



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Succession Cause 441 of 1984

IN THE MATTER OF THE ESTATE OF WAKAPA PERE - DECEASED

RULING

The application before me is a summons for revocation or annulment of grant, stay of distribution of the deceased's estate, and cancellation of certificate of grant dated 6th March, 2007. I am sure the last grant mentioned is certificate of confirmation of grant. The application is premised under Section 76 of the Law of Succession Act (Cap.160) and definitely not, under ('the Succession Act' as mentioned therein). It is also premised under Rules 44 and 73 of the Probate and Administration Rules. The said Act and Rules shall be referred to as 'the Act' and 'the Rules' for brevity.

Before I deal with the issues raised in the application, I shall have to give a brief history of this cause.

The deceased herein died on 14th May, 1984. He left a will dated 8th October, 1983. He bequeathed his estate to Richard Pere Njenga and made him an executor of his will and thus applied for the grant of probate on 25th June, 1984.

On 20th July, 1984 Wambui Wakapa and Hanna Nyokabi Wakapa Pere filed their individual notice of objection to the said petition.

They both thereafter filed on 5th October, 1984 cross-petitions for the letters of representation and answers to the Petition. These two widows are the applicants before me in the present application.

After setting aside an ex-parte issuance of grant of probate ordered by Shields J, Justice Pall, as he was then, heard those applications and found vide his Ruling dated 10th March, 1997, that the will was valid and observed that there should be a formal application for reasonable provisions for the dependants under Section 26 of the Act.

Then an application dated 3rd August, 1994 for dependency and reasonable provisions was filed on 4th August, 1999.

In the affidavit in support of that application all the persons who depended upon the deceased were mentioned in para.9 thereof. It was also mentioned that three widows, including the applicants herein, were given 9 acres each inter vivos by the deceased.

The said application made under Section 26 of the Act was heard by me and I gave the ruling on 5th

December, 2000. I have made a finding therein that the three widows of the deceased were adequately or reasonably provided. I also found that the gift inter vivos was only to the widows and not to the children and thus I found that six children of the deceased are not reasonably provided for, and directed the mode of the distribution of the estate property amongst the executor and them, in my said ruling.

This ruling was reviewed by me not in substance but in the manner of distribution vide my ruling of 19th October, 2001.

These findings have not been challenged. But several applications were made as to the difficulties of distribution of the estate as per the ruling.

Thereafter, one daughter of the deceased Wambui Wakapa filed an application for reasonable provision by summons dated 11th April, 2000. On 26th January, 2007 it was conceded that the said applicant is a biological daughter of the deceased and that she be included in the distribution of the estate which became larger when an additional property was discovered being owned by the deceased.

Thereafter a consent was recorded as to the distribution of the estate in presence of all the beneficiaries declared as dependants by the court. It was also agreed that the distribution be made as proposed in the affidavit by Richard Pere sworn on 23rd January, 2007. The certificate of confirmation echoes the same.

After the above proceedings before the court, the two widows have filed this application under Section 76 of the Act and Rule 44 of the Rules. It is true that Rule 44(8) does envisage the consent of all beneficiaries to be obtained at the same time of confirmation. The only issue therefore to be determined is whether the applicants with support of four supporting affidavits of the daughters of the deceased, have satisfied that the certificate of confirmation should be revoked as per the provisions of section 76 of the Act and Rule 44 of the Rules.

An issue is raised that after the confirmation of the testate estate Section 76 does not apply. It was urged that after applications under section 26 of the Act were heard since 1999, the court decided upon the issue of the beneficiaries dependants and then the certificate was issued with consents of those beneficiaries.

I may observe that section 75 of the Act stipulates that after the grant of letters of administration with the will annexed or after its confirmation thereof, if only codicil is discovered, it should be added. Then it was submitted that section 76 talks of grant of representation whether confirmed or not. Thus the grant of administration with will is not envisaged under Section 76, of the Act.

It is an attractive and interesting contention specially when the courts are clogged with application of revocation under Section 76 of the Act all the time after lapse of many years from the issuance of grant or confirmation thereof.

To determine this contention, I shall have to go through relevant provisions of the Act.

Section 2 defines 'representation', as probate of will or the grant of letters of administration.

Part III of the Act provides for provisions for the dependants whether the estate is testate or intestate. Section 30 fortunately bars the applications for provisions before the grant is confirmed.

Sections 53 and 54 provide for forms of grant. Section 53 provides.

"53. A court may –

(a) Where a deceased person is proved (whether by
production of a will or an authenticated copy

thereof or by oral evidence of its contents) to

have left a valid will, grant, in respect of all property to which the will applies, either –

i. probate of the will to one or more of the

executors named therein; or

ii. if there is no proving executor, letters of

administration with the will annexed; and

(b) if and so far as there may be intestacy, grant letters

of administration in respect of the intestate estate”.

Perusing the said provisions, the Act provides for (a) grant of probate when the executor or executors are named, (b) grants of letters of administration with will annexed and (c) letters of administrations in respect of the estate.

Section 54 gives the court powers to issue limited grants as per circumstances of the case.

I have already dealt with Section 75 which makes specific provisions to include codicil of the will whenever discovered.

Coming to Section 76, it simply mentions grant of representation, whether or not confirmed, which could be revoked or annulled by the court on grounds specified in clause (a) to (e) thereof.

With these provisions, I have no option but to find that the confirmed grant of probate or letters of administration with will annexed can be revoked under Section 76 of the Act, and I do so find.

Coming to the application now before me, it has been brought under clause (b) and (c) of Section 76.

The main grievances of the Applicants are that the grant was confirmed without their consents and that they are beneficiary of the estate and those facts were concealed from the court by the Applicants/Respondents herein.

It is also stated that the executor purported to distribute another property namely Ngong/Bgong/6366 to two beneficiaries, Joseph Shaguru and Bernard Pere Wakapa, despite the fact that it did not belong to the estate.

This last contention cannot stand on the face of the annexure WW3 to the affidavit in support sworn by the Applicants. It is obvious that the said property was equally shared by Hanna Nyokabi Wakapa, on of the Applicants herein and the deceased. What is shared in the estate is the half portion belonging to the deceased. It also confirms my ruling made on 5th December, 2000. The widows were given their shares by the deceased during his life time. As per my ruling dated 19th October, 2001, I found that

1. Jane Wanjiru
2. John Wakapa Pere
3. Bernard Pere
4. Issac Pere
5. Joseph Shaguri Wakapa

6. Francis Njenga Pere,

were dependants and should be included as such in the estate, as the deceased had not made reasonable provisions for them. Thus including the Executor, they were seven beneficiaries who could have acquired right to share the estate properties.

Thereafter as mentioned earlier, Wambui Wakapa, a daughter of the deceased was added to the list of dependants.

None of these rulings and orders of the court has been challenged, although the applicants/widows and the daughters who have filed the affidavits were named and evidence adduced in that respect. None of them has made any reference to the aforesaid orders which stand as valid orders of the court.

Thus claim of the Applicants and deponents of the four supporting affidavits that there is concealment of their existence and right to inherit, is not borne out from the records of this cause.

Thus it is my considered view that the grant was not obtained by making any false statement or by concealment from the court of something material to the case, or by way of any untrue allegation of fact essential in point of law.

The court has made findings and declared the names of the dependants who are to be provided from the estate. In other words they were the only lawful beneficiaries of the estate of the deceased. As required under Rule 44(8) of the Rules, their consents were obtained.

In the premises, I do not uphold the claims of the Applicants and deponents of four supporting affidavits and reject the same.

The last issue raised was as regards measurements of the land bearing the Ngong/Ngong/4991. It is true that as per the extract of the said land, the approximate area thereof is stated as 12.25 hectares which had been represented as 32 acres in the earlier pleadings, except that thereafter, it was reduced to 25.2 acres as the certificate of confirmation mentions. It was done so on the survey made by a licensed surveyor, and thereafter in any event, the beneficiaries as declared by the court have agreed for distribution on the basis of the said acreage.

I may add that even if the Applicants could be correct on this issue, do they have any right to contest this issue? None of the beneficiaries of the estate has come forward to support them.

This matter has been contested and re-contested severally. Attempts to go to Court of Appeal by several family members have not been successful. The continued attempts to revive the matter has to be stopped. Every litigation must come to an end and I would not open this estate at least on the basis of the application before me.

In short I order that the summons dated 12th April, 2007 be dismissed.

Once again as it is between family members I shall not make any order on costs.

Dated and signed at Nairobi this 4th day of June, 2008.

K.H. RAWAL

JUDGE

4.6.08