



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Succession Cause 72 of 2004

IN THE MATTER OF ESTATE OF ROBERT WAHOME NDEGWA ... DCD

AND

JULIET WANGUI NDEGWA PETITIONER

JUDGMENT

The estate in this matter relates to the deceased Robert Wahome Ndegwa who is the son of both the petitioners herein that is Francis James Ndegwa (hereinafter called the applicant) and Juliet Wangui Ndegwa (hereinafter called the respondent). At the hearing of the summons for revocation of grant dated 14th June 2007 brought by the applicant the matrimonial disharmony between the two became very evident and over spilled in evidence that was tendered. The respondent was the first person to petition for Letters of Administration. In so petitioning she listed in the petition the beneficiaries of this estate as herself, the applicant, Irene Wangari Ndegwa a sister to the deceased and Jane Murugi Ndegwa also a sister to the deceased. The petitioner listed the assets of the estate as Plot Nairobi Block 75/669 Buruburu Estate, Barclays Bank Account Nkrumah Branch Mombasa, motor vehicle KAQ 716D, motor vehicle KAN 827M, motor vehicle KAL 898B and motor vehicle KAQ 539D. The respondent in the petition cited the applicants. On 5th March 2004 a Memorandum of Appearance to the Citation was filed on behalf of the applicant by the firm of Wagiita Theuri and Company Advocates. The applicant filed an objection to making grant. The applicant and the respondent by consent dated 22nd September 2004 consented to the grant being issued to both of them jointly. Intermittently the respondent made various applications, thereafter, claiming that the applicant was intermeddling with the estate of the deceased in that he was taking for his own benefit the proceeds of the deceased's matatus. The respondent in her various affidavits was complaining that the applicant was refusing to give money to take care of her health which was deteriorating as a result of a motor vehicle accident she suffered on 22nd June 1995. There is in the court file a letter written by the respondent's advocate namely Peter M. Muthoni and Company Advocates addressed to J. Macharia and Company Advocates dated 14th November 2005 by which letter the respondent's advocate acknowledged that J. Macharia advocate was now on record for applicant. The respondent in the absence of the applicant made an application for confirmation of grant dated 6th March 2007. Apart from praying for the confirmation the respondent prayed that the court would allow her to solely sign the papers necessary to put in effect the confirmed grant. In that application for confirmation the respondent sought the assets to be distributed as follows;-

1. *To Juliet Wangui Ndegwa plot NRB Block 75/669 Buruburu Estate, Barclays Bank Account Nkrumah Branch Mombasa, money in National Bank, money in NSSF, Motor vehicle KAL 895B and motor vehicle KAT 549T.*
2. *To Francis James Ndegwa KAQ 539D, KAN 827M and KAQ 716D.*
3. *To Jane Murugi Ndegwa money in Standard Chartered Nyeri Branch.*

The application for confirmation of grant came up for hearing before court on 26th March 2007 when the court confirmed the grant as prayed. On that day of confirmation the applicant was not present in court nor was he represented. The court directed that the Summons for Revocation of grant be heard by way of viva voce evidence. The summary of the applicant's evidence was that he did not consent to the mode of distribution set out in the confirmed grant due to the fraudulent act of the respondent. The applicant said that the respondent did not serve his advocate on record with the application for confirmation. That the applicant served the firm of Wagiita Theuri & Company Advocates instead of J. Macharia Advocate. He produced as an exhibit a Notice of Change of advocate filed by the firm of J. Macharia Advocate dated 11th November 2005. The court however notes that that notice was a photocopy and as a

consequence the date of filing the same was not clear. I perused the court file and I could not find the original Notice of Change of Advocate. The applicant further objected to distribution of the assets of the deceased to their daughter namely Jane Murugi Ndegwa. He said that that daughter was not a dependant of the deceased. In respect of the motor vehicles that were given to him by the confirmed grant he said that they belonged to him and not the estate. As an exhibit he produced various documents to prove his ownership of those motor vehicles. My immediate response to that exhibit is that except for vehicle registration KAL 895B the rest of the vehicles do not reflect the applicant's name as the owner. The exhibit contained documents relating to purchases of those vehicles and documents from the registrar of motor vehicles which reflected the purchaser as Jessikay Enterprises, Bolpak Motors and Osaka Motors. In respect of motor vehicle KAL 895B the same is jointly registered in the name of the deceased. Section 8 of the Traffic Act makes the following provisions:-

“The person in whose name a vehicle is registered shall unless the contrary is proved be deemed to be owner of the vehicle.”

That provision is self explanatory. The vehicles not showing the applicant's name as the owner do not belong to the applicant. The applicant in evidence accepted that he has been collecting the rent in respect of the Buruburu house at the rate of Kshs.12,000/- per month. He accepted that the respondent has not benefited from that rent. He however stated that she has withdrawn sums from the deceased's bank account to the tune of Kshs.5 million. Further the applicant said that the respondent is incapable of administrating the estate because she is 30% mentally incapacitated. In this regard he relied on the judgment of the High Court in a case where the respondent sued in respect of the motor vehicle accident she was involved in, in 1995. He finally stated that the court should not include the motor vehicles in the distribution and for the rest of the assets of the estate the same should be distributed on an equal basis between him and the respondent. In her evidence the respondent denied withdrawing the amount claimed by the applicant from the deceased's bank account. On being cross examined however she accepted that she withdrew Kshs.475,000/- from the National Bank of Kenya account of the deceased after the grant was confirmed. She also said that she had withdrawn some money to cater for her medical care and her upkeep. That when her deceased son was alive he was the one who catered for her medical care by providing financial assistance. She stated that the deceased also supported Jane Murugi in her education at United States and this he did because he was elder brother.

As stated earlier it was most difficult to conduct this hearing because the emotions of the matrimonial disharmony became evident when each party was giving evidence. I did observe that the respondent was very poor in her physical health. She could not communicate very coherently and her hands were clawed. I therefore accept the respondent's contention that the deceased did support her in the medical expenses she required during his lifetime. The issues that I see presenting themselves in this matter are two. The first issue was whether the applicant was served with the application for confirmation of grant. As stated earlier I could not find the original Notice of Change of Advocate in the court file filed by J. Macharia. The applicant exhibited a photocopy of that Notice of Change. The respondent was not heard to dispute the authenticity of that document. Further I did come across in the court file the respondent's advocate letter addressed to J. Macharia dated 14th November 2005. I therefore make a find that the applicant was not served with the application for confirmation. The second issue is whether having made that finding the grant should be revoked. I am of the view that it is not necessary for a grant to be revoked for the court has power to set aside the confirmation without upsetting the original grant. In this regard I am well persuaded by the Ruling of Hon. Justice Khamoni where he stated as follows:-

“Distribution of the estate comes during the proceedings to confirm the relevant grant and a party dissatisfied with the distribution may not necessarily be dissatisfied with the grant of letters of administration and vice versa. That being the position, it becomes unreasonable for a person dissatisfied with the distribution of the estate only to proceed to ask for the revocation or annulment of the grant which, as in this case, has nothing wrong. While section 76 of the Law of Succession Act should therefore be relied upon to revoke or annul a grant, it is not proper to use the same section where the objector is challenging the distribution only.”

I do not accept the prayer by the applicant that the respondent is incapable of participating in the administration of the estate. When the parties entered into a consent for the grant to be issued to both of them the applicant well knew even by then that the respondent had a medical condition brought by the motor vehicle accident of 1995. There is nothing new that has occurred now which can move this court to order the removal of the respondent from the administration of this estate. The third issue to consider is whether the motor vehicles distributed to the applicants belong to him. I have looked at the Form P & A 5 which was filed by the respondent at the time of petitioning for Letters of Administration. That form stated the assets of the deceased and in that list were the motor vehicles which the applicant now says are his. The applicant after being cited in this matter began to participate in the various stages of the administration of the estate. He even filed an application of objection to making grant to the respondent. It is as a result of that application that the parties entered into a consent that the grant be issued to both of them jointly. All that time the applicant never raised an issue that the vehicles belonged to him. As stated earlier even the documents he relied on as evidence that the vehicles belong to him do not support his contention. Accordingly my response to this issue is negative. The vehicles that were distributed to the applicant did not belong to him. They belong to the deceased's estate. The applicant has admitted

collecting rent for the Buruburu property. The motor vehicles which now the court has found belong to the estate have been in his possession. He therefore has benefited from the proceeds of those vehicles which are matatus. The respondent on her part has also benefited from the estate in that she has withdrawn money from the bank account. I have considered the evidence of the applicant and the respondent and I have also considered the submissions made by their respective counsels. Since the court has found that the application for confirmation was not served on the applicant the court does hereby set aside the confirmation of grant made on 26th March 2007. I also make a finding that the deceased did support his young sister Jane Murugi Ndegwa in her pursuit in education. She is therefore entitled as per Section 29 of the Succession Act to inherit from this estate. The court does hereby confirm the grant in the following terms;-

1. *To Juliet Wangui Ndegwa plot NRB Block 75/669 Buruburu estate, Barclays bank account Nkrumah Branch Mombasa, money in National Bank, motor vehicle KAL 895B and motor vehicle KAT 549T.*
2. *To Francis James Ndegwa KAQ 539D, KAN 827M, KAQ 716D and money in NSSF.*
3. *To Jane Murugi Ndegwa money in Standard Chartered Nyeri Branch.*
4. *This being a matter between a husband and wife I will not make any order on costs.*

Dated and delivered at Nyeri this 21st day of April 2008.

MARY KASANGO

JUDGE