



REPUBLIC OF KENYA

IN THE HIGHCOURT OF KENYA

AT NYAHURURU

SUCCESSION CAUSE NO. 73 OF 2017

IN THE MATTER OF THE ESTATE OF STEPHEN MUTHIMA MATHENGE (DECEASED)

DAMARIS WANGECHI MUTUMA.....PETITIONER

-VERSUS-

NANCY WAMBUI MWIRIGI.....1ST OBJECTOR

NJOKI NDEGWA NJIHIA.....2ND OBJECTOR

RULING

INTRODUCTION

1. The matter before Court are the applications by Nancy Wambui Mwirigi, the 1st Objector herein and Njoki Ndegwa Njihia, the 2nd Objector herein brought through Chamber Summons' dated 28th July 2014 and 4th February 2015 respectively seeking to revoke the grant of letters of administration in respect to the estate of Stephen Muthima Mathenge, the deceased herein made to Damaris Wangechi Mutuma, the Petitioner herein.

2. The grounds upon which the 1st Objector's application is based are listed as follows:-

- i. That the petition was filed fraudulently by the making of a false statement and by concealment from the Court of material facts.*
- ii. That the petition was filed surreptitiously and the respondent is wantonly intermeddling, disposing and wasting the estate.*
- iii. That the applicant is a wife of the late Stephen Muthima Mathenge and therefore genuinely and lawfully entitled to the grant of letters of administration in his estate a fact that which was not disclosed to the honorable Court by the Petitioner.*
- iv. That the petition has become useless and inoperative through Respondent conduct.*

3. The grounds upon which the 2nd Objector's application is based are listed as follows:-

- i. That the petition was filed fraudulently by the making of a false statement and concealment from the Court of material facts.*
- ii. That the Petitioner has left out the Objector/ Applicant and her son as beneficiaries of the estate of the deceased with a view to disinherit them.*
- iii. That the Petitioner is intermeddling, disposing and wasting the estate.*
- iv. That the applicant is one of the wives of the late Stephen Muthima Mathenge and therefore genuinely and lawfully entitled to the grant of letters of administration of his estate, a fact which was not disclosed to the honorable Court by the Petitioner*
- v. That the Objector/ applicant and the deceased were blessed with one issue Lloyd Ndegwa.*

4. The 1st and 2nd Objector's application are also supported by the facts set out in the supporting affidavits sworn on 16th July 2014 and 4th February 2015 respectively. In rebuttal, the Petitioner opposed the applications through the replying affidavits dated 17th November 2014 and 16th April 2014 respectively.

5. Concisely, the background to this case is that the deceased died on 11th October 2013 interstate leaving his wife the Petitioner and three children namely Ndirangu Wahome Muthima, Karimi Mathenge Muthima and Eliab Karugu Muthima. Upon his death and burial, the Petitioner was issued with a Certificate of Death in her capacity as the wife and a letter by the Chief Mario Inya Location identifying her and her three children as the beneficiaries of the estate of the deceased.

6. Before the succession proceedings herein were commenced, the Objectors moved the Court by filling citation proceedings to accept and refuse letters of administration against the Petitioner and the three other beneficiaries on 29th November 2013 and 21st January 2014 respectively vide Nakuru High Court Succession Citation Causes No. 818 of 2013 and No. 39 of 2014 respectively.

7. Upon receipt of the same the Petitioner entered appearance for both citations together with her children on 19th December 2013 and 25th March 2014 respectively. Both citations were placed before the Judge on 3rd July 2014 for directions and by consent of all parties and the Court made the following orders:-

i. The citees be and hereby allowed to apply for letters of administration in respect to the estate of the deceased within 30 days from 3rd April 2014.

ii. That the citees do serve the citors with the petition for letters of administration with seven (7) days from the date of the publication of the notice in the Kenya Gazette.

8. On 13th May 2014, the Petitioner in compliance with the Court's orders filed the petition for grant of representation to the estate of the deceased vide Nakuru High Court Succession Cause No. 350 of 2014 the present proceedings and was issued with the same by the Court on 17th July 2014 giving rise to the present applications.

THE PETITIONER'S CASE

9. The Petitioner through her advocate's written submissions dated 3rd October 2020 stated that she filed the petition for grant of representation in respect to the estate of the deceased and served it upon the Objectors on 20th June 2014 in terms of the Court Order made on 3rd April 2014. **(Copies of the petition and affidavit of service marked DWM-5 are annexed to the replying affidavits).**

10. She submitted that the Objectors failed to either file a notice of objection or answer and cross application within the stipulated time as is provided for under **Section 68 of the Act** and as a result after the expiry of notice, the Petitioner was issued with grant of letters of administration by the Court on 17th July 2014. She submitted that the Objectors did not disclose these facts to the court and have not given any explanation as to why they did not file the notice of their objections or what prevented them from doing so.

11. Further, she asserted that the Objectors did not comply with the court orders made on 29th May 2015 and they had taken no steps to prosecute the present applications. She contended that she is the one who moved the Court to have the applications disposed off with which demonstrated their lack of interest in this matter.

12. On whether the grant issued to the Petitioner should be revoked and/or annulled on the grounds that the same was obtained fraudulently by making of false statement by concealing to Court of some material facts, counsel placed reliance on **Section 76 LSA** and in **The Matter of the Estate of LAK- Deceased (2014) eKLR.**

13. She asserted that the 1st Objector's submission that the grant was acquired without her knowledge or after concealing from Court material facts are not anchored on any facts since she was all along aware of the steps taken by then Petitioner in having the grant made to her. Moreover, before applying for the grant the Area Chief Mairo Inya Location issued the Petitioner with a letter through which the Chief identified the Petitioner and her three children as the beneficiaries of the estate of the deceased and did not mention any other beneficiary and/or dependent and as such the Objectors and their alleged children are strangers to the Petitioner.

14. She stated that it was not enough for the Objectors to state that they were wives of the deceased nor is it enough to just state that the deceased bore children with them. They are required to support their allegations by cogent evidence. She averred that the Birth Certificate of one Gift Thengia produced by the 2nd Objector who she alleges was the son of the deceased was not adequate proof of paternity as held in **Re Estate Tonkei Jeremiah Kaurai Koin Tonkei (Deceased) (2019) eKLR.**

15. In conclusion, the Petitioner submitted that she had demonstrated that she acquired the grant in compliance with the laid down procedure and there would be no basis for the Court to revoke the grant which was rightfully made to her. She contended that the Objectors have not been able to bring themselves within the threshold set out under section 76 and the Court should dismiss their applications and award costs to her.

THE 1ST OBJECTOR'S CASE

16. The 1st Objector laid out her case through the face of her application itself, her supporting affidavit dated 4th February 2015 and written submissions date 15th May 2021e Court.

17. The 1st Objector asserted that she was the wife of the deceased and they had two issues together namely Janice Nyathira Mathenge and Peris Nyawira Mathenge. She stated that the deceased was living and taking care of them till his demise and therefore they were legal beneficiaries to his estate yet they were not included in the petition filed by the Petitioner proving that the Petitioner filed the petition fraudulently, made false statements and concealed material facts from the Court.

18. She quoted **Section 29** and in **Re Matter of the Estate of Lesinko Sokorte Kirayio (Deceased) 2017 eKLLR**. In conclusion, she prayed for the revocation of letters of administration filed in the name of the Petitioner and that grant of letters of administration intestate be issued to both the Petitioner and her as co-administrators of the estate of the deceased.

THE 2ND OBJECTOR'S CASE

19. The 2nd Objector's case was couched in the face of the application dated 4th February 2015 itself, her supporting affidavit dated 4th February 2015 as well as the written submissions dated 15th May 2021.

20. She contended that together with deceased they were blessed with one issue named Lloyd Ndegwa Muthima. She stated that while the deceased was alive he provided for their child, a fact that the Petitioner and the deceased's entire family were aware of. She also asserted that she worked at the deceased's institution as a teacher which was evidence of the Petitioner and family knowing her (**Refer to NDN4**). The 2nd Objector also enumerated on cohabitation which is the relationship she alleged to have with the deceased.

21. She stated that the Petitioner proceeded to obtain grant of letters of administration after she failed to file a cross application, which was not an adequate explanation as to why she excluded her son as one of the beneficiaries of the deceased as she was aware of his existence therefore failing to disclose material fact to the Court during the making of the grant with the intention of disinheriting him. She prayed that the Court include her as a co-administrator to cater for the interest of the minor. She stated that the deceased is the one who applied for the minor's birth certificate and it had the deceased's name as his father (**Copy of Birth Certificate Attached and marked as NDN2**). More so, he was taking care of his financial need till his demise as stipulated by Article 53 of the constitution (**Copy of Mpesa Statements Attached and Marked as NDN3**).

ANALYSIS OF THE ISSUES

22. Having carefully considered the application, the affidavits tendered by both parties in support and in rebuttal of issues herein as well as the judicial precedence and the law, the main issue for determination herein is: **Whether the Grants of Letters of Administration issued and confirmed to the Respondent should be revoked and/or annulled?**

23. Primarily, both Objectors contend that the grant was obtained by the Petitioner fraudulently by the making of a false statement or by the concealment from the court of something material to the case.

Section 76 of the Law of Succession Act is very clear that:-

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...

The circumstances in which a Grant may be revoked or annulled are set out in Section 76 of the Law of Succession Act as follows:

76. 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—

that the proceedings to obtain the Grant were defective in substance;

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;

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;

that the person to whom the Grant was made has failed, after due notice and without reasonable cause either—

to apply for confirmation of the Grant within one year from the date thereof, or such longer period as the court order or allow; or

to proceed diligently with the administration of the estate; or

to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

That the Grant has become useless and inoperative through subsequent circumstances.

24. The evidence on record indicates that the Objectors instituted citation proceedings to accept and refuse letters of administration against the Petitioner and the three other beneficiaries on 29th November 2013 and 21st January 2014 respectively vide Nakuru High Court Succession Citation Causes No. 818 of 2013 and No. 39 of 2014 respectively which were placed before the Judge on 3rd July 2014 for directions and by consent of all parties and the court made its orders. In accordance to the court's orders, the Petitioner then filed for grant of letters of administration and was issued with the same by the Court on 17th July 2014. The Petitioner argues that she served the petition on the Objectors and they failed to either file a notice of objection or answer and cross application within the stipulated time and so the grant was issued in her favour. Subsequently giving rise to the present applications by 1st Objector the 2nd Objector dated 28th July 2014 and 4th February 2015 respectively seeking to revoke the aforesaid grant.

25. In considering the Objectors' applications in independently, firstly, looking at the 1st Objector's application, it is evident that the same is starved of evidence. The 1st Objector has not attached any evidence to proof her case of being a beneficiary of the estate of the deceased, thus, she failed to discharge her burden under section 107 of the Evidence Act.

26. Secondly, the 2nd Objector provided sufficient proof before the court vide the birth certificate attached and marked as **NDN2** that Lloyd Ndegwa Muthima was indeed the deceased's son with her. The Petitioner asserted that a birth certificate was not enough proof of paternity but she did not adduce any evidence to disprove the Objector's claim. Lloyd Ndegwa Muthima is therefore a dependent of the estate of the deceased as envisioned by **Section 29 of the Law of Succession Act**.

27. The procedural technicalities enumerated by the Petitioner although significant and this court takes note of the Objectors conduct in the present cause do not explain why she excluded Lloyd Ndegwa Muthima as a beneficiary to the estate. It is for this sole reason that I am inclined to revoke the grant. I will not delve into the issue as to whether the Objectors were indeed wives of the deceased are as they will be ventilated at a later stage.

28. Crucially, it must be noted that the aim of the court is to uphold substantive justice. In the instant case, the court has to weigh between procedural technicalities versus substantive justice and it is my considered view that substantive justice must take precedence and this will only be done by ensuring that all the beneficiaries of the deceased benefit from the estate in question. Whilst the Objectors were indeed served by the Petitioner, the law provides for instances when the court can revoke a grant and one of them is where there is concealment of material information from the court. In this case, it is evident based on the material on record that the Petitioner indeed concealed material information from the court that would justify revocation of the grant issued by the court the issue of service notwithstanding.

29. In light of the above, I invoke the inherent powers of this court granted under Article 159 of the Constitution and Section 76 of the Law of Succession Act and make the order to revoke the letters of grant of administration issued to the Petitioner as it was obtained fraudulently by making a false statement of fact and by concealing from the Court of something material to the case by failing to include the name of Lloyd Ndegwa Muthima, a child borne of the deceased and 2nd Objector as a beneficiary of the deceased with the intention to disinherit him.

i. The letters of administration issued on 17th July 2014 are hereby revoked and applicants are given 14 days to file their reply o petition and cross-petition.

ii. Costs in the main cause.

DATED AND SIGNED AT NYAHURURU THIS 1ST DAY OF JULY, 2021.

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CHARLES KARIUKI

JUDGE