



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 2566 OF 2010
IN THE ESTATE OF MARGARET MURINGI MUHORO – (DECEASED)

RULING

1. Margaret Muringi Muhoro died on 6th December 2009. Representation to her estate was sought in two causes – **High Court Succession Cause No. 2566 of 2010** and **High Court Succession Cause No. 121 of 2011**.
2. **High Cause Succession Cause No. 2566 of 2010** was initiated by her mother, Beth Njeri Muhoro, and her brother, Stephen Mirara Muhoro. They stated her to have been survived by her two children, Victor Zacharia Muhoro and Hellen Nyangungi and her mother, the 1st petitioner in this cause. A grant of letters of administration intestate was made to them on 5th July 2011.
3. The administrators applied for confirmation of the grant by their application dated 12th September 2011. The application in this cause is yet to be heard.
4. The cause in **High Court Succession Cause No. 121 of 2011** was initiated by Patrick Kamau Kariuki, who claimed to be the husband of the deceased and Joseph Njoroge Kariuki, his brother. They listed the two children of the deceased as survivors, together with the alleged widower, the 1st petitioner herein. Representation was made to the petitioners on 15th July 2011.
5. Confirmation of the said grant was sought by the administrators by their summons dated 16th February 2012. The said grant was confirmed by an order of this court made on 21st May 2012.
6. In **High Court Succession Cause No. 2566 of 2010**, an application dated 7th September 2005 for revocation of the grant made to the 1st administrator in **High Court Succession Cause No. 14 of 2011** was filed on 11th September 2012. He founded his application on the allegation that he is the surviving spouse of the deceased. His case is that the petitioners in **High Court Succession Cause No. 2556 of 2010** concealed his existence, making the proceedings leading up to the making of the grant in that cause defective and fraudulent. He relies on a decision of the Principal Magistrate in **Githunguri Chief Magistrate’s Court civil case No. 3 of 2010**, which pitted him against the 1st administrator in **High Court Succession Cause No. 2566 of 2010** over who was to bury the remains of the deceased and where those remains were to be interred. The said case was resolved in his favour with the finding that there was a marriage between him and the deceased entitling to him to inter the of the deceased remains at his home at Githunguri, Kiambu County.
7. I have carefully combed through the court papers in **High Court Succession Cause No. 2566 of 2010** and I have not come across a reply by the respondents to the application dated 7th September 2012.

8. The 2nd administrator in **High Court Succession Cause No. 2566 of 2010**, on his part filed his own application for the revocation of the grant made in **High Court Succession Cause No. 121 of 2011**. The said application is dated 11th March 2013. He alleges that the grant was obtained fraudulently as the petitioner did not disclose to the court that a grant had already been made in **High Court Succession Cause No. 2566 of 2010**. The applicant concedes that there was a burial dispute in **Githunguri Chief Magistrate's Court civil case No. 3 of 2010**. He has even attached an excerpt of the judgment which shows that the dispute was resolved in favour of the 1st administrator in **High Court Succession Cause No. 121 of 2011** who was recognized as the widower of the deceased. He accuses the 1st administrator in that cause of having carted away the deceased's personal belongings including those of the minors. He discloses that the minors are under the care of their maternal relatives. He has attached documents showing that the said 1st administrator in **High Court Succession Cause No. 121 of 2011** is married to Ann Nyaguthii and they have children together.

9. There is also on record an affidavit sworn shown by Victor Zakaria Muhoro, the first child of the deceased. The said affidavit was sworn on 12th July 2013 and it responds to both applications. He is in favour of the grant made in **High Court Succession Cause No. 121 of 2011** being revoked in the best interests as the children of the deceased. He avers that at the commencement of the proceedings he was still a minor and he did not know what was happening. He gives details of the difficulties that he and his sister have undergone since their mother passed on. He states that they live with their maternal aunt, Esther Wambui Muhoro, and expresses that they as the children of the deceased would like to continue residing with the said aunt.

10. All these parties to the dispute – that is to say the alleged widower of the deceased, the mother of the deceased and the children of the deceased – have filed detailed submissions the respective advocates. The children's submissions through were filed on 15th July 2013. The widower filed his on 12th July 2013. The mother of the deceased filed hers on 15th July 2013.

11. The two applications are really on who is suited to apply for a grant of letters of administration intestate. The applicable law is **Section 66** of the Law of Succession Act. It sets out the order of preference to appointment as administrators. The provision states as follows:-

“When a deceased person has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, without prejudice to that discretion, accept as a general guide the following order of preference-

a. Surviving spouse or spouses, with or without association of other beneficiaries;

b. Other beneficiaries entitled in intestacy, with priority according to their respective beneficial interests as provided by Part V;

c. The Public Trustee; and

d. Creditors...”

12. The above provisions no doubt give prior right to administration to the surviving spouse of the deceased. It would appear that initially there was a dispute as to whether the deceased was married or not. This culminated in the burial dispute which took the form of a civil suit in **Githunguri Chief Magistrate's Court civil case No. 3 of 2011**. It was determined in that suit that the 1st administrator in **High Court Succession Cause No. 14 of 2011** was the surviving spouse of the deceased who was entitled to collect her remains from the mortuary and to dispose of them. This was a determination by a court of law. I have not seen evidence that the decision has been appealed against or quashed on appeal. By virtue of that decree, the 1st administrator in **High Court Succession Cause No. 121 of 2011** is the surviving spouse of the deceased and therefore the person with prior right to the administration of the estate of the deceased.

13. The provisions of **Section 66** of Act make the right of the children to administer the estate of their departed parents secondary to that of the surviving spouse of the deceased. The rights of other relatives rank even lower. However, the provision in **Section 66** of the Act is not mandatory. The court is not bound by the order of preference set out in that provision. There is discretion, the court can overlook those with prior right and pick on a person lower down in the order of preference.

14. Going by the provisions of **Section 66** of the Act, the grant made in **High Court Succession Cause No. 121** of 2011 was properly made to the person who had prior right to administration. This flows from the decision by the Principal Magistrate in **Githunguri Chief Magistrate's Civil Case No. 3 of 2010** that the 1st administrator was indeed a spouse of the deceased. What however is of concern to me is the circumstances under which the grant was made in that case when a grant had already made in respect of the same estate.

15. I am inclined to find that the grant in High Court Succession Cause No. 2566 of 2010 had not been made properly. At the time the petition in that cause was lodged in court on 23rd December 2010, judgment in the burial dispute had already been delivered on 16th November 2010. This would mean that at the time the petitioners moved the probate court on 23rd December 2010 for grant of letters they were well aware of the outcome in **Githunguri Chief Magistrate court civil case No. 3 of the 2010**. They know that the 1st administrator in **High Court Succession Cause No. 121 of 2011** had been named as the widower of the deceased. They therefore ought to have involved him in the process of obtaining grant to the estate of the person that the court in **Githunguri Chief Magistrate's court civil No. 3 of 2010** had found to be his spouse. There was concealment of important matter from the court and therefore the process of obtaining the grant in **High Court Succession Cause No. 2566 of 2010** was defective.

16. The next issue for consideration is whether the administrators in **High Court Succession Cause No. 121 of 2011** are suitable administrators. The court in *Chelang'a vs Juma* (2002) 1 KLR 339, addressed its mind to the matter of a person being qualified for appointment as administrator and his nevertheless being unsuitable for other reasons. The court concluded that a person may qualify for appointment but he may not be appointed for being unsuitable for one reason or other.

17. In this case I do note, although the court in **Githunguri Chief Magistrate's court civil No. 3 of 2010** found the 1st administrator was the surviving spouse of the deceased, that there was a dispute on the matter of the alleged marriage. From the material before me, there is still disquiet about the 1st administrator's status vis-a-vis the deceased. I have noted that he was at all material times married to another woman. I have also noted that it is not he who has custody of the two children of the deceased. I have perused the certificate of confirmation of grant dated 21st May 2012 and noted that the 1st administrator benefits wholly from the money sitting in the account of the deceased with the Standard Chartered Bank and gets 50% of the person benefits. Yet under **Section 35** of the Act, he is only entitled to life interest. I note that the deceased's children were young at the time of her death and they still are young. They need all the resources available. The entire estate ought to have been held in trust for them.

18. In view of what I have stated in paragraph 18 above, I entertain serious misgivings about the suitability of the 1st administrator and his brother as administrators of the estate of the deceased. I doubt whether they would act in the best interests of the children. **Section 66** of the Act gives me discretion to overlook the 1st administrator's prior right to administration and to pick other persons who I consider to be suitable as administrators, in the event I exercise my discretion within **Section 76** of the Act and revoke both grants.

19. In the event both grants are revoked, who should be appointed as administrators? I have already expressed my discomfort with the administrators in **High Court Succession Cause No. 121 of 2011**. The administrators in **High Court Succession Cause No. 2566 of 2010** should be treated similarly in view of what I have stated in paragraph 16 above. There are allegations on record that both sets of administrators withdrew money from certain accounts, which they have not effectively responded to. The children of the deceased appeared before me on 19th February 2012. From the events of that day I was left with the

impression that the children did not have confidence in both sets of administrators. I note that they now reside with their aunt, Esther Wambui Muhoro, who does not appear to support either of the two contending sides. The eldest child has also turned eighteen. In *In the Matter of the Estate of Aggrey Makanga Wawira* Mombaa **High Court Succession Cause No. 89 of 1996**, Waki J. appointed an eighteen (18) old daughter of the deceased as he did not find her under any legal disability. Victor Zacharia Muhoro from what is before me is under no legal disability whatsoever.

20. In view of everything that I have said in the foregoing paragraphs I am disposed to make the following orders:-

- (a) That the grants of letters of administration intestate in respect of the estate of Margaret Muringi Muhoro in High Court Succession Cause No. 2566 of 2010 and High Court Succession Cause No. 121 of 2011 are hereby revoked;
- (b) That the former administrators shall return the said grants to the registry for cancellation;
- (c) That the certificate of confirmation dated 21st May 2012 is hereby cancelled;
- (d) That I appoint Esther Wambui Muhoro and Victor Zacharia Muhoro administrators of the estate of Margaret Muringi Muhoro and a grant of letters of administration intestate shall issue to them accordingly;
- (e) That the former administrators in both causes shall in the next forty five (45) days file and place before the court a full account of their administration of the estate from the date of their appointment till the date of this ruling;
- (f) That the matter shall be mentioned after 45 days for compliance; and
- (g) That the former administrators in both causes shall bear the costs of the applications.

DATED, SIGNED and DELIVERED at NAIROBI this 30th DAY OF May 2014.

W. MUSYOKA

JUDGE

In the presence of Ms. Odiya advocate for the applicant.

In the presence of Mr. Maani advocate for the respondent.

In the presence of Momanyi advocate for the children.