

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1618 OF 2001

IN THE MATTER OF THE ESTATE OF MWAURA GITUKUI (DECEASED)

RULING

1. The deceased herein died on 10th May 1988.
2. Representation to his estate was sought in a petition lodged in Thika CMCSC No. 118 of 1995 by Mary Wanjiku Mwaura in her capacity as widow of the deceased. He was expressed to have been survived by two widows and fourteen children. He was said to have died possessed of two parcels of land, Loc 1/Kiunyu/399 and Loc. 1/Mukarara/492. A grant was accordingly made to Mary Wanjiku Mwaura on 4th June 1996. The grant was confirmed on 13th August 1999, despite protest from Wainaina Mwaura.
3. A summons for revocation of grant dated 6th July 2001 was lodged in this cause on 6th July 2001, seeking revocation of the grant made in Thika CMCSC No. 118 of 1995, on allegations that the grant had been obtained fraudulently. The application was brought at the incidence of Grace Waithira Mwaura. Her affidavit was sworn on 6th July 2001. She complains that she was not served with citations to accept or refuse letters of administration. She further says that the court was not informed that she was an unmarried daughter of the deceased.
4. The affidavit of service on record, sworn on 23rd May 2011 and filed herein on 24th May 2011, indicates that there was service of the application on the survivors of the deceased. I have carefully gone through the record and have not across a reply to the application by way of affidavit.
5. I directed on 30th July 2015 that the application be disposed of by way of written submissions. Both sides complied with the directions and filed their respective submissions. The applicant asserts that she was entitled to a share in the estate as an unmarried daughter and that she ought not have been excluded from entitlement merely because she was a daughter. The respondents raise issues that ought to have been dealt with through an affidavit. They refer to the proceedings at the lower court that the applicant allegedly participated in leading to the confirmation of the grant, and mention that the administrator has since died and there has been no substitution.
6. Revocation of grants of representation is provided for under section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. The grant is to be revoked on the grounds set out in that provision. There has to be problems with the process of obtaining the grant, or with the administration, or the grant has become useless and inoperative.
7. I note from the application that the applicant is more concerned about the distribution of the estate rather than the process of obtaining the grant or problems with the administration of the estate. The application is therefore not premised on any of the grounds set out in section 76 of the Law of Succession Act.
8. The applicant complains that she was not cited to either accept or refuse to take out letters of administration. The petition was at the instance of her mother. Under Rule 7(7) of the Probate and Administration Rules, a citation of the type mentioned by the applicant should issue upon a person who has a prior or equal right to administration with the person applying. By virtue of section 66, a surviving spouse has a superior right to administration to that of her children. Such surviving spouse is therefore under no obligation to cite her children. The failure to issue citations on the

applicant in this case was therefore not fatal to the petition.

9. The applicant had been listed in the petition at the lower court as a survivor of the deceased. There is on record in the file of the lower court a letter from the Chief of Kihumbu-ini Location, dated 4th May 1995, identifying all the persons who survived the deceased, these include the applicant. She had not been left out of the process, and therefore she cannot be heard to complain that she was left out of the schedule of survivors or beneficiaries.

10. The applicant's concern relates to distribution. I have perused the record of the lower court. The grant was confirmed after there had been a full oral hearing of the confirmation application. A judgment followed thereafter. The applicant should have taken advantage of the hearing to advance her case at that time.

11. The applicant did file an application at the lower court on 15th September 2000, dated 15th September 2000. She had sought review of the judgment where the lower court had held that her mother was to hold a certain property in trust for her brothers to the exclusion of the applicant. The application was heard and a ruling was delivered thereon on 24th April 2001. The court held that granting the orders sought would have amounted to sitting on appeal on its earlier judgment.

12. An application for revocation of grant is not all fours with applications for review or setting aside of orders or appeal. It is designed to address particular concerns. Where an applicant's case does not fall within the four corners of what ought to be sought in a revocation application then they ought to scout for the proper application to file or the relief to seek.

13. In the instant case, the complaints raised by the applicant do not bring her application within the grounds set out in section 76 of the Law of Succession Act. The complaints relate to distribution. There was a full trial at the lower court. Anyone aggrieved by the decision after that process had the option to either appeal against the judgment or seek its review. The applicant was one such person. She sought a review of the judgment by her application dated 15th September 2000. Her application was dismissed on 24th April 2001. Thereafter the applicant should have appealed against the said decision instead of seeking revocation of the grant.

14. The application dated 6th July 2001 is without merit for the reasons stated above. I hereby dismiss the same. There shall be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 22ND DAY OF JULY, 2016.

W. MUSYOKA

JUDGE