



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 746 OF 2010**

**IN THE ESTATE OF DORCAS WANJIKU – (DECEASED)**

**RULING**

1. Dorcas Wanjiku Wanjama died on 26<sup>th</sup> March 2008. Representation to her estate was sought on 20<sup>th</sup> November 2003 in Kangema **SPMCSC No. 78 of 2009** by Peter Wanjama Theuri who described himself as the husband of the deceased. He stated the deceased as being survived by himself and their three sons – Geoffrey Maina Wanjama, John Waironyi Wanjama and Peter Muikunu Wanjama. She is expressed to have died possessed of Loc.19/Nyakianga/1514.
2. Notice of the filing of the application for grant of representation was published in the *Kenya Gazette* of 24<sup>th</sup> December 2009, inviting objectors, if any, to be filed within 21 days of the said notice.
3. On 14<sup>th</sup> January 2010, Peter Muikunu Wanjama, John Wanjama and Stephen Kiragu Wanjama filed an objection of even date, complaining that the petitioner had consulted them when petitioning for the grant, that he had not included all the beneficiaries and that he had included persons who were not beneficiaries of the estate. They also filed an affidavit to support their position. Later on 8<sup>th</sup> June 2010, the objectors filed a petition by way of a cross-application and an answer to the petition.
4. The objection proceedings were resolved on 14<sup>th</sup> July 2010, when the petitioner and objectors consented to the petitioner Peter Wanjama Theuri and one of the objectors, Peter Muikunu Wanjama, being appointed administrators of the estate of the deceased. A grant of letters of administration intestate was duly issued on 14<sup>th</sup> July 2010 in that behalf. The said grant has not been confirmed to date.
5. On 30<sup>th</sup> August 2010 a Summons for Revocation of the Grant made by the Kangema Court on 14<sup>th</sup> July 2010 was made by Julius Maina Wanjama. He grounded his application on allegations that the proceedings to obtain the grant were defective in substance as not all the survivors of the deceased and the property she owned were disclosed, that the value of the estate was grossly undervalued and that there were false statements in that same of the persons listed as survivors of the deceased were not her sons.
6. According to the affidavit sworn on 24<sup>th</sup> August 2010 in support of the application, the deceased was survived by Hannah Wangechi, Julius Maina, Rose Wangui, Jane Wambui, Stephen Kiragu Wanjama and Grace Wanjiru. There was also Lucy Nyambura, who had by then died. Geoffrey Maina, John Waironyi and Peter Mukunu were not the sons of the deceased. It is also averred in the said affidavit that the deceased was, apart from Loc.19/Nyakianga/1514, the proprietor of Loc.19/Nyakianga/1515. Search certificates showing the deceased as such registered proprietor are attached. The combined value of the two properties is put at Kshs 4,400,000.00 as per the attached valuation reports. It is submitted that the Kangema court did not have jurisdiction over the estate.

7. The application has been replied to by the 2<sup>nd</sup> respondent, Peter Muikunu Wanjama. He depones that his own mother is called Ruth Nyambura, a co-wife of the deceased. He avers that Loc.19/Nyakianga/1514 and 1515 were subdivisions from Loc.19/Nyakianga/864 whose original proprietor was his father, the 1<sup>st</sup> respondent, and the widower of the deceased. It is the 1<sup>st</sup> respondent who caused the subdivisions and the subsequent registrations of the subdivisions which were in favour of all the 1<sup>st</sup> respondent's wives, except the 2<sup>nd</sup> respondent's mother. He states that there are court orders in respect of the two parcels of land where it was ordered that parcel Loc.19/Nyakianga/1514 ought to revert to estate of his mother to be registered in his favour and that of his brothers Geoffrey Maina and John Waironyi. The affidavit sworn by Stephen Kiragu Wanjama on 4<sup>th</sup> October 2010 is along similar lines and so is the further affidavit of Peter Muikunu Wanjama sworn on 25<sup>th</sup> January 2012.

8. It was directed on 6<sup>th</sup> December 2011, that the said application be disposed of by way of written submissions. The parties herein have duly filed their submissions. The applicant filed his submissions on 22<sup>nd</sup> February 2012, while the 1<sup>st</sup> and 2<sup>nd</sup> respondent filed theirs on the 22<sup>nd</sup> February 2012 and 13<sup>th</sup> March 2012, respectively.

9. I have carefully perused through the documents filed in this matter. It is common ground that this matter relates to the estate of Dorcas Wanjiku Wanjama, who died on 26<sup>th</sup> March 2008. It is common ground that she was survived by a widower and children, and that she died possessed of two assets – Loc.19/Nyakianga/1514 and 1515. I have seen the search certificates and both indicate that the deceased is the registered proprietor of the said two parcels of land. Quite clearly, these two form her estate.

10. The grant made by the Kangema Court was to her widower and her stepson. I have noted that in the petition and cross-petition filed in that cause, the children of the deceased were not listed as her survivors – that is to say Hannah Wangechi, Julius Maina, Rose Wangui, Jane Wambui and Stephen Kiragu. Instead the persons listed as her survivors are the children of her co-wife, Ruth Nyambura – that is to say Peter Muikunu, Geoffrey Maina and John Waironyi.

11. The deceased died intestate in 2008 and therefore the law governing her estate ought to be Part V of the Law of Succession Act. Since she was survived by a spouse and children, the applicable provision should be **Section 35** of the Law of Succession Act. The persons entitled to a share in her estate by virtue of this provision should be Peter Wanjama Theuri, Hannah Wangechi, Julius Maina, Rose Wangui, Jane Wambui and Stephen Kiragu. The stepchildren, that is to say Peter Muikunu, Geoffrey Maina and John Waironyi, are not children of the deceased and therefore they are not entitled to a share in her estate. The principal stakeholders in the estate of the deceased therefore are the widower and the deceased's biological children.

12. I do note that the stepchildren of the deceased base their claim to a share in the estate of the deceased on a decree they hold made in their favour in **Kangema SRMCLDT No. 27 of 2009** with respect to Loc.19/Nyakianga/1514. That decree however does not override **Section 35** of the Law of Succession Act. It does not make them survivors of the deceased, and it does not entitle them to take the place of the biological children of the deceased. It does not make them heirs in her estate. They cannot stake any claim to the estate either as heirs, beneficiaries, survivors or dependents based on the decree. They can come in only as creditors.

13. The law that governing the making of grants is stated in **Sections 51 to 66** of the Law of Succession Act. **Section 51** deals with the information that should go into an application for grant of representation. Under **Section 51(2) (g)** it is stated:-

**“51(2). An application shall include information as to\_\_\_...**

**(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased...”**

14. For the purpose of the estate of the deceased in this cause, for one to comply with **Section 51(2) (g)** of the Act, the petitioners were obliged to disclose the name of the surviving spouse of the deceased in this cause, Peter Wanjama Theuri, and those of her surviving children. Hannah Wangechi, Julius Maina, Rose Wangui, Jane Wambui and Stephen Kiragu. Whereas there was disclosure of the surviving spouse, the children of the deceased were not disclosed; instead the persons listed as surviving her as her children were in fact her stepchildren. **Section 51(2) (g)** of the Act was therefore not complied with.

15. There is also a mandatory requirement in **Section 51(2) (h)** of the Act that “*a full inventory of all the assets and liabilities of the deceased*” be given. The deceased died possessed of two assets – Loc.19/Nyakianga/1514 and 1515. The petitioners disclosed Loc.19/Nyakianga/1514, but not Loc.19/Nyakianga/1515. Both assets formed part of the estate of the deceased and ought to have been disclosed in compliance with **Section 51(2) (h)** of the Act.

16. **Section 66** of the Law of Succession Act sets out by order of preference the persons who are entitled to administration of the estate of an intestate. For effect, I will set out the said provision *verbatim*-

**“66. When a deceased 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, in the best interests of all concerned, be made, but 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.”*

17. By virtue of **Section 66** of the Act, the surviving spouse should have priority over everybody else. He or she has prior right to the administration of the estate of their departed spouse. The rights of others rank after that. According to **Section 66(b)** of the Act, those others are:-

(a) the children of the deceased according to *Sections 35 and 38* of the Act;

(b) the father, mother, siblings and children of dead siblings, half siblings and children of half-siblings, and other relatives in the nearest degree of consanguinity up to and including the sixth degree, according to **Section 39(1)** of the Act.

The Public Trustee and creditors rank last in that order.

18. I have already held that stepchildren of the deceased in this cause are not her kin. They share no blood kinship with her and therefore they cannot possibly be her survivors, unless she had formally adopted them. They cannot therefore be ranked at all in the list of the survivors envisaged in Part V. They do not appear at all in the radar. I have however held that they are creditors since they hold a decree of the court in their favour in respect of one of the assets of the estate. As creditors therefore they have a right to the administration of the estate of the deceased. Unfortunately, that right cannot override that of the biological children of the deceased.

19. **Section 66** of the Act should be read together with rule 7(7) of the Probate and Administration Rules. Again for effect I will cite the said provision *verbatim*-

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

- a. *renounced his right generally to apply for a grant; or*
- b. *Consented in writing to the making of the grant to the applicant; or*
- c. *Has been issued with a citation calling upon him either to renounce such right or to apply for a grant.”*

20. I have held that the stepchildren of the deceased ranked last in the order of preference set out in **Section 66** of the Act. They were therefore bound to comply with rule 7(7) of the Probate and Administration Rules. They did not comply therewith – they never got the children of the deceased to renounce their right to administration, nor to consent in writing to the grant being made to others, nor were any citations ever issued to them.

21. Creditors, as mentioned earlier, are neither heirs nor survivors nor beneficiaries nor dependants. They ought not to be listed in the petition as survivors, except in the column for liabilities. Ideally creditors should wait for the heirs, beneficiaries, survivors and dependants to apply for grant, failing which they, the creditors, would then become entitled to have citations issued. Where grant is not sought after they have issued citations, they should then ask the court to allow them to petition for a grant to be made to them. Where the heirs, dependants, survivors and beneficiaries obtain the grant, the creditors should, after the appointment of the administrators, prove their claim to the administrators, and if the administrators fail to honour their claims then move the court appropriately. Where the claim is comprised in a valid decree of a competent court, the creditor will seek to enforce the decree against the administrators, preferably in a civil action filed in the civil court.

22. Ideally that is the process that the stepchildren of the deceased ought to have followed. They should have waited for the rightful heirs and survivors of the deceased to obtain the grant, where upon the stepchildren would then seek to enforce their decree against the estate. If the said rightful heirs failed to petition for grant the option open to the said stepchildren was to issue citations upon the said rightful heirs, and they, the stepchildren, could only petition for grant with the leave of the court.

23. The interests of creditors are taken care of at the confirmation of the grant. The administrators ought in the confirmation application to creditors where such creditors have proved their debts. In default of the administrators making such provision in the confirmation application, the creditors have the liberty to file affidavits of protest to the distribution of the estate proposed in the confirmation application or to move the civil court in a suit against the estate.

24. The issue of the value of the estate also came up. The applicant asserts that the value of the estate was in the region of Kshs.4,400,000.00 in 2010. This meant that the same was by far in excess of the Kshs.100,000.00 ceiling allowed for matters at the resident magistrate's courts. He has attached valuations to support his case. This contention and the evidence to support it have not been controverted. I also take judicial notice of the fact that the property is situated within Murang'a County and the value of 2.24 hectares of land in that area would no doubt exceed Kshs.100,000.00.

25. I am satisfied that the application before me meets the threshold for revocation of grants in terms of **Section 76** of the Act. The proceedings to obtain the grant in **Kangema Senior Resident Magistrate's Court Succession Cause No. 78 of 2009** were grossly defective and were attended by grave misinformation. I will therefore make the following orders:-

- (1) That the grant made to Peter Wanjama Theuri and Peter Muikunu Wanjama on 14<sup>th</sup> July 2010 in **Kangema Senior Resident Magistrate's Court Succession Cause No. 78 of 2009** is hereby revoked;
- (2) That the administrators shall return the grant issued to them to the Nairobi principal registry for cancellation;
- (3) That the court file in **Kangema Senior Resident Magistrates Succession Cause No. 78 of 2009** is hereby recalled for the handling of the case therein in this cause by this court;

- (4) That I hereby appoint Peter Wanjama Theuri and Julius Maina Wanjama administrators of the estate of the late Dorcas Wanjiku Wanjama;
- (5) That the Deputy Registrar is directed to issue the two with a grant of letters of administration intestate in this cause and out of the principal registry;
- (6) That the administrators so appointed shall move the court within sixty (60) days of the date of this order for confirmation of the grant that is hereby made to them;
- (7) That the matter shall be mentioned after 60 days for compliance; and
- (8) That the applicant is entitled to the costs of the application.

**DATED, SIGNED and DELIVERED at NAIROBI this 23<sup>rd</sup> DAY OF May 2014.**

**W. MUSYOKA**

**JUDGE**