



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
SUCCESSION CAUSE NO. 208 OF 2014
IN MATTER OF THE ESTATE OF THE LATE MOSES MUTA GATHENDU(DECEASED)

PETER MBUGUA WANGAI..... APPLICANT

VERSUS

ESTHER WANGUI WANGAIRESPONDENT

RULING

1. The Applicant, Josephat Gathendu Muta, filed a Summons for Rectification of Grant herein. It is brought pursuant to **Section 74** of the **Law of Succession Act** and **Rule 43 & 73** of the **Probate and Administration Rules** and the inherent powers of the court. The Applicant prayed for the following Orders:

- a) Spent
- b) Spent
- c) THAT pending the *interpartes* hearing and determination of this summons, the honourable court be pleased to restrain the respondent/administrator herein either by herself, her recognized agents and or servants from intermeddling, wasting, transferring disposing or interfering with all that parcel of land known as L/R NO.LAIKIPIA/LARIAK/169.
- d) THAT pending hearing and determination of this cause the Honourable court be pleased to restrain the respondent herein either by herself, her recognised agents and or servants from intermeddling, wasting, transferring, disposing or interfering with all that parcel of land known as L.R. LAIKIPIA/LARIAK/169.
- e) THAT the grant of letters of administration issued to the respondent herein on 14/9/2014 be rectified and the applicant be enjoined as a co-administrator herein together with the respondent as per the court orders of 3/7/2014.
- f) THAT this honourable court be pleased to issue any other and or further directions or orders in the interest of justice.

2. The application is for a restraining order and the rectification of the grant and is based on the grounds found on the face of the application and an undated supporting affidavit and a Further Affidavit

sworn on the 24.04.2015 by the Applicants

3. The applicant states that by an Order dated the 3.7.2014 the Honourable Omondi J. ordered that the applicant and the respondent do jointly petition for letters of administration to the estate of the deceased.
4. In blatant breach of the order the respondent proceeded to petition for the said Letters and utilized an altered and falsified document to wit Form P&A.38 wherein the applicant is purported to have consented to the respondent being the sole administrator.
5. The applicant states that he did not sign the purported consent Form and further states that the Form is dated the 16.05.2014 whereas the Order of the Honourable Judge is dated 3.07.2014 therefore the Grant is irregular as it is against the express order of the court.
6. The applicant prays that the Grant herein be rectified and that he be enjoined as a co-administrator pursuant to the order of the court.
7. The application was opposed by the respondent and she relied on her replying affidavit and Supplementary Affidavit both made on the 16th February, 2015.
8. The respondent avers that the allegations made by the applicant are not true and she is opposed to the rectification of the Grant to include the applicant as a co-administrator. Her fears are that the applicant's intentions as a co-administrator are to frustrate distribution of the estate and to perpetrate his illegal possession and occupation of the estate.

ISSUES FOR DETERMINATION

- i) The admissibility of an undated and unsigned Supporting Affidavit.
- ii) Whether the orders for restraint and rectification are merited;

ANALYSIS

9. On the first issue, this court has perused the main application which bears the court's stamp of 19th January, 2015 and I have noted that the applicant is very particular on dates and signatures and this forms the basis of his application as against the respondent but the interesting issue that the court has noted, *suo moto*, is that his application is short and wanting on the same as it is undated.
10. Further a supporting affidavit must always accompany an application as it contains evidence and that it must also be signed by the deponent. The applicant's Supporting Affidavit in this case has not been signed by the applicant and neither is the attestation by the commissioner of oaths, dated.
11. **Section 5 of the Oaths and Statutory Declaration Act Cap. 15** reads as follows;

“Every Commissioner for Oaths before whom any oath or affidavit is taken or made....shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.....”
12. The place where the affidavit was made is sworn and made is shown as Nakuru and the Commissioner is Nancy Njoroge but the attestation bears no date.
13. Further the Supporting Affidavit bears no signature of the deponent. The legal effect is that the affidavit is not in conformity with the provisions of **Section 5 of the Oaths & Declarations Act**. The applicant has therefore not made any statement or declaration under oath that can support his application.
14. If the omission had only been the lack of a date on the main application this court would have invoked the provisions of **Article 159 (2) (d) of the Constitution** and would have exercised its discretion

by disregarding this omission and I would have indeed proceeded to determine the application on its merits. But the absence or omission of the applicant's signature on the supporting affidavit shows that there is no ownership of the affidavit and that the application is unsupported by any affidavit evidence particularly on the issue of the applicants signature appended on P & A Form 38 which signature he denies as being his.

15. It is this court's considered view that the application is incompetent as it is undated and further the failure by the Applicant to append his signature on the Supporting Affidavit and the omission to indicate the date of swearing renders the affidavit as being incurably and fatally defective and valueless and it cannot qualify to be called an affidavit.

16. The further supporting affidavit which is attested, signed and dated cannot cure the defect as there is no ownership of the first supporting affidavit by the deponent.

17. For the reasons stated above this court is unable to disregard the omission of these substantive procedural requirements and finds the application seeking a restraining order and rectification is defective and incompetent as it is unsupported by any evidence under oath.

9. The application is hereby dismissed.

10. The Respondent shall have costs.

Dated, Signed and Delivered at Nakuru this 26th day of August, 2015.

A. MSHILA

JUDGE