



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO.148 OF 1994

IN THE MATTER OF THE ESTATE OF BENEDICTO MUNGAI (DECEASED)

DAVID KANYANJUA KAMAU.....1ST APPLICANT

SAMMY MBUTHIA KABANGA.....2ND APPLICANT

PETERSON CHEGE.....3RD APPLICANT

ONESMUS WAMUNYU.....4TH APPLICANT

MACHARIA MWANGI.....5TH APPLICANT

PETERSON G. KARIUKI.....6TH APPLICANT

VERSUS

NICHOLAS MUNGAI.....1ST RESPONDENT

PAULINE WANJIRU MUNGAI.....2ND RESPONDENT

RULING

1. The deceased Benedicto Mungai died on 11/11/93. He left a written Will in which he appointed his son Paul Kariuki Mungai and advocate Mary Wambui Ngui as executors. The executors petitioned this court for the grant of probate which was issued on 12/4/94. On 3/10/94 they filed summons for the confirmation of the grant. Ngugi Ford Mungai, Nicholas Mungai, Patrick Mungai and Christine Wanja, all beneficiaries of the estate, objected to the confirmation of the grant. Those objectors, except for Nicholas Mungai, died. Ngugi Ford Mungai, had left a daughter, Pauline Wanjiru Ngugi, who became the administratrix of his estate. She also objected to the confirmation of the grant of probate. The executor Paul Kariuki Mungai later died. That left Mary Wambui Njui as the sole executor. Paul Kariuki Mungai was not substituted. The summons for confirmation of the grant of probate was filed M.W.Njui & Co. Advocates. On 15/2/96 Munene & Co. Advocates filed a Notice of Change of Advocates to take over the Cause. The objections were not heard. On 12/3/12 a consent was recorded between Mr. Munene for the "petitioner/applicant" and S. Maira for the "objectors/respondents" in which the grant of probate issued on 12/4/94 was revoked; a new grant of letters of administration intestate was issued in the names

of Nicholas Mungai and Pauline Wanjiru Ngugi; the administrators were to apply for the distribution of the estate and confirmation of the grant; and any other pending application was marked as spent.

2. The applicants filed the present summons dated 13/11/15 against Nicholas Mungai (1st respondent) and Pauline Wanjiru Mungai (2nd respondent) seeking the revocation of the grant of letters of administration intestate that was issued to them on 12/3/12. They also asked for the setting aside of the consent order that was recorded on 12/3/12 that revoked the grant of probate that had been issued on 12/4/94. This is the consent order that formed the basis of the grant of letters of administration intestate. The application was based on the stated grounds, the sworn affidavits of David Kanyanjua Kamau and Peter G. Kariuki and the supplementary affidavit of Peter G. Kariuki. The applicants' case was that they were purchasers of part of the estate of the deceased and were in actual possession of what they had purchased, and that this was with the knowledge of the respondents, and yet this material fact was not made known to the court by the respondents at the time of the consent; that the applicants were not served to be able to participate in the recording of the consent; that the 1st applicant had appointed M/s Kiarie Njuguna & Co. Advocates who were on record and the advocates were not served to participate in the consent; that Paul Kariuki Mungai was not substituted as an executor and therefore Munene & Co. Advocates who took over the cause did not have authority of the said Paul Kariuki Mungai; and the grant of probate remained in the name of Mary Wambui Njui and there is no indication on record, or at all, that she had renounced her executorship.

3. The respondents opposed the application. Their case was that the grant of probate issued to Paul Kariuki Mungai and Mary Wambui Ngui was challenged by many of the beneficiaries through objections which they filed. Their issue was that there was delay in the administration of the estate. A number of these objectors died. The family met and agreed to appoint the respondents to administer the estate. Hence the consent to revoke the grant of probate and to have the respondents issued with a grant of letters of administration intestate. The family did not consider it necessary, the respondents averred, to involve the applicants who, to them, were "third parties" who had, in any case, bought part of the estate from persons who had no title that they could legally pass. Lastly, they stated that Munene & Co. advocates could sign the consent, because he had been in the matter from the start.

4. In this application, the applicants were represented by Kiarie Njuguna & Cp. Advocates and the respondents by Maira & Ndegwa Advocates. Counsel agreed to file written submissions which was done. I have considered them.

5. The record shows that upon the death of Paul Kariuki Mungai on 27/3/07, the 2nd respondent filed an application on 21/3/11 seeking to substitute him. The 1st respondent supported that application which they sought to serve on Mary Wambui Ngui who was the other executor. The application was not served, heard or granted. It follows that at the time the consent was recorded Paul Kariuki Mungai had not been substituted. Further, Mary Wambui Ngui who was the surviving executor of the Will of the deceased was not a party to the proceedings that led to the consent. She was not present when the consent was recorded. This means that the executors of the Will of the deceased and who had been issued with a grant of probate were excluded from the consent that revoked their grant.

6. Secondly, the record shows that the applicants had filed their protests by the time the consent was being recorded. The affidavits filed in support of this application show that the applicants had been acknowledged by the respondents and other family members to be buyers of certain parcels of land in the estate, and various meetings had been held between the parties to try and resolve the buyers' claims. It matters not what the respondents thought of these claims or their legal viability. What is material is that the applicants (the buyers) had protests on record, and the protests were known to the respondents. The respondents could not therefore sneak into court, as it were, and record the consent without reference to the applicants. The applicants had instructed Kiarie Njuguna & Co. Advocates who were on record. The advocates were not invited to participate in the consent.

7. The Respondents' case was that the applicants had bought parcels from Paul Kariuki Mungai who had a grant that had not been confirmed and who therefore had no capacity under **section 82(b)(ii)** of the **Law**

of Succession Act (Cap.160) to sell the parcels; that the alleged sale to the applicants by the said Paul Kariuki Mungai amounted to intermeddling. What is in issue here is that the applicants were, by their protests and objections, parties in the cause, and were entitled to be heard on those protests and objections, their merits notwithstanding.

8. Under **section 76** of the **Act**, a grant may be revoked if the proceedings to obtain the grant were defective in substance; if it was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case; or where it was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently. From the evidence on record the grant of probate was revoked and grant of letters of administration intestate issued without disclosure that the applicants were parties to the Cause and were laying claim to the estate, and had not been served to be present and neither had their claims been heard or determined. On the basis of the **ESTATE OF MUTISYA MARTINE NGITE H.C SUCCESSION CAUSE NO.3579 OF 2004 AT NAIROBI** both the consent and the grant of letters of administration intestate cannot stand.

9. Section 5(1) of the **Act** gives an adult person of sound mind the freedom to dispose of his free property any way he desires by means of a valid Will. The deceased herein left a written Will in which he appointed Paul Kariuki Mungai and Mary Wambui Ngui as executors. As long as the Will was technically and procedurally valid, it could not be interfered with or altered except as provided under **section 26** of the **Act** which permits a dependant to apply to the court for a reasonable provision to be made to him on the ground that the testator did not make reasonable provision to him. In **ELIZABETH KAMENE NDOLO-V- GEORGE MATATA NDOLO, CIVIL APPEAL NO.128 OF 1995 (1996 e KLR)** it was held that a testator has the right to dispose of his property by means of a Will, and the court even when making provision for a dependant under **section 26** is not to make another Will or substitute its own from that is the testator as this infringes on the right of the testator to deal with his property as he wishes.

10. Further, Paul Kariuki Mungai had died but Mary Wambui Ngui was still alive. Under **section 80** of the **Act**;

“ 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 and administrators shall become vested in the survivor or survivor of them”.

Unless Mary Wambui Ngui renounced her executorship under **section 59** of the **Act** and filed the requisite forms under **rule 18** of the **Probate and Administration Rules**, there was no legal basis to appoint the respondents as the administrators of the estate of the deceased.

11. In the circumstances, I find that the consent recorded on 12/3/12, the revocation of the grant of probate and the appointment of the respondents as the administrators of the estate of the deceased were all done without full disclosure of material facts, without the consent of all the parties to the Cause and the proceedings leading to them were defective in substance. The entire consent recorded on 12/3/12 is set aside, and the grant of letters of administration intestate in the estate of the deceased issued to the respondents on 12/3/12 is revoked. The grant of probate of written Will that was issued to Paul Kariuki Mungai and Mary Wambui Ngui on 12/4/94 is hereby reinstated. The costs of this application shall be paid for by the respondents.

DATED and SIGNED at NAIROBI this 10th day of OCTOBER 2016.

A.O. MUCHELULE

JUDGE

DELIVERED and SIGNED this 12th day of OCTOBER 2016

W.M. MUSYOKA

JUDGE