



REPUBLIC OF KENYA

High Court at Meru

Succession Cause 341B of 2002

IN THE MATTER OF ESTATE OF M'MUKETHA M'TWAMWARI....(DECEASED)

VERSUS

MARY KARAMBU MUTIRIA.....1ST APPLICANT/OBJECTOR

JOHN KATURE THURANIRA.....2ND APPLICANT/OBJECTOR

J U D G M E N T

The petitioner REBECCA KATHURE MUKETHA is step-mother to MARY KARAMBU MUTIRIA and JOAN KATHURE THURANIRA, the objectors herein.

The petitioner petitioned for grant of Letters of Administration in respect of the estate of M'Muketha M'Twamwari in her capacity as widow to the deceased. That in form P&A 5 she named the deceased survivors as follows:-

- 1. Rebecca Kathure Muketha**
- 2. William Mugambi Muketha**
- 3. Jacob Kirima Muketha**
- 4. Charles Mburugu Muketha**

The consent to the making of a grant of administration intestate to person of equal or lesser priority was signed for the petitioner by the following:-

- 1. William Mugambi**
- 2. Charles Murega**
- 3. Jacob Kirima**

The letter from the Chief had listed the following as dependents:-

- 1. Rebecca Kathure**
- 2. William Mugambi**
- 3. Jacob Kirima**
- 4. Charles Mburugu**
- 5. Mary Karambu**
- 6. Kathure Muketha**
- 7. Janet Kendi**

8. Rhoda Gakii

The letters of administration was issued to the petitioner on 19th June, 2003 and on 30th June, 2008, the petitioner sought confirmation of grant through her application dated 10th November, 2003. The petitioner in her application for confirmation of grant omitted the names of the objectors. The grant was confirmed excluding the two objectors.

The objectors through an application dated 6th October, 2009 sought the following orders:-

- 1. That this honourable court be pleased to revoke and/or nullify the grant of letters of administration intestate issued to the petitioner herein on 12th June, 2002 and confirmed on 16th June, 2008.**
- 2. That this honourable court also make an order cancelling all the titles of deceased's estate in the name of the petitioner and make an order that the same be reversed back to the deceased's name.**
- 3. That the costs of this application be in the cause.**

The application is based on the grounds on the face of the application and supportive affidavit attached thereto. The application on the other hand is opposed. The petitioner filed a replying affidavit in opposition to the objector's application.

On 1st October, 2012 Court gave directions that the case be heard by way of viva voce evidence. The objectors gave evidence and called no witness whereas the petitioner gave evidence and called one witness.

The objectors through PW1 and PW2 testified that they are step-daughters to the petitioner and that the deceased M'Muketha M'Twamwari was their father and husband to the petitioner who was the deceased's second(2nd) wife. PW1 and PW2 testified that they are married and stay at their respective matrimonial homes. That the deceased they averred died about 10 years ago and was survived by seven(7) children and two wives. The first wife was JANET NKATHA(deceased) and second wife was KATHURE MUKETHA the petitioner.

That JANET NKATHA had three(3) children namely:-

- 1. Mary Karambu**
- 2. Joan Kathure**
- 3. Mugambi William**

The second house of REBECCA KATHURE MUKETHA had four children namely:-

- 1. Kirima**
- 2. Mburugu**
- 3. Janet Kiende**
- 4. Gatwiri**

That the deceased left the following assets:-

- (a) Ntima/Ntakira/553 and**

(b) Ruiru/Rwarera/449

The objectors testified that during the petition for the grant of letters of administration they were not involved as they were not informed nor did they give their consent as the same was not sought. They further testified that they were not involved in seeking confirmation of the grant nor were they aware of the seeking of the confirmation of the grant. The objector testified that in the confirmed grant they were not provided for. The two objectors stated that from their mother's house, it was only their brother WILLIAM MUGAMBI who was given a portion of the deceased land.

The 1st objector during cross-examination by the petitioner she stated that her father could not speak for 2 years before his death due to sickness. She also stated that they did not attend confirmation of the grant because they had not been notified of the same.

The petitioner in her evidence, stated that the objectors are her step-daughters being daughters of her co-wife, the late JANET NKATHA. She testified that the estate subject of this objection was of her late husband M'MUKETHA M'TWAMWARI who was married to her and the late JANET NKATHA. Petitioner admitted the 1st wife had three children as mentioned by the objector and that she had 4 children as mentioned by the objectors. She testified that all her daughters are married save Roda Gatwiri and that all the daughters of her co-wife are all married.

The petitioner averred that when she filed the petition for grant of letters of administration in respect of the deceased estate she did it openly and without concealment. She denied that the petition was filed secretly or fraudulently. She however added that she did not communicate the intention of filing the grant to the objectors or discussed the matter with them. The Petitioner admitted that she proceeded with this petition without the knowledge of the objector but that she recorded their names. She however conceded in form P & A 5 she gave only 4 names of the deceased heirs. She further averred in her affidavit in support of confirmation of grant she gave all the names of the deceased heirs but that she did not seek and obtain consent of the deceased daughters. She concluded by stating that as the deceased's daughters are married she is only offering to give them one(1) acre each.

During cross-examination the petitioner testified that the land at Ntima was shared by the deceased and the objectors are not entitled to any land at Ntima.

DW2, Murithi John, who was in the court all the time of the hearing of the objectors' evidence and that of the petitioner, was in the interest of justice allowed to give evidence. DW2 evidence was to the effect that he was present when the deceased shared the land and said Roda Gatwiri be given one acre. During cross-examination DW2 stated that the deceased only showed his children where to settle. The witness did not know the year the deceased shared the land. He stated there was nobody else. He stated that according to Meru custom the owner of the land cannot share his land in presence of only one witness. He said they shared 2 acres to each son. He said he is surprised petitioner has two acres as she was not given any. DW2 testified he is not aware who was to seek and obtain grant of letters of administration.

The issues of determination in this cause are as follows:-

- 1. Are there sufficient reasons or grounds to warrant the revocation of grant of letters of administration and confirmed grant issued in this cause?**
- 2. If the grant and confirmed grant are revoked should the court order cancellation of all titles issues to the beneficiaries as per confirmed grant and have the same revert back to the deceased name?**
- 3. Who should bear the costs of this cause?**

Under Section 76(a), (b), (c), (d) and (e) of the Law of Succession Act it is provided:-

“76.A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any 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 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) that the person to whom the grant was made has failed, after due notice and without reasonable cause either -

(e) that the grant has become useless and inoperative through subsequent circumstances.”

In the instant cause the petitioner obtained a letter dated 8/11/2002 from Chief of Ntakira location and in which letter the chief listed survivors as 8 which list included the two objectors. The petitioner in her form 38 for consent to making of grant of Administration intestate to person of equal or lesser priority failed to obtain the consent of the objectors. The petitioner only obtained consent of only three(3) beneficiaries. In form P& A 5 the petitioner listed only four(4) out of the eight deceased survivors excluding even the objectors. In application for confirmation of the grant the petitioner did not include the names of the objector nor were they provided for. The petitioner admitted that she did not inform the objectors or sought their consent when she denied to petition for the grant. She did not equally inform them when she opted for confirmation of the grant.

The petitioner in form P&A 80 deponed that every person having an equal or prior right to a grant of representation herein had consented hereto or renounced such right or had been issued with a citation to renounce such a right or had been issued with a citation to renounce such a right and apply for a grant of representation and had not done so. The petitioner in this cause fraudulently obtained grant and confirmed grant by making of a false statement and/or by concealment from the court of something material to the case. The petitioner made a false statement that all persons having an equal or prior right to grant of representation had consented to her petitioning for the grant or had renounced their right. The grant and confirmed grant were further obtained by means of untrue allegations of fact essential in point of law to justify the grant. The petitioner did not obtain consent on mode of distribution and consent to confirmation of grant and I believe for that reason she decided to exclude the names of the objectors so as to obtain the grant, and have the same confirmed excluding the objectors. Thus the grant and confirmed grant were obtained secretly and fraudulently.

Under Rule 26(1) and (2) of the Probate and Administration Rules it is provided:-

26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require. In the above-mentioned rule it is mandatory for petitioner to any grant to give notice to every other person entitled in the same degree as or in priority to the petitioner before letters of administration is granted. Further in case where there is no renunciation or written consent in form 38 or 39, by all persons so entitled in equality or priority, there should be an application for a grant should be substituted by an affidavit by applicant and other evidence as court may require.”

Under Rule 40(8) of the Probate and Administration Rules it is provided:-

“(8) Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependents or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that

the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit.”

In the instant cause it is evidently clear that the petitioner did not comply with the mandatory provision of Rule 26(1) and (2) of the Probate and Administration Rules in that the petitioner did not give notice to every other person entitled in the same degree as or in priority to her when she moved to seek grant. The objectors in this cause were not given notice. They did not renounce or give written consent in form 38 or 39 in respect of their entitlement nor did the petitioner file an application for grant supported by an affidavit as required under Rule 26(2) of the Probate and Administration Rules.

Significantly when the petitioner filed summons for confirmation of grant she did not file the same together with consent in writing in form 37 of all dependants. The application was not accompanied by consent in writing of all dependants or other persons who might have been beneficiaries.

In view of the foregoing, I am satisfied that there is sufficient ground to warrant the revocation of grant of letters of administration and confirmed grant issued in this cause.

Having found that there are sufficient grounds to warrant revocation of the grant, as the grant and confirmed grant were made in complete disregard of the provisions governing the issuance of grant and confirmation of the grant, and that some of the dependants who were entitled were denied their entitlement, I find that it is just and fair to have all titles issued as per confirmed grant cancelled and the same do revert back to the deceased name.

The upshot of the matter is that the objectors application dated 6th October, 2009 should succeed. I therefore make the following orders:-

- 1. The grant issued on 19th February, 2003 is revoked and as this matter is old I direct that a fresh grant do issue in the name of REBECCA KATHURE MUKETHA, WILLIAM MUGAMBI MUKETHA AND MARY KARAMBU MUTUMA as joint administrators.***
- 2. That all titles issued arising out of confirmed grant issued on 30th June, 2008 be and are hereby cancelled forthwith and the same do revert back into the name of M'Muketha M'Twamwari(deceased).***
- 3. That this order be served upon the Land Registrar Imenti North District for compliance.***
- 4. As this is an old matter the joint administrator are given 60 days to file joint scheme of distribution or separate scheme of distribution and set the matter down for confirmation of grant.***
- 5. As the objectors and petitioner are step-daughters and step-mother and the issue relates to the estate of objectors' father and estate of petitioner's husband I order that each party bear its own costs.***

DATED, SIGNED AND DELIVERED AT MERU THIS 19TH DAY OF FEBRUARY, 2013

**J. A. MAKAU
JUDGE**

DELIVERED IN OPEN COURT IN THE PRESENCE OF:-

1. The objectors in person(absent)
2. The petitioner in person(absent)

J. A. MAKAU
JUDGE