



**In The Matter of the Estate of Mbai Wainaina (Deceased) (Succession Cause 864 of 1996) [2015] KEHC 6978 (KLR) (Family) (23 January 2015) (Ruling)**

*In re Estate of Mbai Wainaina (Deceased) [2015] eKLR*

Neutral citation: [2015] KEHC 6978 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**FAMILY**  
**SUCCESSION CAUSE 864 OF 1996**  
**WM MUSYOKA, J**  
**JANUARY 23, 2015**

**The provisions of Principal legislation overrides those of Subsidiary Legislation.**

Reported by Andrew Halonyere

**Succession Law** - probate and administration - application for grant of letters of administration - where applicants challenged confirmation of grant on the ground that respondents failed to disclose that the deceased was survived by other relatives - where the application conformed with the prerequisites of rule 7(1)(e)(i) of the Probate and Administration Rules, but not section 51(2)(g) of the Law of Succession Act - whether such material non-disclosure rendered the application defective - Law of Succession Act section 51(2)(g); Probate and Administration Rules, rule 7(1)(e)(i)

**Statutes** - interpretation of statutes - conflict between sections of a statute and rules of a statute - whether statute overrides the rules - Law of Succession Act section 5 (2) (g); Probate and Administration Rules, rule 7(1)(e)(i)

**Brief facts**

The respondents had applied for representation of the estate of the deceased in their capacities as widow and son of the deceased. After the grant was confirmed, the property making up the estate was confirmed for sharing equally between the widow and four (4) sons of the deceased, to the exclusion of two (2) daughters of the deceased. A certificate of confirmation of grant was issued accordingly.

On a later date an application for revocation of the said grant was filed by the applicants. The applicants submitted that the grant was obtained fraudulently arguing that the petitioners did not disclose in their application that the deceased had also been survived by three brothers. The applicant further submitted that the said property was registered in the name of the deceased in trust for the deceased brothers.

**Issues**

- i. Where there was a conflict between sections of a statute and rules of a statute, which one took precedence over the other?
- ii. Whether failure by the respondents to disclose other relatives of the deceased rendered the application for confirmation of grant defective.



iii. Whether the Probate Court under the Law of Succession Act had jurisdiction to deal with issues of ownership of property and declarations of trust.

### **Held**

1. Rule 7(1)(e)(i) of the Probate and Administration Rules, provided that, where the deceased was survived by spouse or child, the applicants for a grant of letters of administration intestate were not required to disclose other relatives except the said surviving spouse or child. It would appear that those other relatives were to be disclosed only where there was no surviving spouse or child.

2. Rule 7(1)(e)(i) of the Probate and Administration Rules which required that where the deceased was survived by spouse or child, the applicants for a grant of letters of administration intestate were not required to disclose other relatives except the said surviving spouse or child. The said rule was in conflict with section 51 (2)(g) of the Act, which envisaged that in cases of intestacy, the application for grant of letters of administration intestate should disclose all the survivors of the deceased regardless of whether he or she had a surviving spouse or child.

3. The Law of Succession Act was the principal legislation, Probate and Administration Rules was subsidiary to it. The provisions of the principal legislation override those of the subsidiary legislation. Consequently, section 51(2) (g) of the Act overrides rule 7(1) (e) (i) of the Rules. An applicant for grant of letters of administration intestate ought to comply wholly with section 51(2) (g) of the Act.

4. The affidavit in support of the application disclosed names of the widow of the deceased and his children as the survivors of the deceased. The affidavit was silent on whether there were surviving parents, brothers and sisters of the deceased and any of the children of any child of the deceased then dead. The particulars set out in the petition conformed with the prerequisites of rule 7 (1)(e)(i) of the Probate and Administration Rules, but not section 51 (2) (g) of the Law of Succession Act.

5. The petitioners were confronted with requirements set out in two conflicting provisions. They complied with one but not the other. They complied with the subsidiary provisions rather than the principal provision. It could not be held against them, in the absence of evidence that there was an active effort on their part to defraud.

6. The deceased was survived by a spouse and children. Under the intestacy provisions, surviving spouses and children took priority over all other surviving relatives. Under section 39(1) of the Act, the other relatives could only be entitled to a share in the estate of a deceased person who was not survived by a spouse or child. The fact that the respondents in their petition only disclosed the surviving spouse and the surviving children of the deceased was not in the circumstances sinister.

7. The mandate of the Probate Court under the Law of Succession Act was limited. It did not extend to determine issues of ownership of property and declarations of trusts. It was not a matter of the Probate Court being incompetent to deal with such issues, but rather, that the provisions of the Law of Succession Act and the relevant subsidiary legislation did not provide a convenient mechanism for determination of such issues. A party who desired to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.

8. Even if the applicants had a case in terms of existence of a customary trust in their favour the same could not be proved in proceedings conducted by way of written submissions. The nature of a trust could not be proved otherwise, than in a full trial where parties gave oral evidence, were cross-examined and provided documentary evidence if any.

*Application dismissed.*

### **Citations**

None referred to

### **Statutes**

#### ***East Africa***

1. Law of Succession Act (cap 160) sections 39(1); 51 (2) (g); 76 - (Interpreted)



## RULING

1. The deceased herein died on 1<sup>st</sup> July 1988. Representation to his estate was sought herein on 22<sup>nd</sup> April 1996 by Hannah Wanjiku Mbai and Patrick Mwaura Mbai in their capacities as widow and son of the deceased respectively. He was expressed to have been survived by a widow and six children and to have died possessed of a property described as Kiganjo/Gachika/460. Representation was made to the petitioners on 25<sup>th</sup> June 1996.
2. The grant was confirmed on 3<sup>rd</sup> October 1997. The property making up the estate was confirmed for sharing equally between the widow and the four (4) sons of the deceased, to the exclusion of the two (2) daughters of the deceased. A certificate of confirmation of grant was issued accordingly.
3. On 19<sup>th</sup> April 2014 a Summons for Revocation of the said grant was filed at the registry by one John Nganga Wainaina. He argues that the grant was obtained fraudulently for the petitioners did not disclose that the deceased had also been survived by three brothers, being himself, Joseph Kabucho Wainaina and Francis Mwaura Wainaina. He asserts that he and Francis Mwaura reside and cultivated on Kiganjo/Gachika/460 and no provision had been for them during the confirmation of the grant. He states that the said property was registered in the name of the deceased in trust for his brothers. He proposes that the said property be divided between the widow of the deceased, himself and Joseph Kabucho Wainaina and Francis Mwaura Wainaina in proportions that he has set out in his affidavit.
4. Upon being served, the respondents replied through Hannah Wanjiku Mbai, who swore an affidavit on 24<sup>th</sup> September 2012. She argues that the application dated 19<sup>th</sup> April 2012 has been overtaken by events as the sole asset Kiganjo/Gachika/460 has since been subdivided and distributed following confirmation of the grant. She asserts that the deceased was the sole owner of Kiganjo/Gachika/460 and the applicants claim is therefore remote and untenable for as a brothers of the deceased they are is neither heirs nor a dependants of the deceased. It is argued that the applicant is also staking claim to a share in the estate of his late father in Thika SRMCSC No 411 of 2011.
5. There is nothing on record to indicate that the applicants responded to the replying affidavit by the respondents. The allegations made in the said affidavits are therefore not controverted.
6. It was directed by consent on 11<sup>th</sup> November 2013 that the said application be disposed of by way of written submissions. The applicants put in their written submissions on 23<sup>rd</sup> January 2014, while the respondents submissions were filed on 9<sup>th</sup> December 2013.
7. In their submissions, the applicants assert that they were born in the subject land and cultivated on it and state that the respondents have not denied it. It is also submitted that the respondents have not explained how the deceased acquired the property. They submit that the respondents hold the property in trust for them, and it is on that basis that they claim a stake in the estate of the deceased. They found their claim on a Kikuyu customary trust. They argue that the non-disclosure that the deceased held the property in trust for them was good ground for revocation of the grant.
8. On their part, the respondents submit that Kiganjo/Gachika/460 being claimed by the applicants is non-existent since it has since been subdivided. It is also submitted that the claim by the applicants is remote, for as brothers of the deceased their right to inherit the deceased's property is lesser to that of the respondents. They argue that the applicant's claim of a customary trust can only be entertained



in a substantive suit. Furthermore, they are entitled to access their father through Thika CMCS No 411 of 2011.

9. By virtue of Section 76 of the Law of Succession Act a grant of representation is liable to revocation on the grounds of concealment of material information from the court and for misrepresentation.
10. The information that should be carried in an application for grant is set out in Section 51(2) of the Law of Succession Act. The relevant provision is Section 51 (2) (g) of the Act. It states as follows:-

“ 51

- (2) An application shall include information as to –
  - (g) in cases of total or partial intestacy, the names and addresses of all previous spouses, children, parents, brothers and sisters of the deceased and of the children of any child of his or hers then deceased;...”

11. Section 51(2) (g) of the Act should be read together with Rule 7(1) (e) (i) of the Probate and Administration Rules which states as follows:-

“ ... where an applicant seeks a grant of representation to the estate of a deceased person ... the application shall be by a petition... containing... the following particulars-

- (e) in cases of total or partial intestacy –
  - (i) the names, addresses, marital state and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving spouse or child, like particulars of such person or persons who would succeed in accordance with Section 39(1) of the Act.”

12. According to Rule 7(1) (e) (i) of the Probate and Administration Rules, where the deceased is survived by spouse or child, the applicants for a grant of letters of administration intestate need not disclose other relatives except the said surviving spouse or child. It would appear that those other relatives are to be disclosed only where there is no surviving spouse or child.
13. Rule 7(1)(e)(i) of the Rules is in conflict with Section 51(2)(g) of the Act, which envisages that in cases of intestacy, the application for grant of letters of administration intestate should disclose all the survivors of the deceased regardless of whether he or she had a surviving spouse or child.
14. The Law of Succession Act is the principal legislation Probate and Administration Rules is subsidiary to it. The provisions of the principal legislation override those of the subsidiary legislation. Consequently, Section 51(2) (g) of the Act overrides Rule 7(1) (e) (i) of the Rules. An applicant for grant of letters of administration intestate ought to comply wholly with Section 51(2) (g) of the Act.
15. The application in this cause took the form of a petition filed on 22<sup>nd</sup> April 1996. The affidavit in support of the application discloses names of the widow of the deceased and his children as the survivors of the deceased. The affidavit is silent on whether there were surviving parents, brothers and sisters of the deceased and any of the children of any child of the deceased then dead. The particulars set out in the petition conform with the prerequisites of Rule 7(1)(e)(i) of the Probate and Administration Rules, but not Section 51(2) (g) of the Act.
16. Can it therefore be said that the petitioners have concealed information from the court? I think not. The petitioners were confronted with requirements set out in two conflicting provisions. They



complied with one but not the other. They complied with the subsidiary provisions rather than the principal provision. I cannot hold it against them, in the absence of evidence that there was an active effort on their part to defraud.

15. I note that the deceased was survived by a spouse and children. Under the intestacy provisions, surviving spouses and children take priority over all other surviving relatives. Indeed, under Section 39(1) of the Act, the other relatives could only be entitled to a share in the estate of a deceased person who is not survived by a spouse or child. The fact that the respondents in their petition only disclosed the surviving spouse and the surviving children of the deceased is not in the circumstances sinister.
16. The applicants claim that Kiganjo/Gachika/460 was held by the deceased in trust for them, and therefore that makes them heirs to his estate.
17. Whether the deceased held Kiganjo/Gachika/460 in trust for the applicants is a matter of both fact and law. It is incumbent upon the applicants to establish that such trust did exist. The issue is that the applicants have provided material upon which I can conclude whether such trust existed or not. I have not seen material from what is deposed in the affidavit sworn on 17<sup>th</sup> April 2012 by John Ng'ang'a Wainaina in support of the application.
18. Even if there was material establishing that there was such a trust, I doubt that that would be a matter for the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determine issues of ownership of property and declarations of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.
19. This is the spirit of Rule 41(3) of the Probate and Administration Rules which provides as follows:-

“Where a question arises as to identify, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant... by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules ...”
20. In any event, even if the applicants have a case in terms of their being a customary trust in their favour the same cannot be proved in proceedings conducted by way of written submissions. The nature of a trust cannot be proved otherwise than in a full trial where parties give oral evidence, are cross-examined and provide documentary evidence if any.
21. In view of everything that I have said above, I have come to the conclusion that the application dated 17<sup>th</sup> April 2012 is wholly without merit. I hereby dismiss the same and award costs thereof to the respondents.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JANUARY 2015.**

**W. MUSYOKA**

**JUDGE**

