



REPUBLIC OF KENYA
HIGH COURT AT NAIROBI
MILIMANI LAW COURTS - FAMILY DIVISION
IN THE MATTER OF THE ESTATE OF E N K (DECEASED)
SUCCESSION CAUSE NO. 1189 OF 2013

BETWEEN

J K KAPPLICANT

AND

N N M.....1ST RESPONDENT

C K M.....2ND RESPONDENT

RULING

INTRODUCTION

The deceased, E N K, died on 1st July, 2012, and Grant of Letters of Administration to her Estate were granted to N N M and C K M (hereafter ‘the Respondents’). Subsequently, on 30th June, 2014, the said Grant was confirmed and the deceased’s properties were shared equally between them. The said properties included:

1. Pension benefits held by Alexander Forbes Limited.
2. Pension held by Essar Telkom Limited.
3. NIC Bank Account.
4. Motor Vehicle Registration No. [...], Toyota IST.

Aggrieved by the said confirmation and the issuing of the Grant of Letters of Administration to the Respondents, J K K (hereafter ‘the Applicant’), filed the present Summons for Revocation of Grant dated 23rd January 2014 seeking orders to the effect that:

1. ...
2. *The Honourable Court be pleased to stay the operation of Certificates of Confirmation of Grant issued to N N M and C K M on 30th June 2014.*

3. The Honourable Court be pleased to set aside and vacate the Certificate of Confirmation of Grant of Letters of Administration issued to N N M and C K M be revoked.

4. This Honourable Court issue a Grant of Letter of Administration to J K K

5. Costs of this Application be in the cause.

THE APPLICANT'S CASE

In his Affidavit in support sworn on 23rd January 2015, the Applicant deponed that he is the deceased's husband and that they celebrated their marriage on 20th August 1994 and the marriage was blessed with two children namely, I W K born on 21st May, 1998 and J K K born on 13th October 2002.

He stated that the Respondents have conceded that the deceased had two children however they concealed the fact that he was married to the deceased. In that regard, he averred that he enjoys priority over his parents-in-law to petition for the Grant of Letters of Administration.

The Applicant stated that during the period between 20th August, 1994 to the year 2008, the deceased was a housewife and he supported her fully together with the family. It was his contention that he was in the business of importing and selling pre-owned motor vehicles but due to his decision to extend credit facilities to clients, his business ran into a credit crunch and other difficulties and thereby leading to its collapse.

That in January 2003, the deceased began ailing and during her illness and until her demise, he provided for his family to his best ability, but when his business collapsed, he agreed with the deceased that she would move to stay with her parents to give him time to revive his business. Further, that at all times, he maintained an excellent relationship with her and their children and upon her demise, his parents-in-law became hostile and denied him an opportunity to visit or be with his children and as such, he did not want to traumatize his children and hence decided to leave the matters in the hands of his parents-in-law. Accordingly, that he eventually decided to have his children and informed his parents-in-law that he would file proceedings against them, and that resulted to the children being surrendered to him.

It was the Applicant's other deposition that when his parents-in-law encountered legal challenges in **Petition No. 1957 of 2012**, they abandoned it and filed for a full Grant of Letters of Administration and when the same came to his knowledge, he instructed the firm of M/s Amolo and Kibanya Advocates to act on his behalf in the matter. Furthermore, that he had advocates on record and yet he was never in any way involved in the proceedings or served and hence, he was never involved in any of the proceedings.

It was the Applicant's other contention that whereas the deceased was survived by minor children and him, the Certificate of Confirmation of Grant purports to give his parents-in-law pension benefits to be shared equally between them, without any provision being made to either him or his children. Additionally, that the parents-in-law have also purported to take the free property of the deceased namely, motor vehicle [..], Toyota IST, and hence the same is prejudicial.

In the Applicant's view, the pension benefits do not constitute free property of the Estate of the deceased and therefore, cannot be the subject of succession proceedings and further, that he has priority under the law to administer the deceased's Estate.

In his Supplementary Affidavit sworn on 17th March, 2015, he reiterated his earlier depositions and contended further that the allegations that he was separated from his family is tainted with malice and made in bad faith. That since their marriage on 20th August, 1994 until 2010, the deceased was a housewife and he fully provided for the family, she began ailing in 2003, during the years 2003 to 2010, she would be hospitalized at the Nairobi Hospital at least once or twice every year and he took care of the medical bills, and that the deceased's heavy costs of hospitalization exhausted all his savings and forced him to sell some of his assets and that in turn affected his business thereby resulting to financial

challenges to his business.

It was also his contention that in 2008, the deceased, despite her bad health, sought employment and during this period, his business still continued to experience financial hardships and due to the many debts and frequent visits from auctioneers and bailiffs, they agreed that it would be in the best interest that she and the children lived with the Respondents.

The Applicant stated further that the only free property that belongs to the deceased's Estate and which can be the subject of these proceedings includes proceeds of the National Industrial Credit Bank Ltd and the Motor Vehicle, [...], which, his sister-in-law, P N is in unlawful possession of. He pointed out further that no evidence has been adduced before the Court by the Respondents in support of their arguments that they paid the children's school fees.

He deponed further that during the period between 2010 and 2012, he moved into a small flat and did not take his children since he did not want them to be separated from their ailing mother, and his house was too small and the circumstances were unfavourable and would have greatly inconvenienced the children with their schooling. That soon afterwards, he moved to a bigger house and took the children and ever since, he has been able to provide for them.

According to him, the Respondents had in their possession the deceased's Identity Card and were therefore able to get her Death Certificate which they used to obtain the Grant of Letters of Administration, and that surprisingly, they did not even bother to take out a citation to require him to petition for the said Grant Letters of Administration.

The Applicant, in his two sets of Written Submissions dated 18th February 2016 and 4th April 2016 respectively, reiterated his earlier depositions and submitted that the Respondents did not include him as a beneficiary of the deceased's Estate and as such, they were not at liberty to fix the Summons for Confirmation of Grant for hearing and prosecute it *ex parte* as prescribed in **Rule 8** of the **Probate and Administration Rules**.

Furthermore, it was his submission that the Respondents have not adduced any evidence to show that they were dependants of the deceased or beneficiaries and as such, they can neither qualify to be administrators nor beneficiaries to the deceased's Estate. That the fact that his marriage to the deceased was in turmoil is immaterial and the non-disclosure of the fact that he was alive at the time of the deceased's death is a justified reason for the annulment of the Grant.

He also submitted that the pension benefits held by Forbes Financial Services and Essar Telkom were not free property within the meaning of **Section 34** of the **Law of Succession Act** and cannot therefore be disposed of through the process of succession. In addition, that such property must be disposed of as stipulated by the terms and conditions of the contract in question.

Additionally, that whereas he is cognizant of the provisions of **Section 66** of the **Law of Succession Act**, he is concerned that the Respondents did not disclose to the Court a crucial fact that the deceased had a surviving spouse.

The Applicant further stated that these are not proceedings under the **Children Act** and the invocation of **Sections 2** and **7** of the said **Act** are inapplicable in the present case and that the submissions by the Respondents that he shall not provide for the children are unmerited and lack any evidential backing. The Applicant therefore urged the Court to allow his Application and grant the orders sought therein.

THE RESPONDENTS' CASE

Through the Affidavit sworn by C K M on 23rd February 2015, the Respondents opposed the present Application and asserted that the deceased children are their grandchildren and all the steps they have taken have always been in their interest and that in any event, at all material times, the deceased and her children were separated from the Applicant and were living with them.

They noted that the deceased died intestate leaving behind an Estate comprising of:

- a. Pension benefits held by Alexander Forbes;
- b. Pension benefits held by Essar Telkom Limited;
- c. Funds in an NIC Bank Account;
- d. A motor vehicle, [...], Toyota IST, which at the time of the deceased's death, was the subject of a debt at the NIC Bank and consequently, the Bank informed them that it fully applied the funds in the NIC Bank account to pay off the debt due on the motor vehicle.

As regards the funds held by Alexander Forbes Limited, it was their position that they have always acted in the best interests of the minors and that it is inaccurate for the Applicant to state that they abandoned **Petition No. 1957 of 2012** as it was an Application for a Petition for a limited Grant of Letters of Administration *ad colligenda* bona specifically and solely to authorize Alexander Forbes to pay school fees for the minors. Further, that the same was obtained in order to enable them continue with their studies as they were living with them and under their care and protection at the time of the Application.

They contended further that the deceased and the Applicant had been separated for over two years prior to her death and was living in their house and under their care and that in any event, the deceased left the minors under their care and they have at all times taken care of them and further treated the Applicant with utmost respect.

Additionally, that the Applicant always had free access to the minors and that he did not however take up his responsibilities in providing for their care and upkeep. That for a year after her death, the Applicant made absolutely no contribution or effort towards the minors' welfare and that he made no suggestions or effort of any kind to secure the urgent and immediate benefits of the minors.

The Respondents pointed out that they were left with the sole responsibility of settling the hospital bills, funeral expenses as well as upkeep of the children after the deceased's demise and that the minors lived in their home and under their care for up to two years after the death of their mother and the Applicant was aware and had free and unrestricted access to them.

The Respondents pointed out that the Applicant never took any urgent steps in regard to safeguarding the children's education and that in any event, he has never given any indication whatsoever on how he intends to maintain them, secure their best interest, or provide for them and yet he admitted under oath that he had no regular income or sustenance sources.

They averred further that they do not have in their custody and control any of the funds that belong to the deceased's Estate and that their position is one of trusteeship to ensure that the interests of the children are maintained at all times and that in any event, the funds are, and have at all times, been in the complete control and care of Alexander Forbes Pension Services, who manage the said funds prudently and ensure that they are put to good benefit of the children.

It was their other argument that proceedings in relation of the deceased's Estate were launched in 2012 and they, after waiting in vain to see if the Applicant would take any active step for the care of the children, continued with the responsibility and filed a Petition for the consolidation of the Estate and they were appointed as Administrators on 6th August 2013 and the Grant was confirmed a year later. Further, that the Applicant had appointed advocates to represent him before the Confirmation of the Grant was issued but he did not file any objection to the confirmation and yet he was fully aware.

In their Written Submissions dated 21st March 2016, they contended that **Section 66** of the **Law of Succession Act** provides for the preference to be given to persons to administer the Estate of a deceased who dies intestate and the Court is mandated to consider the best interests of all concerned parties prior to following the order of preference. In that regard, their submission was that the Grant was taken and

confirmed in the interests of the minors and in line with **Article 53 (1) (b)** of the **Constitution**, and **Sections 2** and **7** of the **Children Act**.

According to the Respondents, they only wish to act as trustees because the Applicant, despite being the spouse to the deceased, had previously demonstrated no responsibility towards the upkeep of the minors and hence it is prudent to put him in charge of the minors' wellbeing.

While citing **Section 76** of the **Law of Succession Act**, they submitted further that the Section provides grounds for which the Court may revoke a Grant and the powers are discretionary and as such, the Court may still choose not to revoke a grant even on any of the grounds stipulated therein is proved. That in any event, the Applicant has failed to demonstrate that they obtained the Grant fraudulently or on untrue allegations and hence should let the status quo of the matter prevail.

The Respondent also submitted that a revocation sought herein if granted, will be an exercise in futility since there is no property within the Estate available for administration and/or distribution and that, any claim that the Applicant may have towards the deceased's Funds held by Alexander Forbes is a claim in contract that ought to be canvassed in a civil action against Alexander Forbes.

For the foregoing reasons, the Respondents contended that the present Application is inappropriate, poorly conceived and would only serve to destabilize the minors' and their welfare and the Applicant has not shown what prejudice the minors have or are suffering currently to justify the grant of the orders sought. It was their argument therefore that the Application be dismissed in the interest and for the benefit of the minors.

DETERMINATION

Has the Applicant made out a case to warrant the revocation of the grant?

Section 76 of the **Law of Succession Act** gives this Court the powers to revoke a grant provided the conditions stipulated therein have been met. It states that:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

- a. That the proceedings to obtain the grant were defective in substance;***
- b. That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;***
- c. That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.***
- d. That the person to whom the grant was made has failed, after due notice and without reasonable cause either-***
 - i. To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or***
 - ii. To proceed diligently with the administration of the estate; or***
 - iii. To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or***
 - iv. That the grant has become useless and inoperative through subsequent circumstances.***

In the present case, it is uncontested that the Applicant and the deceased were separated for almost two years prior to the deceased's death and that she, together with her children, were living with the Respondents. It is also not in dispute that as at the time the Grant of Letters of Administration were issued, the deceased's children were under the care and custody of the deceased's children. In that regard, the Respondents filed for a limited Grant of Letters of Administration in order to enable them cater for the children's education. That, in the Court's view, was in the best interest of the children and as such, it cannot be said to be a nullity.

The Applicant challenges the validity of the Confirmed Grant on the basis that they were obtained fraudulently and in secrecy as he was never involved. Furthermore, the same was obtained without informing the Court that the deceased had a surviving spouse. It will be noted that **Section 66** of the **Law of Succession Act** provides a guide which is to be followed in determining the suitable person to be appointed as the Administrator. It states that:

When a deceased has died intestate, the Court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

- a. Surviving spouse or spouses, with or without association of other beneficiaries;***
- b. Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;***
- c. The Public Trustee; and***
- d. Creditors***

Provided that, where there is partial intestacy, letters of administration in respect of the intestate shall be granted to any executor or executors who prove the will.

It therefore follows that a surviving spouse is the first one in priority in the line of who is to be appointed as an Administrator to a deceased's Estate. In the present circumstances, the Respondents have not rebutted the assertions that they did not inform the Court that the deceased had a surviving spouse. In that regard therefore, the non-disclosure of that material fact is sufficient reason to revoke the present Grant.

The Court takes the view that it was prudent for the Respondents to disclose that key fact to the Court in order for the Court to weigh the circumstances of the case and determine the appropriate person(s) to be appointed as Administrators. The failure to disclose the fact thus renders the Grant a nullity and the same is hereby revoked.

Who then should be appointed Administrator?

As it stands at the moment, the deceased's children are under the care and protection of the Applicant. The Applicant is therefore vested with the responsibility of taking care of them.

Section 35 of the **Law of Succession Act** is to the effect that:

1. Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-

- a. The personal and household effects of the deceased absolutely; and***
- b. A life interest in the whole residue of the net intestate estate:***

Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to

any person.

2. A surviving spouse, shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.

3. ...

In that regard, and pursuant to **Section 35** of the **Law of Succession Act**, the surviving spouse is entitled to the personal effects of the deceased absolutely and a life interest on the rest of the deceased’s intestate Estate. The surviving spouse is the most suitable person in line to administer a deceased’s spouse’s estate, and he/she holds the deceased’s Estate in trust and in the interest of the children. In the present case, while bearing in mind that the Applicant is in custody of the children, it is fair and just that he be appointed as the Administrator of the deceased’s Estate.

It should be noted that these were not proceedings to determine the suitability of otherwise of the Applicant’s capabilities as a parent and to determine the question of who should take custody of the deceased’s children and as such, the Court declines the invitation to open an inquiry into that, as invited by the Respondents.

In conclusion, the Court notes that in the Confirmed Grant, the Respondents have bequeathed all the deceased’s properties equally to themselves to the exclusion of the deceased’s husband, the Applicant, and her children. That is a nullity in law and a great injustice to the Applicant and his children and the Court cannot shut its eyes to such an illegality.

DISPOSITION

For the above stated reasons, the Court holds that:

- 1. The Certificate of Confirmation of Grant issued to N N M and C K M on 30th June, 2014 is hereby revoked.**
- 2. The Grant of Letters of Administration to the Estate of E N K is hereby granted to J K K forthwith.**
- 3. Each Party to bear his costs to this Application.**

DATED AND SIGNED ON THIS 31ST DAY OF OCTOBER, 2016

M.W.MUIGAI

JUDGE

In the presence of

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