



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 3116 OF 2004

IN THE MATTER OF THE ESTATE OF AUGUSTINO NDIRANGU MBUTHIA – (DECEASED)

JUDGMENT

1. The deceased whose estate is the subject of these proceedings died on 26th September 1998. Representation to his estate was sought on 21st October 2004 by Beatrice Wamugo Ndirangu and David Wangai Ndirangu, who described themselves as widow and son, respectively, of the deceased.
2. Representation was made to them on 22nd December 2004 and a grant of letters of administration intestate of even date was issued to them.
3. The said administrators moved the court on 27th June 2005 for confirmation of the said grant. The grant was confirmed on 26th April 2006 and a certificate of confirmation of grant of even date was issued to the administrators. The estate was to be held in trust by the administrators with the widow having life interest and thereafter to the three children _ David Wangai Ndungu, John Mbuthia and Samuel Njuguna in equal shares.
4. In 2006 a Summons for Revocation of Grant dated 19th July 2006 was lodged seeking the revocation of the grant made on 22nd December 2004 and confirmed on 23rd May 2006. The application was founded on *Section 76* of the Law of Succession Act and Rule 44 of the Probate and Administration Rules.
5. The applicants claim to be widows of the deceased and accuse the administrators of having obtained the grant through deceit, concealing material facts from the court and making a false statement. They assert that the administrators were not related to the deceased. They claim that the administrators did not disclose to the court the fact that the three applicants were widows of the deceased, neither was it disclosed that the deceased had 22 children with the said three applicants.
6. When the application was served on the administrators, they responded to it through the replying affidavit sworn by Beatrice Wamugo Ndirangu on 25th September 2006. She asserts in the affidavit to be the only wife of the deceased and that her children were the only dependants of the deceased. She then attached copies of a marriage certificate as proof that she contracted a statutory marriage with the deceased and birth certificates to show that she had biological children with the deceased. She goes on to say that the applicants, after the deceased death, invaded his property and transferred it to third parties and generally wasted the estate. She states that she was not introduced to the applicants and their children as being wives and children of the deceased, and that she only came to see these people after the deceased's death when they declared themselves to be widows and children of the deceased.

7. The annexures to the replying affidavit of Beatrice Wamugo Ndirangu include, as I stated above, a certificate of marriage which shows that the deceased contracted marriage on 28th July 1985 at the age 60 years with Beatrice Wamugo Ndirangu who was then aged 22 years. The said ceremony was conducted at the Tuthu Catholic Mission. The other annexures are three birth certificates. Certificate serial number 491749 relates to Johana Mbuthia who is said to have been born on 4th August 1984 to Augustino Ndungu Mbuthia and Beatrice Wamugo Njuguna. Certificate serial number 065475 shows that Samuel Njuguna was born on 11th day July 1980 to Augustino Ndirangu Mbuthia and Beatrice Wamugo Njuguna. There is also certificate number 524594 of David Wangai who was born on 29th October 1982 to Augustino Ndirangu Mbuthia and Beatrice Wamugo Njuguna. Two of the certificates were issued in 1986 and the other one in 1988.

8. The record does not reflect a reply by the applicants to the replying affidavit by Beatrice Wamugo Njuguna sworn on 25th September 2006.

9. The application dated 19th July 2006 was dismissed on 25th April 2008 when it came up for hearing. The applicants did not attend court, but the administrator was represented by Mr. Saende. The court made the following ruling, which I will quote verbatim:-

“It is now 11.00a.m. The advocate for the objectors was duly served on 13th March 2008. Mr. Saende applies for dismissal of the Summons for Revocation dated 19th July 2006 wherein the objectors claim to be the widows of the deceased. The respondent petitioner filed her affidavit in reply sworn on 25th September 2006 wherein she has annexed certificate of marriage dated 28th July 1985 and certificate of births of her children. I also note that there is no response to the said affidavit and the objectors have not given any details of their averred marriages in the affidavit in support of the Summons for Revocation. In the circumstances, I am compelled to accede to the application for dismissal. The Summons for Revocation dated 19th July 2006 is dismissed with costs.”

10. On 2nd May 2008, a Summons under Rule 73 of the – Probate and Administration Rules dated 30th April 2008, was lodged in by court Erastus Maina Ndirangu, an alleged son of the deceased. The said application sought in the main two orders – an injunction to restrain the respondents, the administrators herein, from executing the certificates of confirmation of the grant pending the hearing and determination of the application of revocation, and revocation of the certificate of confirmation issued to the respondents on 23rd May 2006.

11. The application dated 30th April 2008 was placed before Rawal J. on the same day, who certified it urgent, directed its service and fixed it for hearing on 7th May 2008. On 7th May 2008 the application was stood over to 28th May 2008 for hearing. On 28th May 2008 it was directed that the only issue for determination was whether the objector and the other beneficiaries were son, widows and children of the deceased. The parties agreed by consent to file further affidavits to annex documents that they intended to rely on. It was also directed that the witness affidavits be filed by both sides and hearing could be on cross-examination of the deponents of the affidavits. The matter was then fixed for further directions on 2nd July 2008. On 2nd July 2008 the matter was fixed for hearing on 7th July 2008. The matter was not heard on 7th July 2008 instead it was directed that the Summons for Revocation be heard by way of cross-examination of the deponents of the affidavits on record except the chief be called as witness by the objector. The matter was then to be fixed for hearing at the registry on priority. On 14th July 2008, counsel for the applicant had the matter fixed for hearing on 24th November 2008 of the Summons for Revocation dated 19th July 2006. Come 24th November 2008 the hearing commenced. It was heard on 24th November 2008, 9th March 2009 22nd June 2009 and 25th February 2013.

12. I have set out the events between 25th April 2008 and 25th February 2013 in detail deliberately as

they form the basis of what I will eventually decide in this matter. The Summons for Revocation dated 19th July 2006 was dismissed on 25th April 2008, yet Rawal J who made the said order proceeded thereafter as if the order of 25th April 2008 was not on record and as if the Summons for Revocation dated 19th July 2006 was still pending. The directions given by Rawal J. on 28th May 2008 and 7th July 2008 were given in that belief. The reality was however that the Summons for Revocation dated 19th July 2006 was no longer pending having been dismissed on 25th April 2008. The proceedings conducted on 24th November 2008, 9th March 2009, 22nd June 2009 and 25th February 2013 were on the basis of a non-existent application. It was an exercise in futility. A waste of judicial time.

13. The application dated 30th April 2008 which is the foundation for the events and proceedings conducted by the court from 2nd May 2008 to date, was premised on the existence of the Summons for Revocation of Grant dated 19th July 2006. Given that the said Summons for Revocation of Grant had been dismissed on 25th April 2008, the application dated 30th April 2008 was without foundation.

14. In view of everything that I have said above, I hereby dismiss the application dated 30th April 2008. The respondents are awarded costs of the said application. I reiterate that the application dated 19th July 2006 is not up for determination as it was dismissed on 25th April 2006 and it died on that date. I reiterate further that the application dated 30th April 2008 was not a Summons for Revocation of Grant grounded on *Section 76* of the Law of Succession Act.

DATED, SIGNED and DELIVERED at NAIROBI this 31st DAY OF January, 2014.

W. MUSYOKA

JUDGE