



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

HIGH COURT SUCCESSION CAUSE NO. 185 OF 2012

IN THE MATTER OF THE ESTATE OF WANJERI MUTHENDE (DECEASED)

ESTHER MUGURE MWANGI.....APPLICANT

VERSUS

NAFTALLY MWANGI MUTHENDE.....1ST RESPONDENT

ESTHER NYAMBURA MUTHENDE.....2ND RESPONDENT

JUDGMENT

Pursuant to section 51(1) of the Law of Succession Act, Chapter 160 of the Laws of Kenya (hereinafter referred to as “the Act”) and Rule 7 of the Probate and Administration Rules (hereinafter “the Rules”), the Respondents petitioned for grant of letters of administration of the estate of the late Wanjeri Muthende (hereinafter “the deceased”) in the Kangema Senior Resident Magistrate’s Court Succession Cause No. 23 of 2010. The Petition was lodged in court on 23rd February, 2001 and it is apparent from the documents filed together with this petition that the deceased died on 20th October, 2000.

One of the documents that were filed in court in support of the petition was a letter dated 15th February, 2010 from the chief of Gitugi location where the deceased is said to have hailed from. According to this letter, the petitioners who are the respondents herein were introduced respectively as the son and the daughter of the deceased. However, in form P&A. 80 which is one of the forms prescribed in rule 70 of the Rules for making applications for grants the respondents are indicated to have petitioned for the grant in their capacity as the grand children of the deceased. They are also named as the only survivors of the deceased’s estate in form P&A. 5.

The record of the succession cause in the magistrate’s court shows that the grant of the letters of administration was made on 1st September, 2010 and was subsequently confirmed on 27th April, 2011. According to the certificate of confirmation of the grant, the only asset in the estate which is a parcel of land referred to as Loc. 13/Karung’e/ 1674 was transferred to the petitioners as joint owners.

By a summons dated 28th November, 2012, brought to court on 17th December 2012 under Section 76 of the Act and Rule 44(1) of the Rules, the applicant sought to revoke or annul the grant made and issued to the respondents mainly on the ground that the grant was obtained fraudulently by making a false statement or by concealment of facts material to the case.

In the affidavit in support of the summons for revocation or annulment of grant the applicant

disputed the information given by the respondents in their petition for grant of letters of administration. Contrary to the respondents' allegations, the applicant swore that the deceased was survived by one child only; he was called Mwangi Muthende and that the applicant was his lawful wife. Mwangi Muthende is deceased and was so deceased at the time material to the petition.

The respondents, according to the applicant, are son and daughter of one of the applicant's sons named Nicola Muthende who also happened to have died before the petition for the grant of letters of administration was made. The Petitioners were therefore the great grandchildren of the deceased and not his children as described in the letter from the chief.

It is the applicant's position that under section 38 and 39 of the Act she was disinherited; she wants the grant of letters of administration made to the respondents revoked and the title to land parcel No. Loc. 13 / Karunge/ 1674 registered in the name of the respondents cancelled.

In the affidavit sworn by the 2nd respondent on her behalf and on behalf of the 1st respondent in response to the applicant's summons for revocation of the grant, the respondents have admitted that they are the applicant's grandchildren. They, however, contest the allegation that the chief of Gitugi location described them as the deceased's children with the intention of defrauding the applicant; if anything, so they argue, the applicant accompanied them to the chief to collect this letter and had no problem with the description that the chief gave them.

Although the petitioners were described by the chief as the children of the deceased, the petitioners argue that their correct description of their relationship with the deceased was given in form P&A. 5 where, in their view, they are properly described as the grandchildren of the deceased.

On the issue of the distribution of the estate of the deceased between the petitioners, the petitioners contend that they hold the title to land parcel No. Loc. 13 / Karunge/ 1674 in trust for themselves and the rest of the survivors of the deceased including the applicant herein. The petitioners have argued that much as the said Mwangi Muthende was the only child of the deceased, he was not the sole beneficiary to his estate because as the deceased's grandchildren they have a stake in the parcel of land that comprises the estate where they have lived all their life.

When the summons came up for directions on 17th October, 2013 parties agreed that it be disposed of based on the affidavit evidence on record; accordingly, the court directed that the summons dated 28th November, 2012 be determined by way of affidavit evidence and that parties file and exchange written submissions. Indeed, the respective parties complied and filed written submissions in support of their respective positions which they adopted in support of and in opposition to the summons for revocation or annulment of grant.

This court has duly considered the submissions by both counsel for the objector/applicant and the petitioner; they largely reiterate what the parties have deposed upon in their affidavits.

Nothing is said of the deceased's spouse and therefore it is assumed, and indeed both parties are in agreement, that the only survivor to the deceased's estate was his son Mwangi Muthende. Mwangi Muthende was the applicant's husband. The two were blessed with a son, Nicola Muthende who was the respondents' father. The applicant was therefore the respondents' grandmother and the deceased whose estate was the subject of the succession cause was the great grandmother of the respondents. In other words the respondents are the applicant's grandchildren and the deceased's great grandchildren.

Under section 66 of the Act, the court has the final discretion as to the person or persons to whom a grant of letters of administration shall be made taking into account the best interests of all the concerned parties. Subject to this discretion, preference is given first, to the surviving spouse or spouses with or without association of other beneficiaries; second, other beneficiaries entitled on intestacy with priority according to their respective beneficial interests as provided under Part V of the Act; third the public trustee and finally the creditors.

The deceased in this case was not survived by any spouse but his son who unfortunately also passed away and left behind his wife, the applicant herein and grandchildren, the respondents herein. Under Part V of the Act, more particularly section 38 thereof, the deceased's estate ought to have devolved upon his surviving child and on his demise, upon his spouse. Section 38 states;

38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.

Under this provision, the applicant's interest ranked prior to any other interest in the devolution of the deceased's estate and therefore subject to the court's discretion, she was the most preferred person upon whom the grant of letters of administration of that estate should have been made.

Rule 7(7) of the Probate and Administration Rules sheds more light on this issue. That rule says:

(7) Where a person who is not a person in the order of preference set out in section 66 of the Act seeks 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 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 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.*

In their petition, the respondents did not even acknowledge the applicant's existence though they admit that the applicant is the deceased's daughter in law and that she was the wife of the deceased's only survivor. They instead presented themselves as the only survivors of the deceased and therefore the sole beneficiaries of his estate. By suppressing the fact of the existence of the applicant; and without demonstrating that the applicant had either renounced her right to apply for grant or had consented to the making of the grant to the respondents; or that the respondents had cited the applicant calling upon her to renounce her right or to apply for the grant, the respondents denied the court the material upon which it could exercise its discretion on whom to make the grant of letters of administration.

When the petitioners deliberately failed to disclose facts material to the petition, they thereby flouted sections 38, 51 and 66 of the Act as read with rule 7(7) of the Probate and Administration Rules. Such material non-disclosure and breach of the very provisions of the law upon which the petition ought to have been made constitute a basis upon which the resultant grant will be revoked or annulled. This is apparent from section 76 (b) and (c) of the Act.

This section provides:-

76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

- a. ...*
- b. that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;*
- d. that the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.*

e.

The grant which the petitioners obtained is blemished with these deficiencies and cannot be allowed to stand; accordingly, this courts orders as follows:-

- 1. Pursuant to section 76 of the Act cited hereinabove, the grant of letters of administration made to the respondents in respect of the estate of Wanjeri Muthende on 1st September, 2010 is hereby revoked.**
- 2. In the absence of any valid grant upon which the estate of the late Wanjeri Muthende could be administered and distributed the registration of the transfer of the parcel of land known as LOC. 13/KARUNGE/1674 and the title obtained thereby in the names of the respondents are hereby cancelled.**
- 3. For completeness of record and pursuant to this court's powers under section 66 of the Act as read with Rule 73 of the Probate and Administration Rules, the grant of letters of administration of the estate of the late Wanjeri Muthende is hereby made to the applicant and the respondents jointly.**
- 4. The summons for revocation of grant dated 28th November, 2012 is allowed in terms of the foregoing orders save that parties shall bear their own costs.**

Dated, signed and delivered in open court this 31st day of January, 2014

Ngaah Jairus

JUDGE