



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI MILIMANI LAW COURTS
SUCCESSION CAUSE 2884 OF 2004

IN THE MATTER OF THE ESTATE OF EDWARD MURIUNGI THIRINJA (DECEASED)

JANE NDUTA MURIITHI.....PETITIONER/RESPONDENT

VERSUS

JOSPHAT MUTIRIMU THIRINJA.....OBJECTOR/APPLICANT

R U L I N G

By summons dated 20.12.05 dated to be brought under section 76 of the Law of Succession Act, Cap. 160 and rule 44 of the Probate and Administration Rules, the Objector/Applicant, JOSPHAT MUTIRIMU THIRINJA applied for the following order, namely:-

That the grant of probate/letters of administration issued to the petitioner/respondent, JANE NDUTA MURIITHI and RISPAAH WANJIRU KIMURA on 06.01.05 be revoked or annulled.

The grounds upon which the application is based are:?

- a) That the proceedings to obtain the grant were defective in substance.
- b) That the grant was obtained fraudulently by the making of a false statement that the petitioner is the widow of the deceased and by concealing from the court of something material to this case, i.e. failed to disclose all the deceased's dependants/beneficiaries and assets.
- c) That the grant was obtained by means of untrue allegation of fact in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

The application is supported by the objector's/applicant's affidavit sworn on 20.12.05.

On 16.05.07 learned counsel, Mr. G.R. Kariuki appeared for the petitioners/administrators, Jane Nduta Muriithi and Rispar Wanjiru Kimura while learned counsel, Miss F.M. Githinji appeared for the objector/applicant. Both counsel addressed this court regarding a Consent Order stated to have been entered into between petitioner Jane Nduta Muriithi and objector/applicant Josphat Mutirimu Thirinja and members of their respective families. It was petitioner/respondent Jane Nduta Muriithi's case that she signed the purported consent, which is undated, under duress and she sought to disown it. At that stage it was not clear who perpetrated the alleged duress, so in a Ruling delivered on 08.06.07 I directed:?

a) That petitioner Jane Nduta Muriithi do swear a further affidavit identifying the alleged perpetrator or perpetrators of duress upon her and specifying the nature of the duress.

b) That petitioner Jane Nduta Muriithi do file and serve the further affidavit referred to in (a) above upon the alleged perpetrator of the duress upon her within 14 days.

On 18.07.07 this matter came up before me again whereat learned counsel, Mr. K. Runo appeared for both petitioners/administrators Jane Nduta Muriithi and Rispar Wanjiru Kimura while learned counsel Miss M. Githinji appeared for the objector/applicant Josphat Mutirimu Thirinja. Petitioners' counsel informed the court that petitioner Jane Nduta Muriithi had sworn an affidavit on 13.06.07 pursuant to the court's directions of 08.06.07. He sought a date for Ruling. Objector's/applicant's counsel told the court that while Jane Nduta Muriithi's affidavit sworn on 13.06.07 had been served on her law firm, the perpetrator of the alleged duress had not been served. In response, petitioners'/respondents' counsel pointed out that the perpetrator of the duress was the objector/applicant himself who was being represented by Miss Githinji's law firm, i.e. Mithega & Co. Advocates and that, therefore, the objector/applicant had been served. Miss Githinji then drew attention to paragraph 19 of Jane Nduta Muriithi's earlier affidavit sworn on 22.09.06 which, according to her, implied that the perpetrator of the alleged fraud was the then objector's advocate, Mr. Momanyi who was working in the law firm of Mithega & Co. Advocates but was no longer in the firm. At that juncture this court drew attention to paragraph 19 of Jane Nduta Muriithi's further affidavit sworn on 13.06.07 vide which she deponed:

'19. That I swear this affidavit to confirm that the consent was entered into by duress occasioned by the objector.'

On the basis of that deposition by Jane Nduta Muriithi, Miss Githinji said she had no objection to the court setting a date for Ruling.

The objector/applicant filed written submissions dated 16.05.07. Petitioner Jane Nduta Muriithi swore a further affidavit on 13.06.07. There is also a 'Replying Affidavit' by Francis Kalung'e Thirinja, Geoffrey Murerwa Thirinja and M' Akwalu M'Mborothe Kalothe sworn on 04.08.06.

No oral evidence was called by the parties. The matter proceeded by way of submissions based on affidavit evidence.

I have duly considered the rival evidence and submissions of the parties.

The objector's/applicant's case is basically to the effect that petitioner/respondent Jane Nduta Muriithi teamed up with her sister Rispah Wanjiru Kimura to get themselves appointed administrators of the deceased's estate and named only petitioner/respondent Jane Nduta Muriithi and her two children as having survived the deceased while the deceased had other dependants. He challenged the petitioner's/respondent's marriage on the basis that there was no documentary proof of such marriage. He contended that he is the right person to receive all benefits of the deceased from KTDA since he is named as the next of kin. He annexed to his affidavit KTDA Staff Provident Fund Membership Form dated 14.08.98 in which the deceased named him as his next of kin. Petitioner/respondent Jane Nduta Muriithi's affidavit sworn on 22.09.06 annexed, *inter alia*, a photocopy of letter of 15.04.04 which she said was written by the objector/applicant informing KTDA that he was transferring the kinship form to the petitioner/respondent as 'wife'. The objector/applicant has not made specific response to this letter ascribed to him.

The petitioner's/respondent's case is essentially that she married the deceased under Kikuyu Customary Law. With regard to the consent she disputes, she says she was made to sign it under duress. She ascribed the duress pleaded to the objector/applicant.

At paragraph 15 of the petitioner's/respondent's affidavit sworn on 22.09.06 she accused the objector/applicant of having announced publicly that the petitioner/respondent was suffering from HIV/AIDS but at paragraph 24 of the same affidavit she said that the objector/applicant publicly stated

that she was his third wife and that he had authority over her and that all deceased's property should not be under the petitioner's/respondent's control. It was her case that the objector/applicant intends to disinherit her. I note from paragraph 15 of the petitioner's/respondent's affidavit under discussion that the deceased died of complications arising from HIV/AIDS. It sounds curious that the objector/applicant should publicly describe the petitioner/respondent as suffering from HIV/AIDS and also publicly express aspiration to have her as his third wife. Paragraph 24 of the petitioner's/respondent's aforesaid affidavit does not quite add up.

At the request of this court, the petitioner/respondent attempted to elaborate on the nature of the duress she pleaded with regard to the consent. She basically said that she was called for a meeting in Nairobi. She travelled from Kiriaini to Nairobi in the morning of 24.02.06, arriving in Nairobi at 8.00 a.m. Her two children were with her. She and the children were eventually led to the offices of Mithega & Co. Advocates at 9.30 a.m. but no meeting took place for roughly the next three hours. At about 12.15 p.m. she demanded that the meeting she was called for should proceed and be concluded as her children were hungry. Nothing, however, happened until 2.30 p.m. when Mr. Momanyi, Advocate walked in and said he would chair the meeting. The advocate continued writing on instructions of the objector/applicant and at 5.00 p.m. she (petitioner/respondent) was informed that a document had been prepared which on being signed would be evidence of goodwill and blessings for the children of the deceased with her and that after that the objector/applicant would withdraw his objection. She said she was asked to pay Kshs.3,000/= for the day's legal services. She did not have the full amount but made part-payment of Kshs.2,000/=. She added that the objector/applicant did not, however, actually withdraw his objection. Petitioner/respondent urged this court to find that the consent said to have been entered into by the parties and filed on 28.02.06 was signed by her under duress and that it was involuntary.

I note that the consent order in question was witnessed by the objector's/applicant's and also the deceased's father, mother, two brothers and uncle on the one hand, and by the petitioners'/respondents' father, mother, brother and uncle on the other hand.

None of the aforesaid witnesses have furnished any evidence of the duress pleaded by the petitioner/respondent. I find that there was no duress and that the petitioner/respondent signed the consent order filed on 28.02.06 freely.

The consent order states at the very outset that the parties agreed that the letters of administration granted to JANE NDUTA MURIITHI and RISPAAH WANJIRU KIMURA on 06.01.05 be revoked and that letters of administration be granted to JANE NDUTA MURIITHI, M'THIRINJA MUCEKE and JOSPHAT MUTIRIMU THIRINJA. It also lists properties of the deceased and how they are to be distributed.

As I have found the consent to have been entered into voluntarily by petitioner/respondent Jane Nduta Muriithi, the natural consequence of that finding is for the grant issued to her and her sister Rispar Wanjiru Kimura to be revoked and a new one issued to the persons named in paragraph 2 of the consent order filed on 28.02.06.

Accordingly, I make the following orders:?

1. The grant issued on 06.01.05 to JANE NDUTA MURIITHI and RISPAAH WANJIRU KIMURA is hereby revoked and annulled and in its place a new grant issued to JANE NDUTA MURIITHI, M'THIRINJA MUCEKE and JOSPHAT MUTIRIMU THIRINJA.
2. Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 15th day of November, 2007.

B.P. KUBO

JUDGE