



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO. 617 OF 2005

RUTH KAVISYO KATULU.....PETITIONER

VERSUS

MWELU NZIA KIANGA

BONIFACE PAUL NZIA.....OBJECTORS

RULING

1. On the 5th February, 2007 a Certificate of Confirmation of a Grant of Letters of Administration Intestate issued forth of this court to Ruth Kavisyo Katulu (the Petitioner) whereby the immovable property and other assets set out therein were to be registered in the sole name of the Petitioner, the widow of David Musao Kiangi (the Deceased).
2. Boniface Paul Nzia (the Objector) moved the court on the 16th November 2009 by way of Summons seeking orders that the said Grant of Letters of Administration made to the Petitioner on the 17th February, 2006 and confirmed on the 5th February, 2007 be revoked. In the grounds upon which the application is brought, the Objector contends that the Grant was obtained fraudulently by making false statements and concealment of material facts to the court; that the proceedings in which the Grant were obtained were contrary to the provisions of sections 39, 51 and 72 of the Law of Succession Act (**“the Act”**) and Rule 7, 25, 26 and 40) made thereunder and that some property belonging to the estate of the Deceased was left out. The application is supported by the affidavit of Paul Nzia who avers that in addition to the sister named in the Petitioner’s affidavit in support of the Summons for Confirmation of Grant filed on the 28th August, 2006, the Deceased had a brother, Nzia Kianga (also now deceased), who was the Objector’s father. The Objector contends that the house of his Deceased father was excluded as a beneficiary of the Deceased’s estate which also included two plots namely, Title Numbers Wamunyu/Kyamatula/490 and 606 which were excluded in the grant.
3. The Petitioner opposes the application on the basis of her own detailed Replying Affidavit made on the 28th April, 2010. She admits that Nzia Kianga was a son of her deceased husband. She contends that

the Objector has no *locus standi* to bring the application because being a nephew of the Deceased, he can only inherit the property of the Deceased if the parents, brothers and sisters of the Deceased are all dead in accordance with the order of devolution set out in section 39(1) of the Act. She also admits that the two properties referred to in paragraph (2) above were left out in her petition but inadvertently so as she did not know of their existence at the material time. The foregoing averments are reiterated in the Petitioner's Notice of Preliminary Objection filed on the 29th April, 2010 which was heard together with the application.

4. In submissions made at the hearing of the application, learned counsel for the Objector argued that in the order of devolution prescribed by the Act, the brothers and sisters of the deceased rank at the same level of priority as the children of the brothers and sisters of the Deceased. Learned counsel for the Petitioner, on the other hand, contended that the Objector would have to wait until all the brothers and sisters of the Deceased were dead before making any legitimate claim to the Deceased's estate.

5. The only issue for the court to determine in this application is to give interpretation of section 39(1) (c) of the Act. Section 39(1) reads as follows:-

“39 (1) where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority:-

(a) Father; or if dead.

(b) Mother; or if dead

(c) Brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none.

(d) Half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none.

(e) The relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.”

6. It is common ground that the Deceased died intestate; that both his sons David Musau Kiangi (who was unmarried) and Nzia Kiangi (the Objector's father) are both also deceased and that the surviving sisters of the Deceased authorised the Petitioner to apply for the Grant. It is also not disputed that the Objector is the nephew of the Deceased, being the son of Nzia Kiangi, the Deceased's brother as aforesaid. As I have already stated, the Act provided that the Deceased's estate shall devolve upon his brothers and sisters **and** any child or children of the deceased brothers and sisters, in equal shares. In my opinion, this means and can only mean that where any brother or sister does not survive the intestate but leaves a child or children, then such child or children (being nieces and nephews) of the intestate as survive him are entitled to the share their father or mother would otherwise have taken had he or she survived the intestate, and if more than one in equal shares.

7. Accordingly, I find and hold that the Objector/Applicant Bonface Paul Nzia (and any other child or children of the late Nzia Kiangi) is entitled to the share the late Nzia Kiangi would have been entitled to in the estate of his late brother, David Musay Kiangi, had he survived the Deceased.

8. For these reasons, and as the Petitioner concedes that two immovable properties of the Deceased were not included in the confirmed Grant, the application dated the 13th November 2009 succeeds and is allowed and orders in terms of prayer number 1 therein be and are hereby granted.

Dated and delivered at Machakos on this 17th day of **March**, 2011.

P. Kihara Kariuki

Judge