



REPUBLIC OF KENYA

HIGH COURT AT NYERI

SUCCESSION CAUSE 159 OF 2004

*IN THE MATTER OF THE ESTATE OF WAITHERU KIHORO – DECEASED*

AND

JOYCE MUTHONI WAITHERU ..... PETITIONER

VERSUS

JANE WANJIKU WAITHERU ..... OBJECTOR

**R U L I N G**

Through Messrs Kirubi, Mwangi Ben & Co. Advocates, Jane Wanjiku Waitheru, hereinafter referred to as “*the applicant*” took out summons for Revocation or annulment of Grant dated 19<sup>th</sup> May, 2006 and filed in court on 22<sup>nd</sup> May 2006. The application was expressed to be brought under section 76 of the law of Succession Act and rule 44(1) of the Probate and Administration rules. By that application, the applicant sought to have the grant of letters of administration to **Joyce Muthoni Waitheru** made on 24<sup>th</sup> June 2004 with respect to the Estate of **Waitheru Kihoro**, hereinafter referred to as “*the deceased*” revoked and or annulled on the grounds that the grant aforesaid was obtained fraudulently by making of a false statement and by concealment from the court something material to the case and also on the ground that the same was obtained by means of untrue allegation of fact essential in point of law.

The application was supported by the affidavit of the applicant who in the main deponed that she was the daughter of the deceased. That at the time that the deceased passed on he was survived by, **Joyce Muthoni Waitheru** – wife, **Philis Njoki Waitheru** – wife, **David Kihoro Waitheru** – son, **Jane Wanjiku Waitheru** – daughter, **Margaret Wambui Waitheru** – daughter and **Jane Wanjiku Waitheru** – daughter. That the succession cause was filed secretly by her mother, **Joyce Muthoni Waitheru**, hereinafter referred to as “*the respondent*” and despite being unmarried daughter of the deceased she was not involved or consulted. The grant has since been confirmed to the respondent alone without considering other beneficiaries. Thus the grant was obtained and confirmed fraudulently, by making of a false statement or concealment from court of something material and also by means of untrue allegation because she was never informed or cited when the cause was filed, nor was she included among the beneficiaries. Further though the respondent filed a consent purportedly signed by all the beneficiaries dated 5<sup>th</sup> December 2005, it was a forgery as she never signed such a consent. The inventory of the assets of the deceased was not correct as some other assets were left out to wit; **plot No. B2215/5/66163 Dandora, LR No. 74/298/5/PG 4746 Buru Buru, LR 315/5/Ph 8944 Kariobangi light industries, Jua Kali LR 14/5/PL Ofafa Maringo, Nanyuki plot No. LR 278/573, Kiriko plot No. 1 & 2, Kiruri/Kiambuthia plot No. 13 and motor vehicle Registration numbers KZS 350 and KWQ 100.** Finally, the respondent failed to disclose to the court that she had earlier on filed a succession cause number 341 of 2003 in respect of the same estate which is still pending in court.

The application received support from one, **Agatah Wangechi Waitheru** who described herself as a daughter to **Margaret Wambui Waitheru** who in turn is a daughter to the deceased. Her mother aforesaid she deponed was unmarried. All along the deceased treated her as his daughter and even allowed her to assume his surname. He had informed her in his lifetime that upon his death she would inherit his property just like any of his other children. She was thus surprised to learn that a succession cause in respect of the deceased's estate had been secretly filed by her grandmother without informing her. Had she been made aware she would have filed her objection and laid a claim to the estate as a dependant under Section 29(b) of the Law of Succession act.

Further support for the application came from **Margaret Wambui Waitheru**. She stated in her affidavit that she was surprised on 17<sup>th</sup> May 2007 to be served with an application for revocation of grant. She was not aware that, her deceased's father's estate was subject of this succession cause. Being an unmarried daughter of the deceased she ought to have been cited when the cause was filed. The court had not been told that the respondent had filed another succession cause No. 341 of 2003 at Nyeri and she had objected to the same. That cause is still pending. She denied having signed a consent to confirmation of grant.

Of course the application was opposed by the respondent. In a replying affidavit filed through **Messrs Kagundu & Mukunya Advocates**, she deponed that she did not file secretly the succession cause but conceded that she had earlier on filed an application for limited grant vide Nyeri succession cause number 3411 of 2003. She was the mother to the applicant. That she sued for a limited grant to allow her access the deceased's finances in the bank for purposes of filing this succession cause. The applicant opposed the same and she abandoned it. On 29<sup>th</sup> March 2004, she filed the instant cause and attached the Chief's letter showing the heirs of the deceased's, estate which included the applicant. All the heirs including the applicant signed P & A form 38 consenting to her petitioning for the grant. The consent was signed before an advocate. The applicants were even cited in form P & A 5 filed in court. Indeed the petition was advertised. Similarly the applicant was cited in the affidavit in support of summons for confirmation of grant. On 5<sup>th</sup> December 2005 a consent to confirmation of grant was filed but it was only signed by **David Kihoro Waitheru, Phylis Njoki Waitheru and Jane Wanjiku Waitheru**. The applicant refused to sign. The matter thereafter came before **Okwengu J** on 7<sup>th</sup> April 2005 who ordered that all beneficiaries be served with the hearing notice. This was subsequently done going by the affidavit of service on record dated 28<sup>th</sup> November 2005. On 5<sup>th</sup> December 2005, the grant was confirmed by **Khamoni J**. Therefore there was no concealment of facts or fraud as alleged by the applicant. If there were properties left out in the grant, it was by sheer inadvertence and they can always be added to the grant and this is not enough reason to annul the grant. She finally deponed that the applicant is her daughter and she had no wish at all to disinherit her of her entitlement.

When the matter came before me for directions, parties agreed that the same be determined on the basis of the affidavits on record. In addition they agreed to file and exchange written submission on the said affidavits. This was subsequently done. I have carefully read and considered the written submissions.

It is common ground that the applicant is an unmarried daughter of the deceased whereas the respondent is a wife of the deceased and the applicant's mother. It is also common ground that the deceased died on 14<sup>th</sup> May 2003. Following the death, the respondent petitioned for a limited grant. That application was met with resistance by the applicant as well as her other sister, **Margaret Wambui Waitheru**. It would appear that following that objection, the respondent chose to abandon the same and file the instant succession cause. It is also common ground that the name of the applicant feature in the list of those left behind or survived the deceased in the affidavit in support of the Petition for letters of administration intestate. It is also common ground that the name of the applicant also features in the letter from the chief dated 16<sup>th</sup> July 2003. She is listed as one of rightful heirs of the estate of the deceased. It is also common ground that a consent to the making of a grant of administration intestate to a person of equal or lesser priority under rule 26(2) of the Probate and administration rules was signed by all would be beneficiaries before **Mwikali Rika**, advocate and commissioner of oaths on 29<sup>th</sup> March 2004. Among those is the applicant. It is also common ground that the cause was advertised in the Kenya Gazette of 14<sup>th</sup> May 2004. Thereafter a grant of letters of administration was issued to the respondent on 24<sup>th</sup> June

2004. Subsequent thereto, the respondent applied for the confirmation of the same. In the affidavit in support of the application, the applicant's name features as among those who survived the deceased. It is also common ground that all the assets of the deceased were to go to the applicant going by paragraph 7 of the affidavit in support of the application for confirmation of grant. It is also not in dispute that when the application came up for hearing before **Okwengu J**, she directed that all the beneficiaries be served, much as the other beneficiaries save for the applicant had consented to the grant being confirmed to the respondent. On the record there is an affidavit of service filed in court on 29<sup>th</sup> November 2005 indicating that the applicant was served on 5<sup>th</sup> August 2005. On 5<sup>th</sup> December 2005, **Khamoni J** confirmed the grant having been satisfied as to the service of the hearing Notice on the applicant.

With all this background information, the applicant would wish this court to believe that the grant was obtained fraudulently by the making of a false statement and by concealment from court of something material and that the confirmed grant was obtained by an untrue allegation of fact. I do not see any evidence of fraud on the part of the respondent, nor do I discern any false statement or concealment of any material fact. All the relevant information was given in the petition. All the documents required were filed. The mere fact that the applicant may not have been informed of the succession cause, which fact I doubt very much, cannot amount to fraud, false statement or concealment of material fact. It would have been different had the applicant not been mentioned in the papers filed in court by the respondent in this cause. I would also have been sympathetic to the applicant's case, had she claimed that all the beneficiaries were informed of the succession cause save for her. That would have been discriminative. I would also have been sympathetic to the applicant had the respondent in the distribution scheme left out the applicant. As it is however, the entire estate of the deceased is going to the respondent who is the widow of the deceased. We all know that in such event, the widow only retains a life interest. In any event in terms of priority, the respondent, ranked much higher than the applicant when it came to who was entitled to petition for the grant.

The applicant is an unmarried daughter of the deceased. I presume that she stays in the same homestead as the respondent and her other siblings. It is hard to imagine that the respondent would file the instant cause, involve the applicant's other siblings in terms of consents and prosecute the same to the end without as much as the applicant getting wind of the same. It is simply incredible. Why would at least her sisters or brothers not mention the fact to her, assuming that perhaps she had some disagreements with her mother, the respondent. I do not think that the applicant is being candid when she proclaims that she was kept out of the picture throughout the hearing of the succession cause. Considering that earlier on, the respondent had sought letters of Administration ad colligenda Bona, for purposes only of withdrawing money from the estate of the deceased for purposes of mounting this succession proceedings and which she vehemently opposed, I do not think that the applicant would thereafter become so complacent as not to know of this succession cause. Yes, the fact of an application of letters of administration ad colligenda Bona may not have been brought to the attention of **Okwengu J** and or **Khamoni J**. However what difference would it have made. It would not have impacted negatively and or positively on the instant succession cause. After all it was for a limited purpose, which purpose had been overtaken by events with the filing of this succession cause.

The applicant has not discounted the fact that she appeared before **Mwikali Rika**, commissioner for oath and signed the consent to the making of a grant of administration intestate to a person of equal or lesser priority. Her only beef was with the consent purportedly signed by all the beneficiaries dated 5<sup>th</sup> December 2005 tendered during the hearing of the application for confirmation of grant. This consent executed on 29<sup>th</sup> March 2004 having not been challenged or impugned by the applicant goes to show that the applicant was all along in the loop as regards this succession cause. There was therefore no need for the applicant to be cited.

The cause was subsequently Gazetted. The assumption is that every Kenyan reads the Kenya Gazette. The assumption may be erroneous. However my understanding is that the need to Gazette the succession cause is to enable those inclined to object to do so. There is no evidence that this succession cause was not Gazetted. If anything, there is overwhelming evidence that it was indeed so Gazetted. The applicant is presumed to have read that said Gazette Notice. If she did not, then it was at her peril. These too goes to show that the applicant was aware of the succession cause and that the succession cause was

prosecuted procedurally. It cannot be claimed that it was fraudulent and there was concealment of material fact therefor.

The cause subsequently came up for confirmation of the grant on 8<sup>th</sup> July 2005. The respondent was ordered to serve all the beneficiaries. However according to the applicant, the respondent did not abide by this order. Instead, the respondent purportedly filed a consent supposedly signed by all the beneficiaries. That cannot possibly be correct. I have looked at the consent to confirmation filed herein. It is only signed by **Phyllis Njoki Waitheru, David Kihoro Waitheru and Jane Wanjiku Waitheru.** The applicant and her sister, **Margaret Wambui Waitheru** did not sign it. It is therefore erroneous for the applicant to suggest that the judge confirmed the grant on the basis a purported consent signed by all the beneficiaries. Earlier on **Okwengu J** had declined to confirm the grant as the beneficiaries were absent. She had then directed that all the beneficiaries be served. That order contrary to what the applicant has deponed to was complied with going by the affidavit of service on record dated 28<sup>th</sup> November 2005 and filed in court on 29<sup>th</sup> November 2005. It clearly shows that the applicant was served with the hearing notice. The contents of the said affidavit have not been challenged by the applicant. They should therefore be taken to be true. Claims of forgery have been made by the applicant. That is a criminal act. Yet there is no evidence at all that the applicant took up the matter with the police or our criminal justice system.

The totality of the foregoing is that the applicant's claim that the petition was filed secretly that she was not consulted and that she was not informed or cited in the same is false and untrue.

Yes, all the assets of the deceased may or may not have been included in the confirmed grant. However that is not sufficient ground to annul and or revoke the grant. The law of Succession Act has comprehensive provisions to cure such an eventuality. In any event it is a cardinal principle of our justice system that whoever alleges must prove the allegation. It is the applicant who has alleged that some properties of the deceased were left out. She promised to provide documents related to the said assets later through a supplementary affidavit. To date no such supplementary affidavit has been filed. Accordingly, the applicant's averments on the subject remain mere allegations. Courts of law do not act on mere allegations. There is therefore no proof of the existence of the alleged assets left out.

As correctly observed by **Mr. Mukunya**, learned counsel for the respondent, the applicant has not come to court claiming that the administrator has distributed the estate and left her out or that she has mismanaged the same. It is simply that she was never informed or involved in the cause. However, as we have been able to demonstrate above, that allegation is not true. I sense no fraud, false statements or concealment of material facts in this cause. Nor do I discern an untrue allegation of fact essential in point of law. If anything the whole process upto the confirmation stage was above board. Accordingly I find no merit in the application which is accordingly dismissed with costs so the respondent.

*Dated and delivered at Nyeri this 17<sup>th</sup> day of September 2009*

**M. S. A. MAKHANDIA**

**JUDGE**