



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO.376 OF 2010

IN THE MATTER OF THE ESTATE OF THE LATE MOSES KAGO MBURU (DECEASED)

MARY WAWIRA KIURA.....PETITIONER/RESPONDENT

VERSUS

WILSON MACHARIA KAGO (THE NEXT FRIEND OF ROSEMARY WAIRIMU KAGO

AND LEAH MUTHONI KAGO(MINORS).....OBJECTOR/APPLICANT

JUDGEMENT

1. The applicant filed a chamber summons application dated **26th October 2015** pursuant to the **Provisions of Section 76 Succession Act and Rules 73 Probate and Administration Rules** and requested for the following orders;

- a) That this honourable court does revoke and annul the Certificate of Confirmation of Grant issued to the Petitioner on 13th May, 2011.
- b) That a preservative order be issued in regard to the parcels of land known as GILGIL/KARUNGA BLOCK 8/339 and 340 pending the determination of this application.
- c) That title number GILGIL/KARUNGA BLOCK 8/339 and 340 which are already in the name of the Petitioner be revoked.
- d) That the Applicant be appointed as a guardian of RWK and LMK who are the Deceased minor daughters and minors be included as Dependants of the Deceased MOSES KAGO MBURU.
- e) That Unsurveyed Commercial Plot in Gilgil Town allocated to the Deceased Moses Kago Mburu on 22nd March 1995 be included in the assets of the Deceased and the Petition do henceforth account for rental income therefrom.
- f) That such orders as would meet the end of justice in this case be issued to ensure justice is done.
- g) Costs of this application be provided.

2. The application was premised on the grounds that the respondent applied for the letters of administration secretly and surreptitiously without notifying the court that the deceased had left behind two minor children who were a product of his second marriage. That there were properties left behind by the deceased which should accrue to the said children and not the respondent and which she left failed to disclose to the court.

3. That the Petitioner wants to sell the land and she has advertised the same to the detriment of the Deceased's orphaned daughters.

4. When the matter came up for directions the court ordered the same to proceed by way of oral evidence.

5. The applicant **WILSON MACHARIA KAGO (OW1)** testified and retaliated all that he had stated in his affidavit. He stated that the first-born daughter of the deceased was named after their mother according to Kikuyu customary law. The children's mother who was the second wife to the deceased died in 2005. He produced a death certificate and the photos as documentary evidence. He also stated that the children are recognized by the government as orphans and he produced a letter from the Ministry of Labour East African Affairs in support. He also

testified that the deceased had not sold the plot at Gilgil as the signature shown on the agreement is not his brother's.

6. The applicant further testified that the plot at Gilgil was jointly bought by the deceased and the petitioner but parcels no. 339,340 and 341 were given to the deceased by their father. He stated that they agreed to stand for the kids as a family and that they don't have any interest in the said properties.

7. The second witness **ROSEMARY WAIRIMU MACHARIA**, testified that she is the grandmother to the minors and that she took them in after their father died since the petitioner refused to take care of them. She testified that the deceased had married three wives. The first wife died when giving birth and the child also died, the 2nd wife who is the mother to the minors died in 2005. She confirmed that dowry had been paid to her parents. The third wife who is the petitioner herein was married after the death of the 2nd wife and she bore no children.

8. She stated that she is the one who took the minors to school and that Rosemary the firstborn daughter is named after her. She testified that one of the deceased properties plot no. 341 had been transferred to the petitioner by the deceased and plots 339 and 340 were retained by the deceased for the benefit of himself and the children. She said that her husband and herself gave the three parcels of land to the deceased and therefore she didn't have any interest on the said property again.

9. The third witness **SAMUEL KAMAU MBUTHIA** a maternal uncle to the minors also reiterated the sentiment in his affidavit and confirmed that he stays with one of the minors who is named after his mother. He also maintained that the kids were the deceased's.

10. The petitioner closed her case without calling any witness. Parties were directed to file their submissions. The petitioners indicated that he would not be filing any submissions.

Applicant's Submissions.

11. The applicant submitted that according to the law, where a person was in a polygamous relationship, his estate should be divided according to the units in each house hold. The petitioner already got Gilgil/ Karunga Block 8/341 this should be factored in when distributing the estate. The two remaining plots Gilgil/ Karunga Block 8/339 and Gilgil/ Karunga Block 8/340 should be allocated to the minors. Since the petitioner had already transferred the said titles to herself, the same should be cancelled and transferred to the minors or their trustees if they are still minors.

12. The applicant further submitted that the petitioner had filed a transfer agreement dated 20th January 2007 showing that the Unsurveyed plot NO. 6300/121/A situated in Gilgil town had been gifted to her by the deceased. The signatures on the said transfer document was subjected to a document examiner who testified before this court and produced a report. The deceased specimen signatures did not tally with the signature in the transfer agreement. It was therefore a forgery. The court should therefore find that the said plot belongs to the deceased estate and make such directives as the Court will deem fit on it's distribution.

13. In making his submissions the applicant placed reliance in the case of **Re Estate of Nzioka Muathai (deceased) (2017) eKLR** where the grant was nullified, **Re Estate of Mwenga Kavoi (deceased) (2018) eKLR** and the case of **Samuel Wafula Wasike v Hudson Simiyu Wafula 253 of 1993 CA** where grant obtained on false claim without obtaining the consent of beneficiaries is liable to revocation.

14. The applicant submitted that according to **Section 32 (2), (3), (5) and 38 of the Law of Succession Act** the children of the deceased are to share the deceased estate in equal shares. The petitioner had contravened **S. 51 (1) (g) of Succession Act and Rule 26 (1) and (2) of Probate and Administration Rules** when the petitioner moved the Court for grant without including all the beneficiaries. The applicant further relied on the case of **Patricia Wanja Mundia v Jacinta Gathoni Karanja & 6 others [2017] eKLR** to support the cancellation of title obtained through misrepresentation.

ANALYSIS AND DETERMINATION

15. Having perused through the affidavits, the evidence adduced in court and the submissions, two things fall for determination namely, **Whether the minors were born in the marriage between Joyce Waitihira Gathara the 2nd wife and the deceased and Whether the applicant has met the threshold for revocation of a grant.**

16. Before I consider if the applicant has established the requirements for a revocation of a grant, I have to establish if indeed the minors were the children of the deceased. I have perused through the birth certificates that were adduced in court, the letter from school which indicated that the children were total orphans who were under the care of their grandmother and that their father Moses Kago died when they were young.

17. I have also considered the evidence of the applicant and his mother who confirmed that the children were the deceased's and were named according to the Kikuyu traditional naming system where the firstborn child is named after the parents of the husband and the second born child after the parents of the wife. In this case the first -born minor a daughter was named after her grandmother Rosemary Wairimu as evidenced by the birth certificate that was adduced in court and the second born was named after her other grandmother from the mother's side.

18. The petitioner has contended that the birth certificates were forgery since they were registered in 2010 and informant section indicated that they were obtained by parents of the minors and yet they had already died.

19. The grandmother of the minors conceded that she is the one who obtained the children's birth certificate due to the requirement that students had to own birth certificates for them to sit for their examination. The birth certificate was also registered in the year 2010 while the summons for revocation of a grant were filed in the year 2015 way after the birth certificates were obtained. Hence, the contention that the

birth certificates were a forgery and that the applicant's interest was to enrich himself with the petitioner's property is misplaced.

20. In view of the foregoing evidence, and in the absence of any other evidence to the contrary the court concludes that the minors were the deceased children hence there was need to be included in the list of the beneficiaries.

21. On the next issue of whether the applicant has met the threshold for revocation of a grant the Law of Succession Act provides for revocation of grants under **Section 76, (a), (b) and (c)** as follows:

“76. Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

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 or by the concealment from the court of something material to the case;

c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

22. In the instant case, the applicant pegs her application for revocation of grant on **Section 76(a) (b) (c) of the Law of Succession Act**, on grounds that the process of obtaining the same was attended by procedural flaws, fraud and concealment of material facts from the court. It is contended that the Petitioner omitted to seek the consent of the applicant and that some of the beneficiaries (deceased children) were omitted from the list of beneficiaries as presented before this Court.

23. The applicant complains that he was unaware of the proceedings, as he did not know how the administrator got hold of the deceased's death certificate and yet it was in his custody. That would mean that he was not consulted before administration was sought, or his consent was not obtained before representation was sought by the administrator.

24. **Section 66 of the Law of Succession Act** sets out the order of preference with regard to who ought to apply and be appointed administrator in intestacy. Priority is given to surviving spouses, followed by the children of the deceased. **Rule 7(7) of the Probate and Administration Rules** requires that a person with a lesser right to administration ought to obtain the consent of the person or persons with a greater priority to administration, or get that person or persons to renounce their right to administration or cause citations to issue on them requiring them to either apply for representation in the estate or to renounce their right to so apply.

25. These provisions state as follows:

“66. Preference to be given to certain persons to administer where deceased died intestate

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

a) surviving spouse or spouses, with or without association of other beneficiaries;

b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

c) the Public Trustee; and

d) creditors ...” and

“7 (7). Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has –

a) renounced his right generally to apply for grant; or

b) consented in writing to the making of the grant to the applicant; or

c) been issued with a citation calling upon him to renounce such right or to apply for a grant. “

26. In the instant case, the applicant who is a brother to the deceased is not a person in the order of preference. The surviving spouse has a higher priority hence ought not to have obtained a consent from the applicant who had a lesser right to administration. In **re Estate of Festo Akwera Kusebe (Deceased) [2019] eKLR** the administratrix in the instant cause, being a surviving spouse, had a superior right to

administration over the children and the other relatives of the deceased, going by **section 66 of the Act**.

27. A reading of **Section 66 and Rules 7(7) and 26 of the Probate and Administration Rules** would mean that the widow herein did not need to comply with requirements of **Rules 7(7) and 26**, since those provisions apply only to persons who seek representation while they had an equal or lesser right to administration. She did not, therefore, have to obtain the consents of her children to apply for representation to the estate of her late husband.

28. **Section 51(2) (g)** however requires the petitioner to disclose all the surviving spouses and children of the deceased. The provision is couched in mandatory terms. **Section 51(2) (g)(h)**, states as follows:

“Application for Grant

51. (1) every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.

(2) Every application shall include information as to

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;

(h) a full inventory of all the assets and liabilities of the deceased...”

29. According to the pleadings and evidence on record, the petitioner depicted herself and her brother as the only beneficiaries. In her affidavit in support of the petition for letters of administration, she indicated that **Charles Njeru Kiura** was a brother to the deceased yet in real sense Charles was her own brother as averred by the applicant.

30. The petitioner also contended that the children were not recognized by the deceased when he was alive hence they were not his kids. The letter from the chief also indicated that the petitioner was the only survivor of the deceased and the only dependant. The letter from chief was erroneous since the deceased had kids who were not included in the letter as beneficiaries. The chief ought to have assisted the court with the correct information but rather he opted to conceal such an important information from the court.

31. The petitioner failed to provide any evidence to controvert the applicant’s evidence that the two minors were the deceased’s and for that reason she concealed something material from the court.

32. The court **In re Estate of Festo Akwera Kusebe (Deceased) [2019] Eklr** stated as follows;

“The administratrix was obliged to disclose the children of the deceased and the children of any of them who had died. This is required because, as a surviving widow, she was not entitled absolutely and exclusively to the intestate estate of her departed husband. If anything, she was entitled only to a life interest over the property, for the ultimate destination of the property of the deceased is not to her but to the children of the deceased. Her entitlement to absolute access to the estate is limited to personal and household goods, but not to capital assets, which are destined to the children. It is about a parent passing property on to his or her descendants but not to his or her contemporaries or ascendants.”

33. A surviving spouse who conceals existence of the children from the court intends to remove the devolution of property from **Section 35** so as to bring it within **Section 36**. Such an action can only be described, at best, as fraudulent and dishonest.

34. It was contended that the petitioner failed to include Unsurveyed Commercial Plot in Gilgil Town allocated to the Deceased Moses Kago Mburu in 1995. The petitioner argued that the property was transmitted to her as a gift by the deceased before he died. She produced in evidence a transfer agreement dated 20th January 2007. The said agreement bore a signature that was purported to be that of the deceased but when it was subjected to Forensic document examination together with other signature specimens made by the deceased person it was found not to be genuine. In his report the examiner confirmed that the signature in the agreement was not that of the deceased person. This indeed showed that the property had been obtained fraudulently hence there was need to revoke the entire grant. In essence, the said property still belonged to the deceased person’s estate.

35. In **re Estate of Festo Akwera Kusebe (Deceased) [2019] eKLR (supra)** the court opined that;

“I need not say more. A case for revocation of the grant herein has been made out successfully. The conduct of the administratrix, from the very inception of the matter to its conclusion, clearly points to the fact that she does not merit the position of administratrix, which is one of trust, as she has proved herself untrustworthy.”

CONCLUSION

36. Due to the foregoing reasons, the court finds that the respondent indeed concealed material facts to the court and in particular that the deceased had left behind minor children. She failed to offer any contrary evidence rebutting the applicants case.

37. In the premises the court makes the following orders;

a) The grant issued and to the respondent and confirmed on the 13th day of May 2011 with all the attendant consequences is hereby set aside.

b) RWK and LMK are legitimate children of the deceased herein born out of her marriage with the late Joyce Waithira Gathara.

c) Mary Wawira Kiura and Wilson Macharia Kago are hereby appointed as joined administrators of the estate of the late Moses Kago Mburu, the deceased herein.

d) Titles numbers Gilgil /Karunga Block 339,340 and Unsurveyed commercial plot at Gilgil township do revert to the deceased estate and if there is any title to any other third party the same is hereby cancelled forthwith.

e) The two joined administrators do apply for the confirmation of the grant issued herein so as to have the estate distributed to the rightful beneficiaries.

f) Each party shall meet its respective costs.

Dated signed and delivered at Nakuru via video link this 22nd day of July 2021.

H. K. CHEMITEI

JUDGE