



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1342 OF 2006

AND

IN THE MATTER OF THE ESTATE OF VIRGINIA GICHURU KIMACHIA (DECEASED)

RULING

1. There are two applications for determination by this court. The first one in time is a Summons for confirmation of grant dated 29th May, 2008 and the second one is a Summons for revocation of grant dated 16th September, 2008.
2. The summons for confirmation of grant dated 29th May, 2008 is taken out under Section 71 of the Law of Succession Act and Rule 40 of the Probate and Administration Rules. It seeks confirmation of the grant of letters of administration intestate made to Monica Wangui Kamau on 9th April, 2008. The application is supported by the annexed affidavit sworn by Monica Wangui Kamau the applicant herein on 29th May, 2008. In that affidavit, the Applicant avers among other averments, that a grant of letters of administration of the said estate was made to her on the 9th April, 2008. I will consider this application at a later stage in this ruling.
3. The second application a summons for revocation of grant dated 16th September, 2008 is taken out under Rules 44, 58 & 59 of the Probate and Administration Rules and Section 76 (d) (ii), (iii) of the Succession Act Cap. 160. The Applicants seek from court an order that the grant of letters of administration intestate issued on the 9TH April 2008 be revoked. The application is premised on the grounds that the grant was obtained fraudulently by the making of a false statement or by concealment from the court of something material to the case; and that the grant is irregular as the deceased died intestate.
4. The application is further supported by the annexed affidavits of Geoffrey Njenga and Grace Nyariri Wanganga. The said Geoffrey Njenga in his affidavit contends that the Petitioner did not obtain the consent of all other beneficiaries who are entitled to apply for probate in priority to the petitioner, that the petitioner petitioned the court for a Grant of Letters of Administration with Will annexed but was issued with a Grant of Letters of Administration intestate which is irregular and as such there is no proper Grant whatsoever. On her part, Grace Nyariri Wanganga avers that the deceased left a valid will dated the 5th June, 1990, that the petitioner was not married to their late brother at the date of the demise of the Deceased and that the said petitioner is not the most suited person to administer the Estate of the deceased. She further contends that the petitioner suffers from a terminal disease that may make it impossible for her to effectively carry out the duties of an administrator or for that matter to conclusion.
5. Opposing the application, the Respondent filed in a replying affidavit dated 2nd December, 2011 sworn by Monica Wangui Kamau, the Respondent herein. She avers that the application is an abuse of the

court's process and an attempt to delay the distribution of the estate herein. That whereas it is indeed true that the letters of administration issued herein are stated to be intestate, it is very clear from the proceedings on record on what the petition was, as a matter of fact, the will was part of the annexures to the supporting affidavit to the will. That reference to the letters of administration as intestate is a technical issue that can easily be cured by an amendment by this Honourable Court. She contends that she followed all the legal requirements petitioning for letters of administration and that she was prompted by the inactiveness of the applicants as well as the named executors of the deceased's will. That the Applicants have not explained what took them 14 years to apply for letters of administration. That, in the absence of her deceased husband, she is rightfully qualified to take his position and that her petition was proper and she had the capacity to apply for the same. She further aver that she has always been ready and willing to settle the dispute herein amicably to appoint of requesting the applicants to give names of persons to be joint administrators but the applicants have been very uncooperative. She contends that since all parties are in agreement that the will is valid, the court should not entertain any 'sideshows' from the applicants herein as the opportunity for them to appoint joint administrators has always been open to them but all they want is to leave her out of succession proceedings. That the applicants through their letter dated 21st January, 2009 clearly indicated that they will not comply fully with the deceased's will. That she is apprehensive from the conduct of the applicants if this application is allowed her rights and those of her daughter will not be respected by the applicants.

6. In their submissions the objectors contend that the petitioner in this matter applied for Letters of Administration without consent from any of the beneficiaries and gave no reason as to her decision. Further that the petitioner does not rank higher than any of the other beneficiaries and is not a beneficiary at all. They submit that the petitioner's daughter whose interests she allegedly brought this petition to protect is now of age and can competently protect her interests emanating from the Estate and this completely extinguishes any remote interest that the petitioner may have had in the administration of the estate. It is further their submission that the deceased left a Written Will and that she named her executors of the same estate and neither did the two any time renounce their rights to apply for probate nor were they served with the citation to accept or refuse probate in accordance with section 62 of the Succession Act.

7. The Administrator on her part submits that the claims of fraud are baseless and dishonest. It is submitted further that the deceased died on 2nd September, 1992 and it is only in 2008 that a petition for letters of administration was filed. She submits that unless a good explanation is offered as to why the executors of the Will and/or the applicants for revocation never moved the Court for more than 16 years, they cannot possibly and genuinely deny the administrator the chance to protect her interest in the estate. She further submits that the court gazetted the intention to issue letters of administration after it was satisfied that the same was warranted. She contends that the citation was properly served. It is her submission that it is very curious that the application for revocation was only filed after the administrator filed summons for confirmation.

8. On whether the grant is irregular and the deceased died intestate, the Administrator submits that it is clear that the petitioner petitioned for letters of administration with the will annexed and that other than the error on the part of the person who typed the grant what was granted was letters of administration with the will annexed. She refers to the Gazette Notice published on 29th February, 2008. It is therefore her submission that the error on the title of the grant issued is administrative and thus does not warrant the revocation of the grant. Further that the error was in the Court registry while typing and that it is clear from the court proceedings that the grant was issued with the will annexed.

9. The Court has carefully taken due consideration of the applications, affidavits and rival submissions. For the Applicants to succeed, they must show, as is required by S.76 of the Law of Succession Act, that:-

- a. The proceedings to obtain the grant were defective in substance.

- b. The grant was obtained fraudulently by the making of a false statement or the concealment from the court of something material to the case.
- c. The grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.
- d. The person to whom the grant was made has failed, after due notice and without reasonable cause either –
 - i. To apply for confirmation of the grant within one year from the date thereof or such longer period as the court has ordered or allowed, or
 - ii. To proceed diligently with the administration of the estate, or
 - iii. To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or
- e. The grant has become useless and inoperative through subsequent circumstances.

10. I am not satisfied that the Applicants have demonstrated that the present application comes within the provisions of the law stated hereabove. In the case of *Re Estate of Waitheru Kihoro (Deceased)* 2009 e KLR, it was held that “*in any event it is a cardinal principle of our justice system that whoever alleges must prove the allegation.*” Further in *Julius Machabe Marombo –vs. Augustine Wanjala Marombo* (2011) eKLR, the court observed that in the absence of fraud, mistake or misrepresentation, the objector cannot sustain an application for revocation of grant. It is significant to mention, that the Applicants have failed to prove their allegations. The Applicants’ other argument was that the grant was irregular as the deceased died intestate. Yet in their affidavits both Geoffrey Njenga and Grace Nyariri Wanganga attest to the existence of a Will. Indeed, the said Geoffrey Njenga at paragraph 1 of his affidavit avers thus: “*That I am one of the named executors and trustees of the will of the Late Virginia Gichiru Kimachia*”. On her part Grace Nyariri Wanganga states in her affidavit at paragraph 3 that: “*That it is true that my mother left a valid will dated the 5th day of June 1990...*”

11. I find that the Applicants moved the court after summons for confirmation was filed and yet the said Grant was issued on 9th April, 2008, and the deceased had died on 2nd September 1992. The publication in the Kenya Gazette dated 29th February, 2008, Vol. CX- No. 19, Notice No. 1342, Cause No. 1342 of 2006 states as follows:

“By Monica Wangui Kamau, of P.O. Box 76490-00508, Nairobi in Kenya, the deceased’s daughter-in-law, for a grant of letters of administration with written will annexed of Virginia Gichuru Kimachia, late of Kiambu, who died at Nairobi Hospital, on 2nd September, 1992.”

12. There is a minute in the court file dated 9th April 2008 by the Deputy Registrar addressed to the Judge requesting for an order on the file granting letters of administration with written will annexed to the applicant as no objections had been lodged and all the formalities had been complied with. The Judge, Rawal J, on 11th April 2008 ordered that letters of administration with will annexed be issued to the applicant as prayed. The grant on record was no doubt made on the basis of the order of Rawal J of 11th April 2008.

13. I have no doubt whatsoever, that what was granted was letters of administration with will annexed, and the court being a court of justice is enjoined by Article 159 (2) (d) to administer justice without undue regard to procedural technicalities. The substantive justice of this case demands that this court should treat the said error on the title of the grant issued as administrative and does not as contended by the administrator, warrant the revocation of the grant.

14. The executors have not proffered any explanation whatsoever as to why they failed to discharge their duties as per the will immediately following the deceased's demise. One could only read a sinister motive on their part. Indeed, the administrator has alluded to the fact that the objectors/executors' intention is to disinherit her daughter and I note at paragraph 6 of the affidavit sworn by Grace Nyariri Wanganga where she states *"that despite the fact that the petitioner has all along been pestering us unnecessarily she did not inform us when she presented her petition to the court and we only came to know about it by sheer coincidence when my niece saw the Gazette Notice on the 1st day of July, 2008."*

15. It would be safe to conclude that the objectors and the executors have never been interested in the distribution of the said estate and it is only the administrator who has all a long been interested and hence her action. She has all along been pestering them as they have clearly stated. Further, it must be noted that a citation to accept or refuse probate dated 30th June 2006 was served on the said Lillian Wakiiya Mwaura and Geoffrey Njenga as shown by the affidavit of service sworn by John O. Shem, a duly authorized process server of this court, on 19th April, 2007.

16. In the circumstances, this court holds that no case for the revocation of the grant has been made out as has been stated above. The court finds that the application is not merited and must fail.

17. The result of the above is that the application for confirmation of grant ought to be considered by the court. I have carefully gone through the distribution proposed in the application. It appears to differ in certain respects from the distribution proposed in the will of the deceased. Whereas the proposals in paragraph 5A of the affidavit of the applicant conforms with the terms of clause 4(a) of the will of the deceased, paragraph 5B of the said affidavit does not tally with clause 4(f) of the will. I also note that the affidavit of the applicant is silent on the distribution of the property mentioned in clause 4(b), (c), (d) and (e) and clause 5 of the will.

18. I note that the administrator is anxious to have her daughter inherit the gifts made in favour of her father in the will of the deceased. That however should not be an excuse to make her daughter a beneficiary under the will, when in fact she is not named as such. The ideal situation should be to have the property devolve upon the estate of the named beneficiary, and thereafter the survivors of the deceased beneficiary may access the dead beneficiary's share through his estate.

19. In the end I hereby make the following final orders: -

- a. That the application dated 16th September 2008 is hereby dismissed, with costs to the administrator;
- b. That the grant of letters of administration made on 9th April 2008 shall be amended to reflect that the said grant as being of letters of administration with the will annexed;
- c. That the said grant as amended is hereby confirmed, the estate of the deceased shall devolve as per the terms of the will of the deceased made on 5th June 1990.

DATED, SIGNED and DELIVERED at NAIROBI this 25th DAY OF April, 2014.

W. MUSYOKA

JUDGE

In the presence of Mr. Wachira for Mr. Mungai advocate for the objector.

No appearance for the administrator.