



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO: 450 OF 2010

IN THE MATTER OF THE ESTATE OF UNICE WANGUI NDUNGI (DECEASED)

RULING

The application dated 8th March 2010 is for revocation of the grant made on 5th November 2002 to George Kaboro Ndungu in Githunguri SRMCSC No. 70 of 2002.

It is filed by Hannah Wanjiku Njuguna who claims to be a beneficiary of the estate of the deceased Eunice Wangui Ndung'u. She complains that the grant was obtained fraudulently on the basis of untrue allegations. In particular that the petitioner did not disclose all the beneficiaries. The applicant is a child of one of the sons of the deceased Eunice Wangui Ndungu, called David Kamau Ndungu. Her position is that her father's share in the estate ought to have been given to her. She states the grant has been confirmed and the administrator, George Kaboro Ndungu, has fraudulently withdrawn money from the deceased's bank accounts and has caused landed assets to be transferred to himself and to one Margaret Wanjiru Ndungu. She would like the grant revoked and all the undertaken instructions on the strength of that grant cancelled or nullified.

The application was served on the respondents and they have filed their replies. The administrator, George Kaboro Ndungu, swore an affidavit on 7th March 2011. There are also affidavits by his siblings, Margaret Wanjiru Ndungu, and his nephew, Peter Ndung'u Mbugua. There is also an affidavit of an elder called Njau Gathuru.

The gist of the replies is that the administrator did not practice fraud at the time of petitioning for the grant of representation. The deceased, Eunice Wangui Ndungu, had prior to her demise called a meeting of her children and deliberated on how her estate was to be distributed, and it was agreed that Gatamaiyu/Kagaa/1224 and the shares mentioned in the applicant's affidavit were to be allotted to George Kaboro Ndungu and Margaret Wanjiru. Regarding Gatamaiyu/Kagaa/T.93 and 121, Margaret Wanjiru Ndungu was already settled on these parcels. Further the father of the applicant, David Kamau Ndung'u, had inherited what he was entitled to and his estate had devolved upon the applicant following the said David Kamau Ndungu's death. The administrator has attached a bundle of documents to support his case. The documents include the statement of the deceased, Eunice Wangui Ndungu, made on 1st May 1998, distributing Gatamaiyu/Kagaa/1224, Gatamaiyu/Kagaa/T.93 and 121, the bank accounts at Kenya Commercial Bank Ltd and Barclays Bank Ltd and shares at Barclays Bank Ltd, Kenya Barclays Limited, Jubilee Insurance Co. Ltd and Kiambaa Tea Factory. From this document the bulk of the estate has been given to George Kaboro Ndungu and Margaret Wanjiru Ndungu.

Margaret Wanjiru Ndungu in her affidavit sworn on 19th April 2011 says that the family had met and agreed at a meeting held on 5th May 2000 that George Kaboro Ndungu and Margaret Wanjiru Ndungu were to be the only beneficiaries of the estate of their mother. The minutes of this meeting are annexed, signed by, among others, the mother of the applicant and the widow of the applicant's father. Margaret Wanjiru Ndungu further avers that during their mother's lifetime she had settled the applicant's father,

David Kamau Ndung'u, on Gatamaiyu/Kagaa/1225 when David Kamau Ndung'u died this parcel of land, Gatamaiyu/Kagaa/1225, devolved upon his only child, the applicant herein, Hannah Wanjiku Njuguna. This position is supported by Peter Ndung'u Mbugua and Njau Gathuru.

Eunice Wangui Ndungu died on 10th January 2000. Representation to her estate was sought by George Kaboro Ndung'u in his capacity as a son of the deceased. In his affidavit in support of the petition, sworn on 4th September 2002, George Kaboro Ndungu, disclosed that the deceased was survived by two children only, George Kaboro Ndungu and Margaret Wanjiru Ndungu. A letter from the chief Kamburu Location, dated 2nd September 2002, confirms this, that the deceased as survived by George Kaboro Ndungu and Margaret Wanjiru Ndungu. The deceased is said to have died possessed of:

- (a) agricultural land – Gatamaiyu/Kagaa/1224.
- (b) town plots – Gatamaiyu/Kagaa/T.93 and 121.
- (c) money in the bank – KCB Githunguri A/C No. 1550905 and Barclays Bank A/C No. 4137706.

Grant of letters of administration intestate was subsequently made on 5th November 2002 to George Kaboro Ndungu.

Confirmation of the grant was sought on 21st May 2003 through a summons dated 20th May 2003. In the summons it was indicated that the deceased was survived by only two children – George Kaboro Ndung'u and Margaret Wanjiru Ndung'u. It was proposed that the estate be shared between the two George Kaboro Ndung'u was to take the agricultural land and the money in the bank accounts, while Margaret Wanjiru Ndungu was to take the two town plots. The grant was confirmed on 29th May 2003 in those terms.

The application dated 8th March 2010 is premised on **Section 76** of the Law of Succession Act.

Section 76 provides:-

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

- (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 justice the grant notwithstanding that the allegation was made in ignorance or inadvertently...”***

The applicant alleges that the proceedings to obtain the grant were defective, that there was fraud and that there were false statements and concealment of material.

Is there basis for the applicant's arguments? The impression created in the affidavit in support of the petition, as well as in the letter from chief, is that the deceased was survived by only two children. This position is further perpetuated in the summons for confirmation. What emerges is that the deceased had other children alive at the time of her demise. These were David Kamau Ndungu, Maria Njeri Ndungu, Teresia Wacu Ngare, Lucy Wangari Kimani, Jane Wanjiku Mbugua and Elizabeth Wahu Ndungu. David Kamau Ndungu as since passed on. It is misleading therefore for the chief and the administrator to perpetrate the impression that the deceased had only two children. This is concealment of information and it amounts to an untrue allegation of an essential fact. This clearly makes the proceedings defective.

The procedure of applying for a grant is set out in **Section 51** of the Law of Succession Act and rule 7 of the Probate and Administration Rules. **Section 51(2)** (g) of the Law of Succession states:-

“An application (for grant) shall include information as to – 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...”

Rule 7(1) (e) of the Probate and Administration Rules requires that the petition for grant shall be supported by an affidavit containing the following particulars-

“... in cases of total or partial intestacy -

(1) the names, addresses, marital state and description of all surviving spouses and children of the deceased...”

From these provisions it is clear that the application must be supported by details of the survivors which must include the surviving spouse and all the surviving children. It does not require disclosure of only the children or spouses or persons who are entitled to get a share in estate, but of all the surviving spouses and surviving children. A petition which does not comply with **Section 51** of the Law of Succession Act and Rule 7 of the Probate and Administration Rules is defective.

The material placed before me suggests that the deceased might have disposed of some of her assets during her lifetime, and that the assets the subject of these proceedings were the only assets remaining and she, before her death, had given indication that they should be distributed between George Kaboro Ndungu and Margaret Wanjiru Ndungu. It would appear that there was consensus on this. However, that does not excuse the administrator from complying with **Section 51** of the Law of Succession Act and Rule 7 of the Probate and Administration Rules. He was still obliged to disclose all the surviving children of the deceased, including those who were not entitled to a share in the estate in view of any *inter vivos* distribution. Failure to comply with **Section 51** and Rule 7 would expose the administrator to a challenge like the one that he is now facing.

The office of an administrator is a position of trust. The property of the deceased vests in him as holder of the office of administrator, and he holds the property so vested in trust for the benefit of others – beneficiaries, heirs, survivors, dependants, creditors, etc. As trustee he stands in a fiduciary position and he is therefore accountable to the persons on whose behalf he holds the property. As trustee he should inspire confidence and trust, that he is going to act fairly, justly, openly and transparently with everyone who has an interest in the estate.

The administrator in this cause stated on the wrong footing; by failing to make a full disclosure, as required by Section 51 of the Law of Succession Act and Rule 7 of the Probate and Administration Rules, of all the children who survived the deceased. By so doing, he was seen by persons interested in the estate, such as the applicant herein, Hannah Wanjiku Njuguna, as not acting fairly, justly and transparently. He did not inspire the confidence that is expected of him as administrator, hence this challenge to the integrity of the process of obtaining the grant.

There could be merit in the administrator's position that the assets the subject of this cause were not meant to devolve to all the surviving children but to only two of them, the two disclosed in the petition. This, however, does not absolve the administrator, he is still bound to comply with **Section 51** and Rule 7. The information that he is giving now, that the assets in question were only meant to benefit him and Margaret Wanjiru Ndungu, because that was what the deceased intended and that the other children had benefited from *inter vivos* transfers; should have been given at the confirmation of the grant. The administrator should have disclosed all the surviving children of the deceased, and that at confirmation proceeded to allot the assets to Margaret Wanjiru Ndungu and himself. Any person aggrieved at that stage would have been entitled to file an affidavit of protest and then the court would have proceeded to determine who was entitled to a share in the estate.

In the upshot, I find merit in the application dated 29th March 2010 and I will proceed to make the following orders:-

(a) that the grant made on 5th March 2010. The grant made on 5th November 2002 to George Kaboro Ndungu by the Senior Resident Magistrate in Githunguri SRMCSC No.70 of 2002 is hereby revoked.

(b) that all the transactions made on the basis of the said grant are hereby cancelled.

c. that the court file in respect of Githunguri SRMCSC No. 70 of 2002 shall be returned to the Githunguri Court Registry for further handling.

(d) that the family of the deceased shall apply afresh for appointment of administrator in an application where **Section 51** of the Law of Succession Act and Rule 7 of the Probate and Administration Rules are fully complied with.

(e) that the applicant shall be entitled to the costs of this application.

DATED, SIGNED and DELIVERED AT NAIROBI THIS 27th DAY OF June 2013.

W.M. Musyoka

JUDGE