one **Francis Waciuri Ruithibu** died on 31. 12. 2013.

The grounds relied upon by the applicant are *inter alia* that she purchased the share of the deceased's, that the aforesaid deceased person was illiterate and could not have signed the documents he is purported to

have signed in these proceedings. The applicant has also set out her proposed mode of distribution in paragraph 13 of her affidavit in support of the application.

Mr. Wahome, counsel for the Respondent opposed the application and argued *inter alia* that the application is a non starter in that the same applicant has a pending application in court seeking to substitute the deceased administrator, that the application is grossly incompetent since the Law of Succession Act[1] has no provision for setting aside a grant once confirmed, that the orders sought are contradictory in that prayer one seeks to set aside the orders confirming the grant while prayer two seeks to have the grant confirmed yet one of the administrators is already deceased.

Since the deceased died on 9th September 1975 before the Law of Succession Act[2] came into operation on 1st July 1981,[3] I find it necessary to address myself on the law applicable to the deceased's estate in these proceedings. The scope of the Law of Succession Act[4] is stated in Section 2 (2) of the act which provides as follows:-

“(2) The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

The second part of Section 2(2) of the Law of Succession Act[5] states that the administration of the estates of persons who died before 1st July 1981 should commence or proceed so far as possible in accordance with the provisions of the Act. In other words the procedure with respect to administration of estates of such persons is to be governed, not by the law as at the time of death, but by the procedures set out in the act. The said provisions in the Law of Succession Act[6] governing procedures and processes in administration of estates are to be found in Part VII which applies universally to the estates of persons dying either before or after the commencement of the Act.

Having determined that the procedure set out in the act applies to these proceedings, I proceed determine the issues raised in the application before me, namely, what is the effect of the death of a co-administrator. **Justice W. Musyoka**, in discussing a similar issue *In the matter of the estate of Edward Kanyiri Kunyiha (Deceased)*[7] had this to say:-

"Regarding the death of the co-administrator, the position is that the grant...has become inoperative. The grant was made jointly to the applicant and his mother, who has now died. It was intended that the two act together in the administration of the estate. A grant is a certificate. It is issued to a particular person or persons. If the holder of the grant dies the grant becomes useless, as it cannot be transferred to another person. If it was made to two persons and one dies it becomes inoperative. Under section 76 of the Law of Succession Act such grant is liable to revocation. It should be revoked and another grant made."

A similar opinion was expressed by the same judge in the *Estate of Simon Ngugi Nganga (Deceased)*[8]

"The matter of the death of a co-administrator cannot be dealt with as a rectification or review of the certificate of confirmation of grant. It is more fundamental. It touches on appointment of administrators. The grant.....was made to two persons. It is expected that the two are to act jointly at all times with respect to the administration of the estate. With the death of one of them, the grant becomes useless as the surviving sole administrator cannot act on the basis of a grant which still bears the name of a dead administrator. Since the grant has become useless and inoperative, it ought to be revoked and fresh appointments of administrators be made. The surviving administrators cannot even use the grant, as it is useless, to seek the orders that the applicant now seeks in this application."

I fully associate myself with the sentiments expressed by the learned judge in the above cited decisions and maintain that the death of **Andrea Ruthibu R. Kanyiri** rendered the grant issued on 9th October 2009 inoperative within the meaning of Section 76 of the act and on that basis alone the prayers sought in this application cannot be granted.

The grounds relied upon by the applicant in prayer one are that the orders confirming the grant be set aside because they *were obtained irregularly, fraudulently and unlawfully especially in the part on the mode of distribution.* A reading at section 76 of the act shows that it has no provision for setting aside, but the grounds upon which a grant can be revoked or annulled are statutory as enumerated in the said section and it is incumbent upon any party making an application for revocation or annulment of grant to demonstrate the existence of any, some or all the grounds stated the grounds. A close look at Section 76 shows that the grounds can be divided into three categories:- the first two deal mainly with the propriety of the grant making process. I find nothing in the application before me to suggest that the grant making process was improper. The other grounds in the said section deal mainly with mal-administration i.e personal representatives have not been effective in administration. This has not been alleged at all in this application.

The third ground is where the grant has become useless and inoperative through subsequent circumstances. The applicant did not raise this ground at all even though one of the administrators is dead and there is pending before court an application for substitution.

I find myself in agreement with the submissions by counsel for the Respondent that the Law of Succession Act[9] and the Probate and Administration Rules have no provision for setting aside a grant once it is confirmed. The only recourse are the grounds provided under section 76 cited above.

The applicant also invoked the provisions of section 81 of the act which provides that powers and duties of personal representatives vest in survivor on death of one of them. The said Section provides that:-

"Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivor or survivors of them:

Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him."

In this matter, the grant was issued to two persons. The applicant is not seeking to continue with the administration of the estate as the sole surviving administrator under the above section, but seeks to not only set aside the orders confirming the grant but also to vary the mode of distribution. These two prayers are in my view drastic in nature because once the orders granting the grant are set aside, then it means there will be no grant in the first place and secondly this will create an avenue for the administrator to be appointed as the sole administrator of the estate without the consent of the rest of the beneficiaries.

Further, the attempt to vary the mode of distribution in the grant is a fundamental issue that requires the consent of all the beneficiaries. There is nothing to show that the proposed mode of distribution has the consent of all the beneficiaries. It would be improper for the court to grant such an order in absence of such a consent. In the circumstances, I hold the view that Section 81 cannot cover such drastic orders as sought herein but is designed to enable a surviving administrator to proceed with the administration in appropriate circumstances.

In the circumstances I find that the application dated 9th November 2012 has no merits both in law and in substance and I hereby dismiss it with no orders as to costs.

Right of appeal **30** days

Signed, Delivered and Dated at Nyeri this 25th day of July 2016

John M. Mativo

Judge

[1] Cap 160, Laws of Kenya

[2] Ibid

[3] See Section 1, Cap 160, Laws of Kenya

[4] Ibid

[5] Ibid

[6] Ibid

[7] {2013}eKLR

[8] {2013}eKLR

[9] Supra