



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**SUCCESSION CAUSE NO. 431 OF 2005**

**IN THE MATTER OF THE ESTATE OF MUKUHA GATHANGARA (DECEASED)**

**BETWEEN**

**TERESIA P. WANJIRU..... APPLICANT**

**AND**

**SCOLASTICA NJOKI MUKUHA.....PETITIONER /1<sup>ST</sup>RESPONDENT**

**DANIEL MUKUHA WANJOHI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The application is premised under the provisions of Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules; the applicant seeks a revocation of the Grant made to the respondent on the grounds that;

i. Spent;

ii. Spent

iii. That the Grant of Letters of Administration made to Scholastica Njoki Mukuha on 8/03/2007 and the subsequent Certificate of Confirmation of Grant in her favour issued on 27/10/2009 and amended on 24/10/2011 in the matter herein be revoked; and

iv. That the costs of this application be provided.

2. The application is supported by the grounds on the face of the application and on a Supporting Affidavit made by the applicant;

3. Directions were given on the 26/11/2018 that the matter proceed by way of oral evidence; at the close of the hearing the parties were directed to file and exchange written submissions; hereunder is a summary of their respective submissions;

**THE APPLICANT'S CASE**

4. The estate relates to Daniel Mukuha Gathang'ara (deceased) who died intestate on the 5<sup>th</sup> November, 1978; the deceased had two (2) wives namely Scholastica Njoki Mukuha who is the respondent herein and the other wife was Rosemary Njanju Mukuha (now deceased);

5. The applicant contends that she is a daughter of the deceased and produced a letter dated 6/10/2017 marked as 'PEXh.1' which was from the Area Chief which confirmed that she was a daughter of the deceased and the first wife (Rosemary) and it also confirmed that she was entitled to benefit from his estate as a beneficiary;

6. Her evidence was that the 1<sup>st</sup> respondent as the petitioner failed to inform the court that she was a daughter to the deceased and a beneficiary to his estate; she was also not informed when the petition was filed for the Grant of Letters of Administration to her late father's estate; the 1<sup>st</sup> respondent gave no reason as to why the applicant had been excluded as a beneficiary when she filed the petition;

7. The applicant submitted that whilst responding to the instant application none of the respondents had denied that she was a daughter to the deceased; neither did she offer any evidence to controvert the fact that the applicant was a daughter and a beneficiary to the deceased's estate;

8. The applicant prayed that the Grant dated 8/03/2007 and subsequently confirmed on 27/10/2009 and the Amended Certificate of Confirmation issued be revoked; the deceased having been polygamous, the applicant prayed for the distribution of the estate in accordance with the provisions of Section 40 of the Law of Succession Act;

### **1<sup>ST</sup> RESPONDENTS RESPONSE**

9. The respondent filed no written submissions but relied on her Replying Affidavit made on 7/01/2019 in which she deponed that she was a surviving widow of the deceased and that Rosemary (now deceased) was her co-wife; she stated that the land was divided by the deceased and she had distributed it according to his wishes and conceded that the applicant's only share in the estate as a dependant was the share allocated to the family unit where the applicant belonged.

10. She deponed that the grounds upon which the application for the revocation of the grant was founded were invalid and prayed for the application to be dismissed.

### **2<sup>ND</sup> RESPONDENT'S RESPONSE**

11. The 2<sup>nd</sup> respondent filed a Replying Affidavit in response and also filed Written Submissions in which he associated himself and concurred with the submissions of the applicant that the Grant was obtained fraudulently whereby the 1<sup>st</sup> respondent concealed relevant material facts and particulars from the court by stating that there were only three (3) beneficiaries to the estate of the deceased whilst this was not the true and correct position;

12. The deceased had died intestate and prior to his demise he had divided Land Parcel No. Muhito/Muyu/488 into four (4) equal parts and his grandmother Rosemary Njanju Mukuha had been given one portion; the foregoing was within the knowledge of the 1<sup>st</sup> respondent yet she failed to disclose this in the application for the Confirmation of the Grant;

13. He submitted that the Grant should therefore be revoked in accordance with the provisions of Section 76 of the Law of Succession Act and any property forming part of the estate be returned back for redistribution in accordance with Section 40 of the Act; case law relied on **Matheka and Anor vs Matheka [2005] 2KLR 455;**

### **ISSUES FOR DETERMINATION**

14. After reading the respective affidavits and the written submissions this court has framed the following issues;

- i. Whether the applicant is a beneficiary and entitled to benefit for the estate;
- ii. Whether the Grant was obtained fraudulently or by concealment from the court of something material to the case;
- iii. Distribution of the estate of the deceased.

### **ANALYSIS**

#### **Whether the applicant is a beneficiary;**

15. In her replying affidavit the 1<sup>st</sup> respondent does not dispute that the applicant is a daughter from the first house from the union of the deceased and her co-wife Rosemary; the letter from the area chief annexed to the applicant's application also corroborates the fact that she is indeed a daughter of the deceased;

16. Section 29 (a) of the Law of Succession Act gives a description of a dependant and it reads as follows;

#### **“Section 29. Meaning of a dependant**

**For the purposes of this part, “dependant” means-**

**a. ....**

**b. such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sister, and were being maintained by the deceased immediately prior to his death;**

17. This court has examined and considered the uncontroverted evidence put before it and is satisfied that the applicant is a daughter of the deceased and qualifies to be a dependant and a beneficiary of the deceased's estate.

#### **Whether the Grant was obtained fraudulently or by concealment from the court of something material to the case;**

18. The revocation of the Grant and the subsequent Amended Certificate of Confirmation of the Grant was the substantive prayer sought by

the applicant; she contends that when the 1<sup>st</sup> respondent petitioned for the Letters of Administration and also when she applied for the Confirmation of the Grant she did not list the applicant therein as a dependant and or a beneficiary of the estate of the deceased;

19. This court reiterates that in her Replying Affidavit the 1<sup>st</sup> respondent conceded that the applicant was a dependant and further deposed therein that the applicant's '**only share in the estate as a dependant was the share allocated to the family unit where the applicant belonged.**'

20. At this juncture it must be pointed out and reiterated that the fact that the applicant was a daughter to the deceased is not disputed by the 1<sup>st</sup> respondent; therefore being fully aware of this fact the 1<sup>st</sup> respondent when petitioning for the Letters of Administration did not include and or list the name of the applicant on the P & A5 as a beneficiary of the deceased's estate; she also chose not to testify and or file any written submissions so as to challenge or controvert the applicant's contention or to give an explanation for the omission;

21. There is also a letter dated 6/10/2017 from the Area Chief which is not challenged which is ample evidence that goes to support and demonstrate that the applicant was indeed a daughter of the deceased;

22. The 1<sup>st</sup> respondent did not put forth any evidence to counter the allegations made by the applicant that the Grant was obtained by the concealment of material; upon perusal of the court record it contains an Affidavit In Support of Petition For Letters of Administration Intestate dated 30/06/2005 and sworn by the 1<sup>st</sup> respondent wherein she deposed at paragraph 4 that '**the deceased left the following surviving him;**

*i. Scholastica Njoki Mukuha - wife*

*ii. Richard Mwaniki Mukuha -son*

*iii. Jeremano Wanjohi Mukuha -son*

*iv. Charles Mutahi Mukuha -son*

*v. Rosemary Ngunju Mukuha –widow'*

23. When the 1<sup>st</sup> respondent moved the court for the Confirmation of the Grant the record reflects that the name of the applicant was also omitted in the Affidavit in Support of Summons For Confirmation of Grant of Administration Intestate which is dated 18<sup>th</sup> September, 2007 and is sworn by the 1<sup>st</sup> respondent; therein at paragraph 1 she deposed that '**the deceased was survived by the following children;**

*i. Richard Mwaniki Mukuha*

*ii. Jeremano Wanjohi Mukuha*

*iii. Charles Mutahi Mukuha'*

24. Both statements were made on oath and the exclusion of the applicant's name therein amounts to the making of a false statement;

25. This court is satisfied that the respondent made a false statement on oath and unlawfully excluded the applicant as a surviving dependant; this court finds that the exclusion of the applicant amounted to concealment of a material fact that would have enabled the court make a justified determination of the cause and subsequent distribution of the estate;

26. This court finds that the 1<sup>st</sup> respondent acted contrary to the provisions of Section 76 of the Act and is satisfied that the Grant and the resultant Certificate were obtained by the making of a false statement and by concealment from the court of something material to the case;

27. The court is satisfied that the applicant has met the threshold for the Revocation of the Grant.

**Distribution of the estate of the deceased**

28. From the evidence adduced there is no dispute as to the properties that comprise the estate of the deceased; the identifiable properties of the estate are as listed hereunder;

i. Muhito/Muyu/488

ii. Plot No.1 Kahara Market

iii. Plot No.2 Kahara Market

iv. Plot No.7 Kahara Market

v. Plot No.15 Kahara Market

vi. Shares within Muyu General Transport Company Ltd

29. The facts that are not in dispute are that the deceased was a polygamist and had two wives and that there were two households therefore the applicable law for the distribution of the estate as correctly submitted by the applicant and the 2<sup>nd</sup> respondent would be Section 40 of the Law of Succession Act; the Section reads as follows;

**“Where an interstate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate shall, in the first instance, be divided among the houses according to the number of children in each house but also adding any wife surviving him as an additional unit to the number of children.”**

30. The applicant contends that she had no knowledge of the Grant being obtained or confirmed; the court record reflects that at the confirmation the 1<sup>st</sup> respondent had left out the applicant's name from the list of beneficiaries and had unlawfully allocated the portion that belonged to Rosemary to Richard Mwaniki Mukuha, who had already been given his own portion by the deceased; therefore, it is this court's considered view that it is Rosemary's entitlement in Muhito/Muyu/488 that needs to be ascertained and redistributed; this court is therefore tasked with this duty of redistribution of this property;

31. This court is disinclined to apply the provisions of Section 40 of the Law of Succession Act in the redistribution as this will interfere with the current occupation on the ground, it will also interfere with the acreage and the already existing and established boundaries; and any interference of such a nature is bound to increase the acrimony already in existence;

32. The applicant, Richard, Jeremano and Charles are all children from the first house; there is evidence on record that Richard had been given his own piece of land by the deceased, elsewhere, and that he resided there; Jeremano and Charles were allocated their portions by the 1<sup>st</sup> respondent which she claims was according to the wishes of the deceased; as for her co-wife Rosemary's portion she unlawfully distributed this portion to Richard Mwaniki Mukuha whereas she ought to have distributed it to Rosemary's four (4) children to be held by them jointly or in equal shares;

33. This court will therefore only disturb the mode of distribution effected by the 1<sup>st</sup> respondent to Richard Mwaniki Mukuha of the portion in Muhito/Muyu/488 that belonged to Rosemary; the sons have all benefited from the deceased's estate and it is only the applicant who has not benefitted; therefore in the interest of equitable distribution this portion shall be redistributed to the applicant; the Shares with Muyu General Transport Company Ltd shall also be redistributed to be held by Scholastica Njoki Mukuha and Teresa P. Wanjiru (for the benefit of the 1<sup>st</sup> house).

#### **FINDINGS AND DETERMINATION**

34. For the afore-going reasons this court finds that the applicant is a beneficiary and is entitled to benefit from the estate of the deceased.

35. The Grant dated 8/03/2007 is found to have been obtained by concealment of material facts and is hereby revoked; a fresh Grant shall be issued in the joint names of the applicant and the 1<sup>st</sup> respondent;

36. The Amended Certificate of Confirmation of Grant issued on the 24/10/2011 is hereby revoked as the proposed mode of distribution therein is found to be unfair; the estate of the deceased shall be distributed as follows;

37. Land Reference No. Muhito/Muyu/488 to be apportioned equally amongst the applicant and the surviving beneficiaries namely;

i. Scholastica Njoki Mukuha

ii. Teresa P. Wanjiru (the applicant)

iii. Jeremano Wanjohi Mukuha

iv. Tabitha Wambui to hold in trust for the children of Charles Mutahi Mukuha (now deceased)

38. (i) Plot No.1 Kahara Market to Tabitha Wambui to hold in trust for the children of Charles Mutahi Mukuha (now deceased)

ii. Plot No.2 Kahara Market to Scholastica Njoki Mukuha

iii. Plot No.7 Kahara Market to Richard Mwaniki Mukuha

iv. Plot No.15 Kahara Market to Jeremano Wanjohi Mukuha

39. Shares with Muyu General Transport Company Ltd to go to Scholastica Njoki Mukuha and Teresa P. Wanjiru.

40. The Grant is hereby confirmed on the terms as ordered

41. Each party shall bear their own costs.

It is so ordered.

**Dated, Signed and Delivered Electronically at Nyeri this 10<sup>th</sup> day of June, 2021.**

**HON. A. MSHILA**

**JUDGE.**