



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

SUCCESSION CAUSE NO. 1153 OF 2013

(IN THE MATTER OF THE ESTATE OF PAUL WAITHAKA MBURU (DECEASED))

GRACE MUTHONI MWANGI.....APPLICANT

VERSUS

ROSE MUTHONI MBURU.....1ST RESPONDENT

GRACE WANJIKU MBURU.....2ND RESPONDENT

JUDGMENT

The applicant filed a summons dated 19th June, 2012 for revocation or annulment of grant made in respect of the estate of the late Paul Waithaka Mburu on the grounds that the grant was obtained fraudulently by making of a false statement or by concealment from the court something material to the case and also that it was obtained by means of untrue allegation of fact essential in law to justify grant. The summons was made under **Rule 44(1)** of the **Probate and Administration Rules**.

The summons was supported by the applicant's own affidavit; in that affidavit the applicant contended that at the time of the deceased's demise on 10th February, 2009, he had two wives the first of whom is the first respondent while the applicant was the second wife.

Besides the deceased's two wives, the applicant swore that the deceased was also survived by nine children; of these children, five were born in the first house and they have been named as Agnes Njeri Mburu, Grace Wanjiku Mburu, Monica Wambui Mburu, Catherine Wangari Mburu and Loise Wangui Mburu. The applicant has named her children whom she claims were born out of her marriage to the deceased, as SKM, TMM, AIM and PNM. In support of her contentions, the applicant attached to her affidavit two letters stating that she and the first respondent were the deceased's widows and the named children were his children; one of these letters was dated 30th November, 2011, from the chief of Kambiti location addressed to the District Officer, Makuyu Division, while the other was dated 5th December, 2011 from the District Commissioner, Murang'a South district addressed to the public trustee advising him of the legal heirs of the deceased's estate.

The applicant has sworn that sometimes in May 2012, she got information that the first applicant had "secretly and fraudulently" gone to court to petition for grant of letters of administration of the deceased's estate without involving the applicant. It is the applicant's position that considering the circumstances under which the grant of letters was made and subsequently confirmed, it should be annulled and/or revoked so that all the beneficiaries can be provided for.

The respondents opposed the applicant's application and in the affidavit sworn in that behalf by the first

respondent, it is contended that the first respondent was married to the deceased in 1976 and their marriage was blessed with five issues. At the time of the deceased's death all the children except one were of age.

It is the respondent's case that it is only in February, 2009, after the deceased death that the applicant emerged claiming to be the deceased's wife; before then, she was unknown to any of the deceased's immediate family members and in particular the first respondent herein.

On the question whether the petition for grant of letters of administration intestate was initiated secretly and fraudulently as the applicant has suggested, the respondents have stated that the applicant was aware of these proceedings from the very beginning; they have annexed a copy of a letter dated 27th February, 2009 from the applicant's advocate addressed to the District Officer Makuyu division, telling him, *inter alia*, that "as per their records" the deceased was survived by two spouses who are the applicant and the first respondent herein.

The first respondent also swore that the applicant together with her in-laws colluded with the area chief and other provincial administration officers to deny her the letter that would have introduced her and her children to the court as the deceased's survivors for purposes of the succession proceedings. In the absence of this letter, she had to lodge this petition on the basis of a statutory declaration declaring why she was unable to secure the chief's letter. The applicant's conduct, so the respondent has sworn, demonstrated that she was aware that the respondents were intent on commencing succession proceedings in respect of the deceased's estate.

In any event, so the respondents have contended, after they lodged the petition for grant of letters of administration, the same was duly gazetted in Gazette Notice No. 783 of 11th December, 2009 inviting any objections to the making of the grant; no objection was made within the prescribed time or at any other time and that it is only after the grant had been confirmed that the applicant came up with the application herein to revoke and/or annul it.

The first respondent has sworn that immediately after the deceased's demise, the applicant sought to access his benefits from Kenya Air Force where he had been working on the basis that she was a beneficiary to his estate. When the first respondent objected, denying that the applicant was related to the deceased in any way, an inquiry was instituted. According to the applicant's evidence in the ensuing inquiry, a copy of the extract of which was attached to the respondent's affidavit, the applicant admitted that she was neither married to the deceased nor to any other person; that all her children were born at her parent's home and none of them belonged to the deceased; that she was after the payment of Kshs 50,000/= which she lent the deceased to buy a car.

The respondents have sworn that, in view of the evidence before court, the applicant's application is not merited and should be dismissed with costs.

The record shows that on 30th July, 2012, parties took directions before Serгон, J to the effect that the summons for revocation of grant be determined on the basis of affidavit evidence on record. The parties also agreed to file and exchange written submissions on the summons. As at the time this matter was transferred to the High Court in Murang'a and judgment date given on 10th June, 2014, it is only the respondents' counsel who had filed submissions on behalf of his clients; no reason was given by the applicant's counsel or his representative why the applicant's submissions were not filed. I have given due regard to the applicant's summons, the parties' affidavits and the submissions filed on behalf of the respondents.

Section 76 of the Law of Succession Act provides:-

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an interested party or of its own motion-

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) that the grant was obtained by means of 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) that 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.

Basically, the provisions of **section 76** of the Act comprise the express statutory grounds upon which a grant may be revoked or annulled; the burden is on an applicant for annulment or revocation of a grant to demonstrate the existence of any, some or all of these grounds, as the case may be.

It is apparent on the face of the summons that the applicant's application is based on grounds **(b)** and **(c)** of **section 76** of the **Act**; that the grant was obtained fraudulently by making a false statement or by concealment from the court something material to the case and that it was obtained by means of untrue allegation of fact essential to justify the grant.

Looking at the applicant's affidavit in support of the summons, it would appear that the two grounds are based on the same facts and to that extent they are intertwined. As far as I can see, the only basis for the applicant's claims is that respondents did not disclose in the petition for letters of administration intestate of the estate of the deceased that the applicant was also the deceased's wife and together with her four children, survived the deceased.

A scrutiny of the affidavit evidence on record does not seem to support the applicant's allegations. There is no other evidence, apart from the applicant's depositions in her affidavit, that she was either married to the deceased or that her children were sired by him; neither is there any evidence that either all or any of them was the deceased's dependant or was related to him in any other capacity.

One of the exhibits attached to the respondent's affidavit is a copy of the extract of the proceedings of inquiry conducted by the deceased's former employer, the Kenya Air Force, when the respondent objected to the applicant accessing the deceased's benefits. Her statement to the inquiry was as follows:-

“STATEMENT BY WITNESS NO. 7 GRACE MUTHONI MWANGI ID NO. 0816463

I am the above named female adult. I was born in 1962 in Kimathi Location, Murang'a District. I grew up in Murang'a. I have never been married but sired four children while living with my parents at home, my eldest son Sammy was born in 1984 and the last born in 1994, I met the late Paul Waithaka Mburu in Nairobi in the year 2002 and after knowing him for some time we became close friends. He was living in Huruma Estate not far from where I had rented my house. After some time of living apart I moved to his rented house in 2005. In December 2006 he took me to his rural home for Christmas festivities where we were joined by his family members and friends. Sometimes in 2006, Waithaka was involved in a road accident with his vehicle but he was not seriously hurt, but somehow

he remained confused. He started drinking excessively and look (sic) like he was going crazy. I have ever stayed with him since then as a friend till when he passed away on 10 Feb 2009. That is all I have to state.

Date 12/2/2009. Signed Grace

QUESTIONS BY THE BOARD TO WITNESS NO. 7

Q1. Was there any formal introduction between your parents and his parents?

A1. No

Q2. Were you married to the late WOII Paul Waithaka Mburu?

A2. No. I did not want to be married because I knew he had a wife and children. Also I had grown up children of my own and the marriage would not have augured well to them.

Q3. Have you sired any child/children with the late Paul Waithaka Mburu?

A3. No my last born child was born in 1994 and have since never given birth to another child.

Q4. Where are your children currently?

A4. The eldest called SKM is in Mombasa, T who is the second born is in Nairobi, the third born is in Thika and the last born did her KCPE last year and is with my parents at Murang'a.

Q5. In your view whom do you think should be given his benefits?

A5. The late Paul Waithaka Mburu benefits should be shared equally among his wife and children however I had loaned, him some 50,000.00 when he was buying his vehicle and if possible I be refunded that amount."

This piece of evidence was neither controverted nor challenged; the applicant did not swear any affidavit to controvert the respondent's allegations or deny the remarks attributed to her. It is presumed, therefore, that the respondents' contentions in this regard are true.

Without any evidence that the applicant was married to the deceased or even cohabited with him in circumstances that could have led one to believe that she was the deceased's wife; and in the absence of any evidence that the applicants' children were the deceased's children or that he had accepted them as such or were his dependants, there is no basis upon which the applicant can lay claim on the deceased's estate. Accordingly, there is no basis upon which the applicant and her lot could have been included in the petition for grant of letters of administration as the deceased's survivors or beneficiaries to his estate. In my view, it would be asking too much of the respondents to have taken on board the applicant and her children when there was no basis in law to include them in the succession proceedings.

Be that as it may, the respondents have demonstrated, to my satisfaction, that in petitioning for the letters of administration of the deceased's estate they complied with the intestate provisions of the Law of Succession Act. It is not in dispute that they were the wife and the daughter of the deceased and there is no doubt that the rest of the survivors they listed are the deceased's children. The respondent exhibited to her affidavit a certificate of marriage showing that she was married to the deceased under the **African Christian marriage and Divorce Act (Cap)** in 1983. She also exhibited certificates of birth for all her children indicating that the deceased was their father. Pursuant to **section 66** of the Law of Succession Act, the respondents were perfectly in order to petition for grant of letters of administration and subsequently have it confirmed without the involvement of the applicant. That provision of the law states as follows:-

66. Preference to be given to certain persons to administer where deceased died intestate.

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person 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. ...
- c. ...

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

From the evidence available, the first respondent was the deceased's only surviving spouse and the second respondent was one of the deceased's five children who survived him and who were therefore entitled to benefit from his estate.

In the face of this evidence, I am bound to agree with counsel for the respondents that the applicant's application was made out of bad faith. Again although it is clear from the available evidence that the applicant was well aware that the respondent was petitioning for the grant of letters of administration, she never took any step to lodge any objection to the grant being made until such time that it was confirmed. And even if it is assumed that the applicant was not aware of the respondents' intentions there is clear evidence when it was finally lodged, the petition was gazetted in the official government gazette for the general public and in particular for any objection to be lodged by any party including the applicant if there was any valid basis for such an objection.

Section 67 of the **Law of Succession Act** makes it mandatory that a grant of representation cannot be made without a publication of the notice of the application for such a grant. **Section 68** of the same Act provides an objector, such as the applicant herein, with the opportunity to object and even file a cross-application for the grant of representation.

In the succession cause herein, a notice of the application for grant inviting any objections thereto was published in a Government publication pursuant to **section 67 (1) and (2)** of the Act. The applicant did not lodge a notice of objection to the application for grant of representation with the court in any manner whatsoever or within the prescribed time as required under **section 68 (1)** of the Act; indeed no objection was filed at all.

Apart from the statutory provisions in **section 67** and **68** of the Act, the applicant had also the option to invoke the Probate and Administration Rules and place a caveat in the relevant registry seeking to be notified of any action or intended on the estate of the deceased; with such information the applicant would have been properly placed to take appropriate steps to protect her interests and those of her children, if at all there were any, in the estate when the respondents petitioned for the grant of the letters. Under **rule 15(1)** of the Probate and Administration Rules any person who wishes to ensure that he or she shall receive notice of any application either for the making or the confirming of a grant of representation to the estate of a particular deceased person may enter a caveat in any registry.

A caveat serves to enable the principal registrar to notify the caveator that an application for making of a grant in respect of an estate in which he or she has an interest has been lodged and therefore if he or she is intent on objecting to the making of the grant he or she should file an objection within thirty days or such other longer period that the registry may allow from the date of receipt of the notification.

It is in such an objection that under **rule 16(1)** of the **Probate and Administration Rules** the applicant should have ventilated her alleged claims before the grant was made and confirmed. That rules provides as follows:-

16.(1) Any person who wishes to bring to the notice of the court any matter as to the making of or contents of the will of a deceased (whether written or oral), the rights of dependants or of persons who might be entitled to interests on intestacy of the deceased, or any other matter which may require further investigation before a grant is made or confirmed, may file in any registry in which an application for a grant to the estate has been made or in the principal registry an affidavit giving full particulars of the matters in question.

While the Act, under **section 76** thereof, provides the applicant with the window to have the grant revoked and/or annulled even in cases where one could possibly have lodged a caveat and an objection pursuant to the forgoing provisions, it is apparent to me that even if such an objection had been lodged it would have certainly failed; the allegations that the applicant is the deceased's widow and that her children are the deceased's could not have sustained such an objection since the available evidence points to the contrary. In the face of such contrary evidence, the same allegations cannot possibly be basis for revocation or annulment of grant under **section 76** of the Act.

Restricting myself to the provisions under which the applicant's application was made, I would conclude that, in the absence of any evidence of fraud or making of a false statement by concealment from the court of something material to the succession cause, and in the absence of any evidence that the grant was obtained by means of untrue allegation of fact essential in law to justify the grant, it is clear that the application was made in bad faith and it is without any merit. In the premises, I am bound to dismiss the applicant's summons dated 19th June, 2012 with costs. It is so ordered.

Dated, signed and delivered at the High Court in Murang'a this 10th day of December, 2014

Ngaah Jairus

JUDGE