



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO.371 OF 2008

**IN THE MATTER OF THE ESTATE OF LUCY GATHONI WAINAINA ALIAS GATHONI
WAINAINA (DECEASED)**

RULING

The deceased, Lucy Gathoni Wainaina died on 5th March, 2008 at the age of 47 years. She was survived by her mother, Lydia Wanjiru Wainaina (the 1st administratrix), two brothers and three sisters. The grant was issued jointly to the 1st administratrix and John Kamau Wainaina, one of the brothers of the deceased (the 2nd administrator). The deceased was unmarried and had no children. She had several assets comprising land, motor vehicle and cash.

Upon confirmation of the grant, the only motor vehicle (KAR 567J) was to be inherited by the 2nd administrator while three parcels of land namely:

- I) NAKURU MUNICIPALITY BLOCK 21/164
- II) KISUMU/KANYAWEGI/3809
- III) KISUMU MUNICIPALITY BLOCK 12/242 and;
- IV) KISUMU/CHIGA/2997 were to be shared equally by the 1st administratrix and all the deceased person's siblings.

The confirmation of the grant was based on the strength of a consent purportedly signed by the siblings of the deceased dated 18th May, 2010.

One of the beneficiaries of the estate, Vincent Mbogoro Wainaina, has now brought the instant summons for the revocation of the grant, an order of accounts of the estate and preservative orders, arguing, among other reasons, that the signatures of the beneficiaries purporting to give their consent for the confirmation of the grant were forged; that a letter allegedly written by the Chief of Kaptembwo Location did not emanate from the said chief; that the administrators have fraudulently by themselves or through their agents disposed of KUSUMU MUNICIPALITY BLOCK 12/242 to a third party; that the administrators have intermeddled with the estate to the detriment of the beneficiaries and that they have failed to proceed diligently with the administration of the estate.

For their part, the administrators in their separate affidavits have denied the allegations against them

maintaining that the administration has been above board; that they have done their best to preserve and protect the estate. The 1st administratrix has specifically deposed that in terms of **Section 39** of the **Law of Succession Act**, she was under no obligation to involve the beneficiaries, the deceased having died intestate, single and without children; that her estate, in the absence of her father (also deceased) devolved upon her (the 1st administratrix).

According to the 1st administratrix, the applicant (Vincent Mbogoro Wainaina) has brought this application following a demand from her that he accounts for Kshs.3m taken by him from the estate. The administrators have demonstrated the steps they took upon learning about the questionable sale transaction and transfer of the Kisumu property.

In terms of **Section 76** of the **Law of Succession Act** and **Rule 44** of the **Probate and Administration Rules**, under which the present application is brought, a grant will be revoked whether or not confirmed if:

- i) the proceedings to obtain it were defective in substance;
- ii) obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- iii) 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;
- iv) the administrator (or executor) after due notice and without reasonable cause failed to apply for confirmation of the grant or to proceed diligently with the administration of the estate or to produce any inventory or account of administration or has produced a false account or inventory.

A grant will also be revoked if it has become useless and inoperative through subsequent circumstances. The applicant's contention is that:

- i) the administrators have committed acts of fraud on the estate and has given the example of the alleged forged consents of the beneficiaries, the purported sale and transfer of the Kisumu property, the letter from the chief which has been disowned by the chief;
- ii) the administrators have failed to proceed diligently with the administration of the estate, by, for example, not taking any action even after the transfer of the Kisumu property was brought to their attention; by obtaining the terminal benefits of the deceased without disclosing that fact to the court; by receiving and applying the rent from NAKURU MUNICIPALITY BLOCK 21/164 and that the 2nd administrator has planned to take the Kisumu property without involving the beneficiaries;
- iii) the administrators have intermeddled and continue to intermeddle with the estate by disposing of the Kisumu property and by receiving rent from the Nakuru property and failing to account for it.

Before considering these grounds, it is important to point out two relevant issues regarding how the estate of a deceased person ought to be treated and the role of the administrators. **Section 55(1)** of the **Law of Succession Act** stipulates that:

“(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by Section 71”

(Emphasis supplied)

Subsection (2) is equally instructive. It states:

“(2) The restriction on distribution under sub-section(1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.”

(Emphasis mine)

There is no evidence that the administrators distributed the estate before the grant was confirmed. The circumstances of the transfer of the Kisumu property have been the most contentious. It is alleged that the transfer was fraudulent for the reason that the purported transfer by the deceased took place long after her death. That may be so but there is no evidence that the administrators played any role in that transaction.

In terms of **Sections 82 and 83** of the **Law of Succession Act**, the administrators are granted powers and duties which are aimed at the preservation and protection of the estate. With regard to the Kisumu property, the administrators have sufficiently explained the steps they had taken until they were stopped by the applicant’s application in which this court (Wendoh, J) granted orders on 31st March, 2011 to preserve the estate pending the determined of this application. Despite her age and health, the 1st administratrix took steps together with the 2nd administrator who specifically travelled from the United Kingdom where he is based to Kenya to inquire into this issue.

He has exhibited letters to the Commissioner of Lands and to the Criminal Investigations Department (C.I.D.). For the steps they had taken, the administrators cannot be accused of either being involved in the alleged fraud or being complaisant. I have reproduced the law in **Section 55(2)** regarding the issue of rent received by the 1st administratrix from the Nakuru property. The 1st administratrix has sufficiently explained that due to her health, she has been operating the bank account where rent was deposited even during the lifetime of the deceased.

That leaves the question of the beneficiaries’ consent to the confirmation of the grant and the payment of the terminal dues. It is important to emphasis that by dint of **Section 39** aforesaid, the 1st administratrix ranks first in priority to inherit the estate, being the only surviving parent of the deceased, and the deceased having died intestate and without a husband or children. But for her love for her children, she involved all of them, even though they are adults who by all standards cannot be considered poor or dependants as defined in **Section 29** of the **Law of Succession Act**. None of the deceased’s siblings can claim or has insisted he/she was being maintained by the deceased immediately prior to her death. But the 1st administratrix having involved all her children in this cause was expected to act transparently.

It is apparent from the averments in this matter that some Kshs.3m was received in respect of some payment to the deceased that was not disclosed in the application for the grant. It is also clear from the applicant’s own admission that he had been entrusted with some money (according to him Kshs.2m and according to the administrators Kshs.3m). In addition it is apparent from a list of assets dated 5th October, 2011 which also contains various fund to the applicant and his wife.

The assets were not included at the time the grant was applied for. They cannot be considered after the grant was issued and even confirmed. Then there is the issue of the alleged consent. Neither the 1st administratrix nor the 2nd administrator have explained in their respective affidavits how the signatures alleged to be those of the beneficiaries were obtained. Although only the applicant has maintained that his signature and that of Scholar Wambui Rougton have been forged, the latter has sworn an affidavit in which she has not denied the signature purported to be hers. None of the other beneficiaries has disowned the signatures. It is only the signature of the applicant that remains in contention, a fact the administrators have not explained.

In view of what I have stated, it is my considered view that given the circumstances of this cause, the age and health of the 1st administratrix, the fact that the beneficiaries were not the dependants of the deceased, the alleged fraudulent transfer of the Kisumu property, it is just and expedient not to revoke the grant but

to give the administrators an opportunity to rectify the grant by including the properties omitted in the grant, together with the mode of distribution. They are ordered to do so within forty five (45) days from the date of this order.

Secondly, the administrators to render account of Kshs.3,000,000/= received for the benefit of the estate within thirty (30) days of this order. Similarly within that period, the applicant to account for all the funds received from the estate.

Finally, the earlier orders preserving the estate is vacated and the administrators to take all the necessary steps to ascertain the circumstances under which the Kisumu property was transferred and to file a report within thirty (30) days. All the beneficiaries are directed to co-operate with the administrators in order to reduce acrimony and finalize distribution in the shortest time possible.

I make no orders as to costs. Mention on 23rd March, 2012.

Dated, Signed and Delivered at Nakuru this 7th day of February, 2012.

W. OUKO
JUDGE