



REPUBLIC OF KENYA

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

Succession Cause 558 of 2002

IN THE MATTER OF THE ESTATE OF RACHAEL WANGARI BABU

(DECEASED)

RULING

Before me is a summons for revocation of grant dated 28th July 2004 filed by Karago & Company advocates on behalf of GEOFFREY NGANGA WAIRA. The summons was brought under sections 57,35,36,39 and 76 of the Law of Succession Act, and Rules 44, 49, 59, 63 and 73 of the Probate & Administration Rules. It was filed on 29th July 2004 and seeks for the following orders –

- (a) That grant of letters of administration intestate to PENINAH NYAWIRA NGUATHA and PAUL KAMAU NGUATHA be revoked and/or annulled.
- (b) That a fresh grant of letters of administration intestate to the estate of RACHAEL WANGARI MBABU be granted to the applicant GEOFFREY NGANGA WAIRA .
- (c) That costs of the application be provided for.

The application has grounds on the face of the summons. It is also supported by the affidavit of the applicant sworn on 28th July 2004. The grounds of the application re that the proceedings for obtaining the grant were defective; that the grant was obtained fraudulently by making a false statement or concealing of material facts, or that it was obtained by means of untrue allegations. It is deponed in the affidavit that PENINAH NYAWIRE NGUATHA and PAUL KAMAU NGUATHA to whom letters of administration were issued and confirmed were not survivors of the deceased; and that the deceased had no children of her own when she died. It is deponed in the affidavit that the applicant is a son of WAIRA KAMAU who was a brother of BABU MUHIA (paternal uncle of the applicant) whose property was inherited by the deceased herein RACHAEL WANGARI MBABU – in Nairobi Succession Cause No. 1662 of 1995.

The application is opposed and a replying affidavit sworn on 29th March 2005 was filed. Though the applicant depones in his affidavit that the deceased did not have any child, the replying affidavit sworn by PAUL KAMAU NGUATHA on 27th March 2005 avers that the deceased had an adopted child called PAUL KAMAU BABU. It is also deponed in the replying affidavit that the deceased had written a will appointing PAUL KAMAU NGUATHA and PENINAH NYAWIRA NGUATHA as executors of the will. That the estate of the deceased had been distributed in accordance with the deceased's will

following a court order dated 14th October 2003.

When the application came for hearing before me on 1st November 2006 Mr. Maraga appeared for the applicant while Mr. Gikonyo appeared for the respondent.

Mr. Karago submitted that the deceased was married to a paternal uncle of the applicant called BABU KAMAU. That the deceased wrote a will in favour of PAUL KAMAU and another. The contents of the will were not disputed. However, the deceased RACHAEL was merely trying to defeat BABU'S intention. It was always Babu's intention that his properties should be inherited by the children of his brother, among them, the applicant.

He contended that the will of RACHAEL was null and void in terms of section 36 to 39 of the Law of Succession Act (Cap. 160). RACHAEL merely had a life interest leaving the estate to be distributed in terms of section 39 of the Act after her death. He contended that the Act prohibited disposition of assets by will. The grant of probate should therefore be revoked.

Mr. Gikonyo for the respondent submitted that the applicant had not satisfied the provisions of section 76 of the Act and rule 44 of the Probate and Administration Rules. Under rule 44(2) (b) the applicant should have disclosed the extent to which the estate had been distributed.

On section 36 of the Act he contended that the deceased RACHAEL obtained a confirmed grant to the estate of her late husband on 31/1/1997. It was not expressed by the court to be a life interest so she acquired the whole estate of her late husband without limitation. The court's orders still stood, and RACHAEL had the capacity to dispose of the assets by will.

RACHAEL also adopted a son. The date of the adoption was unknown. The applicant had even at one time applied to be guardian of the adopted son of RACHAEL. He contended that it was greed that made the applicant file this application.

He also contended that there was no will evidencing that the husband of RACHAEL wanted his assets to be held by BABU.

I have considered the application documents filed and submissions of counsel for both parties. The application raises a number of issues for decision.

The first issue is whether the late BABU, husband of the deceased RACHAEL wanted his assets to be inherited by the children of his brother, including the applicant. No evidence has been placed before me to show or prove that allegation. I find no basis for that assertion, and dismiss the same.

The second issue is whether RACHAEL adopted a child called PAUL KAMAU. The evidence on record falls short of proof of a legal adoption. I have not been shown any order of a court for the adoption. However, I am of the view that there are customary ways of adopting a child under different communities in Kenya. In any event, one does not need to be an adopted child to benefit from an estate. So long as he becomes a dependant under section 29 of the Law of Succession Act (Cap 160), he can be entitled to benefit from the estate. In my view the said PAUL KAMAU became a dependant under section 29(b) of the Act, as RACHAEL appeared to have accepted him as a dependant.

The third issue is whether RACHAEL could make a will with regard to the assets that she acquired from the estate of her late husband. Indeed, section 36 of the Law of Succession Act, confers a life interest on a spouse who survives a deceased where there are no children. Section 36(3) provides that upon the determination of the life interest created by subsection (1) the property subject to the life interest is to devolve in order of priority set out in section 39. The order of priority under section 39 refers to father, mother, brothers and sisters and their children, half brothers and half sisters and their children and nearest relatives up to the sixth degree.

Though I am told that there is prohibition for making wills, I see no such prohibition. The prohibition

on wills is provided for under section 35 in cases where there is a surviving child or children. It would also appear from the provisions of section 35 of the Act that it is surviving children who can challenge the making of a will.

This court has powers under section 47 of the Act to make such orders as are expedient. After considering the facts in this case, I am of the view that RACHAEL having taken the child PAUL KAMAU as a dependant, had powers to make a will on the property that she inherited for the benefit of the said PAUL KAMAU. I find that the applicant has not proved any of the grounds for revocation of grant under section 76 of the Act.

Consequently I dismiss the application with costs to the administrator.

Dated at Nairobi this 6th day of December 2006.

GEORGE DULU

JUDGE