



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 1094 OF 2007

IN THE ESTATE OF SERAH NJERI GATHU (DECEASED)

RULING

1. This matter commenced by way of citation dated 2nd May 2007, issued at the instance of Miriam Gathoni Gathu, addressed to Teresia Nyambura Gathu, the co-wife of the deceased, Serah Njeri Gathu. The citee entered appearance but did not accept or refuse to petition for grant of letters of administration intestate.
2. On 4th July 2007, Miriam Njeri Gathu the citor, petitioned for grant of letters of administration. In her petition she described herself as a step-daughter of the deceased listed herself as the sole survivor of the deceased. The deceased was described as having died possessed of a property known as Limuru/Bibirioni/1221.
3. Filed together with the petition is a letter from the Chief of Limuru Location, dated 5th September 2006. According to the Chief, the deceased had been predeceased by her husband. She did not have a child or children of her own and was survived by Teresiah Nyambura Gathu, her co-wife, four step daughters (who include the petitioner herein, Miriam Gathoni Kimani) and step sons. The petitioner filed a supplementary affidavit on 2nd August 2007, sworn on 24th July 2007, along the same lines.
4. A grant of letters of administration intestate was made to Miriam Gathoni Gathu on 11th October 2007. The said grant was confirmed on 1st July 2008. According to the certificate of confirmation dated 18th July 2008, 0.85 acres of Limuru/Bibirioni/1221 were devolved wholly upon the said Miriam Gathoni Gathu; being the deceased's inheritance from the estate of her deceased husband, Gathu Thairu as awarded to her in **Nairobi High Court Succession Cause No. 676 of 1989**.
5. The said confirmation orders prompted the filing of the 9th September 2008 of the summons dated 9th September 2008, seeking the review or setting aside of the confirmation of the grant. The said application was however withdrawn on 12th November 2008 at the instance of the applicant.
6. Shortly thereafter the applicant in the withdrawn application filed a summons for revocation of grant, on 16th September 2008, dated 16th September 2008. The application was premised on the ground that the petitioner had made a false statement that the applicant as a co-wife of the deceased was not entitled in priority to the petitioner to apply for representation of the estate of the

deceased and to a share in the estate. Her case was that the administrator did not rank in priority over her and over her children.

7. The administrator in her reply to the application, comprised in her affidavit sworn on 11th November 2008, stated that the deceased was the step mother who raised her after her own mother died when the administrator was two (2) years old, and the deceased was to remain her mother until she died on 27th December 2001. She further stated that her own mother's house, that is the house of Mumbi Gathu, was not allotted any share at the distribution of the estate of her father, Gathu Thairu, which was distributed between the two surviving widows, Serah Njeri Gathu and Teresiah Nyambura Gathu, and brother of the deceased, Jackson Kieya. She conceded that she had been married but there was separation after which she went back to the home of her stepmother, the deceased Serah Njeri Gathu. She was however chased out of the land by the applicant and her children after Serah Njeri Gathu died. That position was supported by Gikonyo Thairu, through his affidavit sworn on 16th March 2009. The deponent is a paternal uncle of the administrator.
8. Directions were initially given a 4th February 2009 that the said application be disposed of by way of oral evidence based on affidavits. These directions were later revised on 1st February 2012 when it was directed, following consent of the parties, that the said application be disposed of by way of written submissions. Submissions were filed and highlighted. On 20th July 2012, Njagi J. held that the administrator was from all intents and purposes a child of the deceased as she was brought up in the house of that deceased person, she therefore had an upper hand over the applicant. The court then proceeded to revoke the grant and to appoint the applicant and the administrator joint administrators of the estate and directed that the estate be shared equally between them.
9. It is these orders that the applicant in the application dated 18th September 2012 seeks to have reviewed. She argues that the court did not find that she obtained the grant fraudulently or in reliance on a false statement, and therefore there was no basis for revoking the grant made to her on 11th October 2007.
10. The respondent has replied to this application through her affidavit sworn 6th November 2012. She argues that there is no material upon which the court could review the orders of 20th July 2012 as no error apparent on the face on record has been demonstrated nor was any new matter been disclosed.
11. The parties filed written submissions to expound on their respective positions. The applicant's submissions are dated 2nd May 2013, and were filed in court on the same date. The respondent's submissions are dated 20th May 2013 and were filed in court on 21st May 2013. Both parties reiterate the arguments advanced in their affidavits.
12. Review of the decisions of the probate court is provided for through Rule 63 of the Probate and Administration Rules, which imports the provisions of the Civil Procedure Rules on review. Review can also be done in exercise of inherent powers saved in Rule 73 of the Probate and Administration Rules.
13. I agree with the respondents that for the court to exercise its discretion to review a court order, it must be demonstrated that there was an error apparent on the face of the record or that there was discovery of new evidence or matter that was not available at the time of the hearing of the matter. Review could also be on the basis of any other sufficient reason.
14. I have carefully gone through the record; I have noted that Njagi J came to the conclusion that the applicant was for all purposes an adopted child of the deceased. His Lordship in fact said that she was closer to the deceased than the Respondents. That effectively put her in the position of a child

of the deceased. If then that was the position, section 38 of the Act would come into play. Meaning that the applicant was the sole surviving child of the deceased and therefore the only person entitled to her estate.

15. Looked at that way, then the applicant's argument would have force. It would mean that there is an error on the face of the record, for the sole surviving child is being forced, contrary to the provisions of section 38 of the Law of Succession Act, to share her inheritance with other relatives.

16. The application dated 18th September 2012 is therefore meritorious. I will therefore review the orders made on 20th July 2012 by Njagi J. I hereby revoke the grant made jointly made to the applicant and the respondent, and appoint the applicant the sole administrator of the deceased's estate. A fresh grant shall issue to her accordingly. I also reinstate the certificate of grant dated 18th July 2008. The applicant shall have costs of the application

DATED, SIGNED and DELIVERED at NAIROBI

this 31st DAY OF January, 2014.

W. MUSYOKA

JUDGE