



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

MISC. SUCCESSION CAUSE NO. 30 OF 2019

ESTATE OF JAMES KAGWA MURUNGU

IRENE CAROLA GOSSMANN.....APPLICANT

VERSUS

ESTHER WANJIRU MURUNGU.....RESPONDENT

RULING

1. Irene Carola Gossmann, the Applicant herein has filed a Summons dated 30.9.19 against Esther Wanjiru Murungu, the Respondent seeking the following orders:

(1) *Spent.*

(2) *Spent.*

(3) ***THAT*** the Limited Grant Ad Colligenda Bona issued on the 31st July 2019 by the Chief Magistrate's Court at Kwale and dated 30th July 2019 be revoked.

(4) ***THAT*** any transaction based on the Limited Grant of Letters of Administration Ad Colligenda Bona issued on 31st July 2019 and dated 30th July 2019 be nullified together with any transaction based on the said, grant.

(5) ***THAT*** the Administrator of the Limited Grant of Letters of Administration Ad Colligenda Bona herein Esther Wanjiru Murungu do render an account of the Administration of the Grant from the date of issue of the grant including all assets of the deceased.

(6) ***THAT*** the Administrator Esther Wanjiru Murungu be barred from continuing to act as an Administrator of the deceased estate on the basis of the grant issued on 31st July 2019 and dated 30th July 2019.

(7) ***THAT*** the Honourable Court be pleased to issue any orders that it deems fit in the circumstances.

(8) ***THAT*** the Honourable Court be pleased to appoint the Applicant Irene Carola Gossmann as an administrator to the estate of James Kagwa Murungu.

(9) ***THAT*** costs of this Application be provided for.

2. In her supporting affidavit sworn on 24.9.19, the Applicant states that she is the widow of James Kagwa Murungu, the deceased herein, having been married to him on 10.10.02. The marriage took place in Germany and the Applicant lived with the deceased in Muenchen, Germany until 3.5.19, the date of his demise. The Applicant presided over the cremation of the deceased and sent the urn containing his ashes to the family in Kenya for burial rights. The Applicant's claim is that the Respondent obtained the Grant fraudulently by concealing material facts and by means of untrue allegations of fact. The Respondent misled the Court that the deceased was not married and further concealed certain assets of the estate, namely motor vehicle registration number KBR 252G, Plot Nos. Kwale/Diani Complex/1179 and 730. The Respondent further excluded the Applicant from the proceedings leading to issuance of the Grant. The Applicant states that the Respondent used the illegally obtained Grant to harass and unlawfully throw out Stephen Musyoki Wambua, (Wambua) the manager appointed by the Applicant and the deceased to manage Plot No. Kwale Diani Complex/1199. She urged that the Application be allowed.

3. The Respondent in her replying affidavit sworn on 13.10.19 stated that she is the biological mother of the deceased. She stated that she obtained the Grant to collect, get in and preserve the estate of the deceased who had rental property in Kwale county. She denied all the

allegations of fraud and stated that she made full disclosure of all material facts. She asserts that the deceased was never married during his life time. According to her Kikuyu customs, a man must introduce his bride or wife to his parents and family. The deceased never introduced the Applicant or any other woman to the Respondent and so to the best of her knowledge, he died a bachelor. The Respondent further disputes the marriage certificate exhibited by the Applicant alleging that it is in a foreign language and should be expunged from the record. The Respondent accused the manager of the properties, Wambua of using the Applicant to make illegitimate claims on the deceased properties. She accuses the Applicant of failing to obtain a grant to preserve the estate since his demise on 3.5.19. To the Respondent, the collection of rent from Plot No. Kwale Diani Complex/1199 was a matter of urgency, to avert intermeddling by Wambua, which could not await a full grant. She further stated that the Applicant is not estopped from petitioning for a full grant of representation. The Grant was issued by a competent Court and she urged that the Application be dismissed with costs.

4. In a further affidavit sworn on 21.10.19, the Applicant denied the allegations by the Respondent. She accused the Respondent of dishonesty by stating that she was not aware of the Applicant's 17 year marriage to the deceased when in fact the Respondent's daughter occasionally visited them in Muenchen, Germany. The Applicant further stated that the marriage certificate she exhibited is in 3 languages, including English, the official language of the Court. The Applicant stated that she ensured that the remains of the deceased were decently buried. She also sent €2200 to the Respondent and €4000 to her daughter Salome and further spent €800 in flying Salome from Germany to Kenya. The Applicant accused the Respondent of taking advantage of her absence from Kenya to side-line her as the deceased's wife and to sabotage her position.

5. On 11.11.19, directions were taken that parties file their written submissions and timelines duly given, with a mention date on 5.12.19 to confirm compliance. On the mention date, the Respondent did not attend Court nor had she filed submissions. Ruling was reserved for 17.1.20. On 20.12.19 however, the Respondent filed an application dated 19.12.19 under certificate of urgency seeking to be allowed to file submissions and that the scheduled ruling be deferred. The Court fixed the application for *interpartes* hearing on 15.1.2020. On the hearing date however, neither the Respondent nor her counsel attended Court. As a result, her application dated 19.12.19 was dismissed for non-attendance.

6. I have considered the Application, the rival affidavits as well as the Applicant's submissions. Section 76 of the Law of Succession Act confers jurisdiction upon the Court to revoke and annul grants of representation 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—

(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;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) 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

(ii) to proceed diligently with the administration of the estate; or

(iii) 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

(e) that the grant has become useless and inoperative through subsequent circumstances.

7. The grounds upon which the Applicant seeks to have the Grant revoked are that the Respondent concealed from the Court the existence of the Applicant as the widow of the deceased. The Applicant further premised her application on the ground that the Respondent obtained the Grant fraudulently by making a false statement, *to wit*, that the deceased died without a wife.

8. I have looked at the exhibited marriage certificate, which the Respondent sought to be expunged as it was in a foreign language. I note that the particulars therein are expressed in German, French and English languages. I further note that the Applicant and the deceased got married on 10.10.02. The marriage though evidently contracted in a foreign Country is by dint of Section 40 of the Marriage Act, recognised as a valid marriage. The claim by the Respondent therefore not valid. Further, the claim by the Respondent that that the deceased did not introduce the Applicant to her as his wife as required by Kikuyu customs, is not sufficient to rebut the fact of marriage as evidenced by the exhibited marriage certificate.

9. Further, there was evidence of communication between the Applicant and relatives of the deceased exhibited in her further affidavit. A bank card of an account belonging to the Respondent to which the Applicant was to send money was exhibited. None of this was controverted. Clearly, the Applicant was no stranger to the Respondent. Indeed the Respondent stated in paragraph 22 of her replying affidavit that *“the applicant herein is not estopped from petitioning for full grant of representation.”* To my mind, this is an acknowledgement by the Respondent of the Applicant as a spouse of the deceased or in the very least as a person entitled to a grant of representation to his estate. Further, it is highly improbable that a German national and resident would come all the way to Kwale County to lay claim on the estate of a man with whom she had no relationship. Based on the material on record, I am satisfied that the Applicant is

indeed the widow of the deceased. In the premises, I find that the Grant was obtained fraudulently by the making of a false statement that the deceased was survived by neither spouse nor child and further by the concealment from the Court of the fact that the deceased was in fact survived by his widow, the Applicant. Had the Respondent informed the Court that the deceased was survived by his widow, it is unlikely that the Grant would not have been issued to her.

10. Further, Section 66 of the Act gives the Court final discretion as to the person or persons to whom a grant of letters of administration shall be made and also gives an order of precedence as follows:

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) ...

11. High on the priority list of persons to whom a grant shall be made is a surviving spouse. The mother of a deceased comes a distant fourth and only in a situation where there is no surviving spouse, children or father.

12. Rule 26 of the Probate and Administration Rules provides:

(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

13. The Respondent as mother of the deceased was under a legal obligation to give notice of her application for the Grant, and to obtain the consent of the Applicant, who is entitled to the Grant in a higher degree than herself. Failure by the Respondent in this regard therefore, upsets the Grant.

14. The Applicant has prayed that the Respondent do render an account of her dealings with the estate from the date of issuance of the Grant. This prayer is reasonable and is supported by Section 83 of the Act which provides that the duties of an administrator include *inter alia*:

(h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

15. The Applicant further prays that she be appointed administrator of the estate of the deceased. The Applicant placed reliance on the case of Philip Onjor Sewe v Elseba Awuor Oyule [2017] eKLR where the grant issued therein was revoked and the applicant therein was appointed administrator. The said case is distinguished in that a full grant therein had been issued. In the present case however, we are dealing with a limited grant. No petition for a full grant has been filed and no gazette ment has been done. The Act is a complete code with its own rules and procedure. The procedural steps for applying for a grant and the prescribed forms are specifically provided for. Rule 7(1) of the Probate and Administration Rules provides in part as follows:

Subject to the provisions of subrule (9), where an applicant seeks a grant of representation to the estate of a deceased person to whose estate no grant or no grant other than one under section 49 or a limited grant under section 67 of the Act has been made, the application shall be by petition in the appropriate Form supported by an affidavit in one of Forms 3 to 6 as appropriate containing, so far as they may be within the knowledge of the applicant, the following particulars...

16. The Applicant is required to comply with the above Rule and apply for a grant by way of petition. All supporting documents as well as the requisite information must be filed for consideration by the Court. In view of the foregoing the Court cannot make a grant of representation to the Applicant on the basis of a prayer to that effect, contained in the present Application for revocation of the Grant.

17. On the prayer for nullification of any transaction done by the Respondent, the Court finds that the Applicant has not stated with specificity what particular transaction is to be nullified. Nothing further need be said on this prayer.

18. In the end the Court finds that the statutory grounds for revocation of the Grant have been established and makes the following orders as are necessary for the ends of justice:

- i) The Grant of Letters of Administration *ad colligenda bona* issued to Esther Wanjiru Murungu on 31.7.19 is hereby revoked.
- ii) Esther Wanjiru Murungu shall within 30 days produce to this Court a full and accurate account of all of the estate of the deceased that she has collected, got in, received and preserved and all dealings therewith from 31.7.19 up to the date of the account;

iii) Mention for compliance on 24.2.2020.

iv) This being a family matter each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 17th day of January 2020

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**