



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 187 OF 1998

IN THE MATTER OF THE ESTATE OF NDETO MUTWIKI (DECEASED)

THERESIA WAYUA NDETO PETITIONER

VERSUS

VERONICAH KALESO MATILU RESPONDENT

RULING

The Petitioner herein filed an application by way of Summons dated 21st July 2014, seeking orders that the summons for confirmation of grant dated 20th June 2013 filed on behalf of the Respondent be struck out with costs. Further, that the Petitioner as the holder of the temporary grant herein be at liberty to file summons for confirmation of temporary grant issued to her on 3rd September 1999. Lastly, that preservative orders do issue restraining the Respondent from intermeddling in any manner whatsoever with the estate of the deceased.

The main ground for the application is that the Respondent is not the petitioner nor administrator of the deceased's estate, and is not entitled to file summons for confirmation of grant. The Petitioner in a supporting affidavit sworn on 21st July 2014 stated that she is the widow of the deceased Ndeto Mutwika, and that a temporary grant to the estate of the deceased was issued to her on 3/9/1999 as administrator. Further, that she was informed that the Respondent, who is not in any way related to the deceased, had on 18/10/2013 filed a summons dated 20/6/2013 for confirmation of the grant which had been issued to the Petitioner on 3/9/1999, purporting to be the Petitioner and the beneficiary of that grant, an allegation which is false. The Petitioner claims that Respondent is a pretender, stranger, usurper and intermeddler in this cause, and is not entitled to seek confirmation of the grant.

The Petitioner's Advocates, Mwanja Mbithi & Company Advocates filed submissions dated 12th October 2014, wherein it was reiterated that the Petitioner filed the petition in this cause on 16/9/1998 as the widow of the deceased, Ndeto Mutwika, and she was duly issued with the temporary Grant of Letters of Administration intestate dated 3/9/1999, pending confirmation after 6 months. Further, that the applicant is the sole petitioner and administrator named in the Temporary grant, which has not yet been confirmed.

However, that the Respondent filed a purported summons dated 20/6/2015 for confirmation of the very same grant issued to the Petitioner, in which she wrongfully purports that the grant issued on 3/9/1999 was issued to herself, and urged the court to confirm the grant in her names. Further, that she attached a copy of the grant dated 3/9/1999 which clearly showed that it was issued to the Petitioner.

It was submitted that the Respondent cannot agitate any claim on behalf of the deceased in the absence of Letters of Administration, and she has no competent capacity to seek confirmation of the grant in this

cause, or claim any interest in the estate.

Lastly, it was submitted that the Petitioner's application dated 21/7/2014 is unopposed, and that the Respondent is duly represented by counsel who on 19/11/2014 applied for, and was given leave to file a replying affidavit within 7 days and also ordered to pay the Petitioner/applicant's costs assessed at Kshs.3,500/= before the next hearing date. However that there has been no compliance of both orders to-date. Further, that the matter was by consent listed for hearing on 7/10/2015 and Respondent and her counsel were not in court.

The Respondent did not file any response to the Petitioner's summons and submissions.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the Petitioner. The issue to be decided is whether the Respondent's summons for confirmation of grant is properly on record. The process for confirmation of grants is provided for in section 71(1) and (2) of the Law of Succession Act where it is provided as follows:

“(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may-

(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or

(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 inclusive, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or

(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or

(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.”

A more detailed procedure is provided for in Rules 40 and 41 of the Probate and Administration Rules. It is evident from the said provisions that it is the holder of a grant of representation who can make an application for confirmation, and it is only where a court is satisfied that the grant was not rightly made that it may issue a confirmation of grant to any other person entitled to be issued a grant under sections 55 to 66 of the Act.

In the present application, no irregularity has been alleged in the issue of the grant of letters of administration to the Petitioner, who is the widow of the deceased Ndeto Mutwika, and has first priority to the grant under section 66 of the Law of Succession Act. I have also read the summons by the Respondent dated 20th June 2013 and her affidavit in support thereof sworn on 18th October 2013, and note that she claims that her deceased husband one Richard Matilu Malei bought a part of plot Ukia/Utaati/751 from the Petitioner, and died before the property was transferred in his name. She has not

annexed any grant allowing her to bring a cause on behalf of the estate of Richard Matilu Malei, her deceased husband, neither has she annexed the grant she claims to have been issued to her on 9th September 1999 with respect to the estate of Ndeto Mutwika.

In addition the Respondent does not qualify to be one of the persons entitled to a grant under section 66 of the Law of Succession Act, as it has not been shown that she or her deceased husband Richard Matilu Malei were creditors of estate of Ndeto Mutwika . The Respondent in this respect alleges that her deceased husband dealt with the Petitioner. If indeed any such dealings were entered into with the Petitioner with respect to property belonging to the deceased Ndeto Mutwika as claimed, any resulting interest is not recognised in law, as the grant to the Petitioner with respect to the said Deceased's estate has not been confirmed.

I therefore strike out the summons for confirmation dated 20th June 2013 and filed in Court on 18th October 2013 for the foregoing reasons, and direct the Petitioner to apply for confirmation of the grant within 30 days of the date hereof. In the meantime the *status quo* to be maintained with respect to the property known as Ukia/Utaati/751 which comprises the estate of Ndeto Mutwika, shall be that there shall be no **further sale, transfer of the said land, and/or further dealings on the same by the Petitioner, Respondent, and/or any other person claiming an interest in the same pending the confirmation of grant.**

The Respondent shall meet the costs of this application.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 25th day of November 2015.

P. NYAMWEYA

JUDGE