



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

P. & A CAUSE NO.41 OF 2006

IN THE MATTER OF THE ESTATE OF THE LATE JOHANA KAMAU MWATHI

WANJUKI KAMAU OBJECTOR/APPLICANT

VERSUS

LUCIA WANGESHI KMAU

NAOMI WAITHERA KAMAU PETITIONERS/RESPONDENTS

R U L I N G

1. The application at hand is the one dated 3rd December 2012 by **Wanjiku Kamau** (herein: Objector/ applicant) for the revocation and / or annulment of the grant of letters of administration Intestate issued on 16th November 2006 to the respondents / petitioners, **Lucia Wangeshi Kamau** and **Naomi Waithera Kamau**, respecting the estate of the late Johana Kamau Mwathi, the said grant was confirmed on the 6th July 2009.
2. The applicant also seeks orders that the objector be made a co-administratrix and be declared a beneficiary to the estate and that a temporary injunction be issued to restrain any transaction or interference with part of the estate. The grounds for the application are essentially that the grant was obtained fraudulently by concealment of the existence of the true beneficiaries and Dependants of the estate, the consent to the making of the grant was not obtained from all bona-fide beneficiaries, that the proceedings to obtain the grant and confirmation thereof are defective in substance and a nullity, that the grant was obtained by concealment of material facts, that, the objector is a legal wife to the deceased hence a dependent to the estate and that the petitioners want to disinherit the applicant from the estate.
3. The foregoing grounds are fortified by the objectors averments contained in the supporting affidavit dated 3rd December, 2012 and a further supporting affidavit dated 23rd February 2015.

The petitioners / respondents are opposed to the application on the basis of the facts contained in their respective replying affidavits dated 16th February 2015 and 27th February 2015 as well as 14 April 2013. There are other applications more or less similar to the present one pending for hearing and determination. It was however, directed by this court that the present application be heard in priority to all the others and by way of written submissions. Consequently, the objector filed her written submissions on 19th May 2014 through the firm of **Sargo & Ngetich, Advocates** and the respondents filed theirs on 16th February 2015 through the firm of **Barongo Ombasa & co. Advocates**. There was an attempt by the firm of **Mwangi Mukira & Co. Advocates**, to take over from the firm of **Barongo Ombasa & Co. Advocates** and act for the respondents. In that regard a notice of change of advocates was purportedly filed on 8th June 2015. However, the said firm of

Mwangi Mukira & Co. Advocates did not participate in this application.

4. Be that as it may, revocation and / or annulment of grant is provided for under **S.76 of the Law of Succession Act (Cap 160 LOK)**. Thus, a grant whether or not confirmed may at any time be revoked or annulled if, the proceedings to obtain it were defective in substance or 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 it 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 etc. Herein, it is alleged by the applicant that the grant was obtained fraudulently by concealing the existence of the beneficiaries and dependents of the estate and in particular the applicant who is a widow of the deceased and hence, a beneficiary of the estate. In that regard, it is contended that the grant was secretly obtained without the knowledge or consent of the applicant.
5. The applicant also contends that she was among the lawful and true beneficiaries of the estate by virtue of being the first widow and should therefore have been made one of the administratrixes of the estate yet she learnt about the petition for the grant from land surveyors who made an attempt to sub-divide land parcel **No.6628/3 Cherangani (Mwago Farm)**. She further contends that the consent to the making of a grant to persons of equal or lesser priority was not obtained from her as a bona-fide beneficiary / dependent and that the aim of the respondents was to disinherit her.
6. The Applicant averred and indicated that the deceased was survived by two wives (i.e herself and the first respondent) and several children. She belonged to the first house being the first widow and has seven (7) children including the second respondent who is her first daughter among her three daughters. The remaining four children are her sons. She averred that the first respondent being the second widow belonged to the second house consisting of herself and nine (9) children, i.e three sons and six daughters. It is therefore her contention that the petitioners did not disclose all the true beneficiaries and / or dependants and failed to act in good faith by not giving a full and true inventory of the beneficiaries of the estate thereby rendering their obtaining of the grant and confirmation thereof fraudulent. A list of heirs from the chief marked (exhibit . RW 3) was relied upon by the applicant.
7. In response to the foregoing, the first respondent averred and confirmed that she is the second wife of the deceased who was polygamous and therefore his estate was in the first instance distributed equally among his two houses. She (first respondent) admitted that the applicant is the deceased's first wife but they separated in 1971 up-to the time of the death of the deceased. The first respondent averred that the applicant left her matrimonial home leaving behind her three children including the first respondent; a daughter called Esther Njoki Kamau and a son called Paul Mwachu Kamau, who were taken up by herself (first respondent). She said that she learnt from the deceased that the applicant was married elsewhere and had children with another man. She indicated that the second house has no dispute and that her status as an administrator would remain. She contends that the dispute relates to the first house and indicated that part of the estate has already been transferred to beneficiaries and in particular parcels **No.61/56 Kitale Municipality, No.105 Nyakinyua , No.205 Cherangany/Kapsara , No.703 Stadium Flats and Wamuini Farm**. She said that the Land Naivasha Maraigishu 8/424 could not be traced and that the property which have not been transferred include **No.6628/3 Cherangany (Mwago Farm)** and **No. Block 116/301 Nairobi**.
8. The first respondent is of the view that given the current status of the estate and having in mind that a large part thereof has been transferred to third parties, the confirmed grant may be rectified to reflect the applicant's eleven (11) acres of the Mwago Farm and ¼ acre in Nairobi.

On her part, the second respondent admits that the applicant is her mother who walked out of her marriage with the deceased and married another person at Bura with who she bore four (4) children. She (second respondent) averred that the applicant left in 1971 when she was eight years old while her sister Esther was seven years old and her brother Paul was two years old. That, she

knew that the first respondent was all along her mother and not the applicant whom she and her siblings came to know as their mother when she re-appeared in 2006 after the death of the deceased and after being away for thirty five (35) years.

9. It is the second respondent's contention that the four children begotten by the applicant while she was away did not belong to the deceased and were not dependents to the estate. That, the applicant relinquished her rights or shares in the estate when she married someone else but out of compassion as a biological mother to the second respondent she was given eleven (11) acres of the Mwago farm. That, the applicant was aware of this succession cause and often attended court even during the confirmation of the grant. That, because she (applicant) had relinquished her rights she did not raise any objection from the initial stage and therefore the present objection is an after thought and is being pressurized by persons interested in the estate.

The second respondent further contends that the applicant is not suitable for appointment as an administrator and has brought this application because she is forcefully ploughing Mwago farm and erecting structures therein to the exclusion of other beneficiaries.

10. With regard to the list by the chief (Annexure – RW 3), the second respondent averred that it is contradictory and was drawn after the confirmation of grant. That, the same chief wrote the first letter (list) which contains contrary information. The said first letter was produced as annexure marked ' *NNK 2*'

It is the second respondent's contention that the present application is an abuse of the court process. That, part of the estate has already been transferred to beneficiaries and purchasers (*see, titles marked "MWK 3*) and as of now only the Mwago Farm and land No.205 Kapsara Cherengany remain un- transferred.

11. What may be discerned from the applicant's averments and contentions is that the grant was obtained by the petitioners without her involvement as the first widow of the deceased and without necessary disclosure of all bona-fide beneficiaries and / or dependents. As a result, the entire process of obtaining the grant and having it confirmed was laced with fraud and / or concealment of material facts and therefore defective and unlawful in substance. Indeed, there is no dispute that the applicant was the first wife of the deceased and is in fact the biological mother of the second respondent. She was therefore the first in priority with regard to petitioning for the grant along with the first respondent who was the second widow and who has stated herein that the present dispute does not involve the second house of the deceased but the first house. However, in as much as the present application seeks to have the grant and the confirmation thereof revoked, the second house is also in this dispute-hook, line and sinker as it would be adversely affected if the application is granted.

12. It was incumbent upon the applicant to prove and establish by necessary evidence that the petitioners acted fraudulently in obtaining the grant and that they concealed from the court material facts while doing so. The applicant implied that the fraud was reflected in the petitioners failure to seek her consent and involve her in the petition for the grant and its subsequent confirmation, a claim which was denied by the respondents who contended that the applicant was fully involved in the whole process and initially found no reason to raise any objection having relinquished her rights in the estate of the deceased when she separated from the deceased and became a wife to another man for a period of thirty-five (35) years but was nonetheless given a portion of the estate by the respondents out of compassion.

The affidavit in support of the petition for letters of administration intestate dated 10th February, 2006, indicated that the deceased was survived by a widow, Lucia Wangeshi Kamau (first respondent). It does not mention the applicant as a first widow. The affidavit also indicates that the petitioner was presented by the first respondent and one Gideon Gakirio Kamau, in their capacity as widow and son of the deceased. It shows that the deceased was survived by one widow and thirteen (13) children some of whom were deceased. Among the children was the second

respondent. A Gazette Notice No.1712 in respect of the petition was issued on **14th February 2006** but on the **10th April 2006**, the applicant filed a notice of objection to making of a grant and a petition by way of cross application for grant.

14.The filing of the notice of objection and the cross petition was an indication that the applicant was aware of the application for grant and was opposed to it in the absence of her inclusion as the first widow. However, the objection appears to have been abandoned when the parties agreed on the **16th November 2006**, to have the grant issued in the names of the first and second respondent. Indeed, the grant was accordingly issued on **16th November 2006** and on the **6th July 2009**, a certificate of confirmation of the grant was issued.

The consent to have the grant issued in the names of the two respondents was a confirmation that the applicant consented to the necessary application and the alteration of the original second petitioner i.e. **Gideon Gakario Kamau**, who was replaced by the second respondent herein. However, with regard to the confirmation of the grant there was no consent of the applicant neither was she provided for in the distribution of the only immovable property availed for distribution i.e. Land Parcel No. Kitale Municipality No. 5616. The rest of the immovable property listed in the affidavit in support of the petition dated 10th February 2006 were not availed for distribution. However, these were later included in the amended certificate of confirmation issued on 7th July 2009 or thereabout.

15.Again, there was no consent from the applicant for the amended confirmation of grant, neither was she provided for in the ensuing distribution of the estate. It is therefore evident that whereas the applicant had the knowledge of the issuance of the grant to the two respondents and indeed gave her approval in respect thereof, she never gave her consent of approval for confirmation of the grant hence distribution of the estate. She was clearly left out in the confirmation and distribution thereby rendering the entire process of confirmation of the grant and distribution of the estate defective in substance due to her exclusion from the benefits of the estate but not necessarily fraudulent. But, if she had indeed relinquished her interest in the estate she couldnot claim anything from it. It was for the respondents to establish that there was relinquishment of rights by the applicant when she left the matrimonial home for more than thirty (30 years and found refuge in another independent matrimonial home where she allegedly gave birth to additional children who did not belong to the deceased and hence, not beneficiaries or dependents of the estate.

16.The reason given by the respondents and in particular the second respondent for the alleged relinquishment of rights to the estate by the applicant is that she separated from the deceased for a very long time and got married to another man who gave her additional children. That, she no longer depended on the deceased and did not assist him nor contribute in acquiring of property when they were together save the Mwago Farm. That, she only returned to her first matrimonial home after the death of the deceased. All these allegations were however, denied by the applicant with contention that there is no legal decree of divorce and or separation between herself and the deceased and therefore she remains a legal wife of the deceased entitled to inherit his property as the widow and member of the first house of he deceased along with the second respondent and her (**applicant's**) children who were born after she left the deceased's matrimonial home due to marital problems associated with the deceased's alleged violent disposition and relationship with the first respondent who was their farm hand but later became a second wife to the deceased.

17.Apparently, it was after realizing that she had been omitted from the distribution of the estate of the deceased together with four (4) of her children that she raised the present objection which was preceded by another application of a similar nature dated 30th March 2011, which was withdrawn on 3rd December 2012, when the present application was filed.

The applicant also filed a notice of motion dated **3rd April 2013** for temporary injunction orders to restrain the respondent from dealing or inter-meddling in one way or the other with some of the estate property. Interim orders were granted in that regard on the **8th April 2013** and remain

in place to this day. Another application for the revocation of the grant and for temporary injunction was also filed by the applicant on the **26th November 2013** and is pending hearing and determination. This later application dated 26th November 2013, is a clear abuse of the court process by the applicant in view of the present application. It cannot therefore be held in abeyance and is hereby dismissed in the exercise of this court power under **S.73 of the Probate & Administration Rules**.

18. Yet, another application for revocation of the grant dated and filed on 30th December 2013, was made by one, **Lilian Wamboi Mbugua**, on grounds that she and others were excluded as beneficiaries of the estate. She claims that they purchased part of the estate property from the deceased and therefore had an interest in the estate. The application is pending but its ultimate fate may be determined by the outcome of this ruling.

Be that as it may, it is evident and undisputed that the applicant was indeed the first wife of the deceased with whom they had several children. It is also evident that the applicant and the deceased lived separately from 1971. she left the deceased's matrimonial home and settled elsewhere due to what was said to be marital problems. She left behind some children but went on to give birth to additional children while away from the deceased matrimonial home. Whether or not the later children were sired by the deceased is a contested matter although the applicant insisted that she had a total of **nine (9)** children with the deceased while in and out of his matrimonial home.

19.The contention by the respondents is that the applicant left the deceased's matrimonial home in 1971 and was married by another man. They (respondents) insisted that the applicant was divorced by or legally separated from the deceased during his lifetime and therefore has no rights whatsoever to his estate. However, the applicant indicated that after leaving the matrimonial home in 1971, she decided to live with her mother at Kapcherop from where she purchased a parcel of land at Sirende where she currently resides with her other children. She contended that the deceased visited her at Sirende and she visited him at Mwago Farm.

In effect, the applicant implies that she was never divorced by the deceased even though they lived separately. She also implies that they continued cohabiting while separated and this resulted in them having additional children. She further implied that she did not get married to any other man after 1971.

20.1n order to rebut or discredit the contentions by the applicant that the deceased and her never divorced or legally separated, necessary evidence by way of a legal decree of divorce or separation was required from the respondents. This was not availed neither was there any tangible evidence to prove that the alleged divorce was effected under the customary law applicable to both the applicant and the deceased given that their marriage was seemingly in accordance with their customary law.

This court must therefore hold that the applicant was the first wife to the deceased although they lived separately for a long period of time. Living separately did not mean that the parties were divorced unless there is evidence to show that they did so either under statute or customary law or it is shown that the applicant subsequently married another person. There was herein no evidence availed by the respondents proving that the applicant married another man after she separated from the deceased in 1971.

21.It was clear from the foregoing that the allegation that the applicant relinquished her rights to the estate of deceased was not founded on any evidence and must therefore be treated as falsehood or a rumour. She is entitled to the estate of the deceased as a beneficiary and ought not have been excluded from the process of confirming the grant and distribution of the estate. In the absence of the deceased, she was the **"de-facto"** head of his first house consisting of herself and several children.

A divorced wife for purposes of Succession would have no rights to the estate of a deceased person as opposed to a legally or judicially separated wife. Herein, the separation of the deceased and the applicant cannot be said to have been a legal separation. In any event, there was proof or there was no doubt that their marriage was valid. The applicant by being a wife to the deceased did not have to prove that she was dependent on the deceased immediately before his death by dint of S. 29(a) of the Succession Act which provides that “dependent” means the wife or wives or former wife or wives and the children of the deceased, Under S. 3(1) of the Act, wife includes a wife who is separated from her husband.

22. With regard to the alleged concealment of material facts by the respondents in obtaining the material grant, the applicant claims that the respondents excluded four (4) of her children as beneficiaries of the estate. She named the children as **Daniel Nganga Kamau, Samuel Gitara Kamau, Peter Kamakia Kamau and Anna Wambui Kamau**. She contended that these children are entitled to the benefits of the estate as they belonged to the deceased and were born after she had left her matrimonial home leaving behind other children including the second respondent, **Esther Njoki and Paul Mwathi Kamau**. She implied that the last four of her children were sired by the deceased on the occasions when they visited each other after she left the matrimonial home. She essentially contends that the respondents concealed the existence of her last four children with the deceased with a view to disinherit them from the estate of the deceased. The respondents vehemently denied the contention by implying that those children were born of other men or man and were not dependents to the estate of the deceased who was not even aware of their existence.
23. The respondents contended that the naming of the said children was completely incompatible with the naming of children under the **Kikuyu Customary Laws** thereby indicating that the children did not belong to the deceased and are therefore not entitled to benefit from his estate. Since it was the applicant's allegation that her last four children are children of the deceased, it was incumbent upon her to establish the fact by necessary evidence. It was not the respondent's obligation to establish the paternity of the children. The applicant was thus expected to provide credible and cogent evidence to prove that her last four children were indeed sired by the deceased. In that regard, a letter from a chief dated **21st March 2011** was exhibited herein (**Annexure marked RW3**) purporting to show that the applicant's last four children belonged to the deceased and were part of his first house. The letter has no probative value and in as much as it is in contradiction with another letter dated **10th February 2006**, from the same chief (**annexure marked “NWK 2”**), the letter is devoid of any credibility.
24. Four birth certificates were exhibited by the applicant to prove the paternity of her last four children (see, Annexures marked “WK1 a -d”). these were supplemented by four identification documents belonging to the said children (see Annexures marked “WK 2 a-d”). such document may on a balance of probabilities establish that the deceased was indeed the father of the said children by virtue of the fact that he was reflected therein as the father. However, the documents cannot be absolute evidence in establishing paternity especially if there is suspicion that the documents may not be genuine or were obtained from the relevant authorities by concealment of material facts.

A careful perusal of the birth certificates (Annexures “WK 1 – a-d”) indicates that they were all obtained on different dates in the month April, 2013, after the commencement of this application thereby implying that they were so obtained for purpose of this cause and to lend credence to the applicant's allegation that her last four children are children of the deceased and nobody else. The I/D Cards were issued in the years 2001, 2005 and 2008 yet they could not have been issued without birth certificates meaning that they are suspect along with the birth certificates. Consequently, the said documents cannot herein be treated as proper and credible evidence in establishing the paternity of the applicant's last four children: Further, if the child Daniel Nganga was born in 1971 why does his birth certificate reflect 1974??.

25. What should have been done to clear the paternity issue regarding the applicant's last four children was the taking of a DNA test which was not done in this matter and was never requested for by the

applicant. It may therefore be safely stated that the applicant has failed to prove that her last four children were sired by the deceased. She has also failed to prove that the children depended on the deceased. Consequently, they cannot be regarded or treated as beneficiaries or dependents of the estate of the deceased. Their mother's benefits in the estates is what they are entitled to and nothing more. It would therefore follow that the respondents did not conceal material facts when they failed to include the subject children as beneficiaries or dependents of the estate of the deceased.

26. Considering all that has been stated herein-above, it would be fair and just for this court to grant orders to the effect that the grant issued to the respondents on 16th November 2006 was proper and remain intact. However, the certificate of confirmation of grant issued on 6th July 2009 was not proper as its issuance was effected without the involvement and consent of the applicant. Consequently, this application succeeds only to the extent that the certificate of confirmation of grant be and is hereby revoked to pave way for a new certificate after necessary agreements between the beneficiaries and / or dependents and / or interested parties on the mode of distribution of the estate of the deceased with great emphasize on all immovable property some of which may have been disposed off-by the deceased in his life time. Since the deceased was acknowledged as having been a polygamous man, the estate ought to be divided between his two houses in accordance with the Kikuyu Customary Law or S.40 of the Law of Succession Act.

Ordered Accordingly.

J. R. KARANJA

JUDGE

Read & signed this 25th day of June 2015.

In the presence of M/S Arunga holding brief for Barongo for Petitioner

and M/S Munialo holding brief for Isiaho for Objector/ applicant and M/s Rono for 1st Petitioner.