



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 549 OF 2012

(IN THE MATTER OF THE ESTATE OF NGAARA GATHURI alias NGARA GATHURI)

KIAMA GATHURI NGARA.....1ST PETITIONER

KAROKI GATHURI.....2ND PETITIONER

VERSUS

TERESA WANGUI NGARA.....OBJECTOR/APPLICANT

JUDGMENT

Ngaara Gathuri alias Ngara Gathuri (deceased) died on 11th August, 2007; he was survived by his wife the applicant herein and his brothers named in this cause as the petitioners.

Upon the deceased's demise, the petitioners lodged a petition for grant of letters of administration intestate in respect of the deceased's estate. In the affidavit in support of the petition, they listed themselves as the only survivors of the deceased. In the same affidavit, they listed land parcels numbers **Gikondi/Kiirungi/1027 and 1028** as the assets comprising the deceased's estate; indeed certificates of official search filed alongside the petition indicate that the deceased was the registered proprietor of these parcels of land.

On 23rd August, 2012, letters of administration of the deceased's estate were granted to the petitioners and on 25th February, 2012, they applied for confirmation of the grant. It is worth noting that in the affidavit in support of the summons for confirmation of grant, the petitioners listed the applicant as one of the beneficiaries and in their distribution of the deceased's estate they proposed to give her an acre of land out of the deceased's parcel number **Gikondi/Kiirungi/1029**.

By a summons for revocation or annulment of grant filed under **section 76(a), (b) and (c)** of the **Law of Succession Act** and **rule 44** of the **Probate and Administration Rules**, the applicant has sought to have the grant revoked or annulled on the ground that neither herself nor the deceased's children were included in the succession cause; in particular, she has sought to have the grant impugned on the grounds that:-

1. The proceedings to obtain the grant were defective in substance;
2. The grant was made fraudulently by the making of a false statement or by the concealment from the court of something material to the case; and,
3. 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.

In the affidavit in support of the summons, the applicant deposed that she only came to know of the succession cause in respect of her husband's estate when the petitioners asked her to sign a consent, apparently, for confirmation of grant. She contended that as the deceased's widow she ought to have been involved in the succession cause together with the deceased's children from the beginning and to the extent that they were omitted, the petitioners misled the court into believing that they were the only survivors of the deceased.

The petitioners responded to the applicant's summons by way of a replying affidavit in which they conceded that indeed the applicant is the deceased's wife and that before his demise, the deceased and the applicant had five children.

Despite the fact that the petitioners were aware that the deceased was survived by his widow and children they deliberately omitted them from the succession cause. **Section 66** of the **Law of Succession Act**, confers the court with the discretion on whom to grant letters of administration of an intestate estate; however, that provision of law also gives a general guide of the order of preference of persons entitled to the grant implying that the court may only depart from this general guide for a specific reason or reasons. The section states:-

66. 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 estate shall be granted to any executor or executors who prove the will.

As the surviving spouse, the applicant ranked prior to the petitioners in the order of preference of persons to whom the grant of letters of administration in respect of the deceased's estate could possibly be made. When the petitioners petitioned for these letters without any reference to the applicant or the deceased's children they apparently disregarded this order and having chosen that course they were bound by **rule 7(7)** of the **Probate and Administration Rules** which enjoined them to table in court all the information necessary to enable the court exercise its discretion on whether or not they were entitled to the letters of administration of the deceased's intestate estate. That rule provides as follows:-

(7) Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has -

(a) renounced his right generally to apply for a grant; or

(b) consented in writing to the making of the grant to the applicant; or

(c) been issued with a citation calling upon him either to renounce such right or to apply for a grant.

There is no evidence that the applicant or any of her children renounced their right to apply for the grant of letters of administration; there is also no evidence that any of them consented in writing to the making of the grant to the respondents; neither is there any evidence that the applicant or her children were cited by the respondents calling upon them to apply for the grant or to renounce that right.

Apart from flouting **section 66** of the **Act** and **rule 7(7)** of the **Probate and Administration Rules**, it appears that the respondents also contravened **section 51. (1) (g)** of the **Act** and **rule 7 (1)** of the same **Probate and Administration Rules** which require of an applicant for letters of administration to, *inter alia*, indicate in his petition the particulars regarding the marital status and the description of the surviving spouse and children of the deceased. As noted, the petitioners suppressed this information from the court and by so doing they could probably have committed an offence under **section 52** of the Act which criminalises the making of wilful or reckless statements that are false in material particular whenever one is seeking for grant of letters of administration.

The petitioners' flagrant breach of the law has, no doubt, tainted the grant they obtained from court. For purposes of determination of the applicant's summons, I am persuaded that she has established the grounds upon which this grant can be revoked or annulled. It is evident that the proceedings out of which the grant was obtained were defective in substance; that the grant was obtained fraudulently by the making of a false statement or by concealment from the court of something material to the case and finally, the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant. I would accordingly allow the summons dated 20th February, 2014 and annul the grant of letters of administration intestate made to the petitioners on 23rd August, 2012. I will make no order as to costs.

Signed, dated and delivered in open court this 13th February, 2015

Ngaah Jairus

JUDGE