



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 1253 OF 2001

IN THE MATTER OF THE ESTATE OF MWANGI KURIA - DECEASED

DANIEL MAINA MWANGIAPPLICANT

VERSUS

LILIAN MUGURE MWANGI.....RESPONDENT

JUDGMENT

1. The Deceased herein MWANGI KURIA (Deceased) died intestate on 18.6.1997 domiciled in Kenya.
2. The Respondent petitioned for Letters of administration and she was issued with the grant of letters of administration on 10.8.2001.
3. The Grant was confirmed on 16.9.2002 and on 29.3.2007, the objector herein DANIEL MAINA MWANGI filed a summons for revocation or annulment of grant dated 21/3/2007.
4. It is the summons for revocation dated 21.3.2007 that is coming for consideration in this ruling. The parties gave viva voce evidence and also relied on their affidavits and witness statements filed herein.
5. The objector who testified as DW 1 called two witnesses. He said his mother was a wife of the deceased and he is a son of the deceased. He asked the Court to revoke the grant as the petitioner/respondent did not disclose that his mother and himself are beneficiaries of the deceased.
6. He PASTOR ELIUD KURIA KARIUKI who said he is a retired pastor and a neighbor go the Objector and his mother. He said he attended the marriage ceremony between the objector's mother and the deceased.
7. The Objector also called Ruth WanjiraMwangi who also said she attended the marriage ceremony between the objector's mother and the deceased. She said 'Mwati and Harika' were given during the ceremony.
8. The Respondent who is the Petitioner said the deceased did not have another wife and that she does not know the objector. She said the objector's mother was her husband's farm labourer at Nakuru.
9. The Petitioner/Respondent called one witness, LUCY NGOIRI NGANGA who was a cousin to the deceased. She said the deceased only had one wife, the petitioner and one daughter and further that the objector's mother was the deceased's farm worker at Nakuru.
10. The issues for determination in this case are as follows:
 - (i) **Whether the Deceased was married to the Objector's mother.**
 - (ii) **Whether the deceased had taken the objector as his son prior to his death.**
 - (iii) **Whether the Petitioner/Respondent conceal material facts in obtaining the grant herein.**
 - (iv) **Whether the grant issued to the Respondent should be revoked**
 - (v) **Who pays the costs of this suit?**

11. I have considered the evidence adduced by both parties in the summons for revocation foiled by objector dated 21.3.2007. It is trite law that he who alleges a fact is duty bound to prove the same.

12. **Section 107** of evidence Act succinctly states:

“Whosoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

And **Section 108** of Evidence Act, further states thus:

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

13. In the current case the objector alleges that he is the son of the deceased with one GRACE WANJIRA MWANGI and that the two are entitled to a share of the deceased's estate.

14. The said GRACE WANJIRA MWANGI was not enjoined as an objector in this case. The objector said the said GRACE WANJIRA MWANGI is normally sickly and could not come to court.

15. I find that even if she could not come, there is no reason why she is not in this case as an objector.

16. The Objector and his witnesses did not discharge the burden of proof required in Civil Cases. I find that there is no evidence that the objector and the deceased were married to each other. The two witnesses who testified for the objector did not adduce evidence to show the existence of a marriage between the deceased and the objector's mother.

17. I also find that the objector's mother did not come to tell the court about the alleged marriage since she was still alive as at the date the hearing proceeded inter-parties.

18. The objector's failure to call his mother leads to the inference that the evidence would have been detrimental to his case. When a party fails to call a witness who is available and who would have assisted his case, the inference is that the evidence would have been adverse to his case.

19. I find that there is no evidence that the objector's mother was married to the deceased herein. The two witnesses who were called by the objector did not prove existence of the alleged marriage.

20. The objector's mother who is still alive and mentioned by the parties did not come to court to support the objector's case and neither is she named as a co-objector in this case.

21. The objector has failed to prove that he was the son of the deceased or that the deceased had taken him as his son and was maintaining him prior to his death and I accordingly find that there is no evidence that he was a son of the deceased.

22. I find that the objector and his mother are not beneficiaries of the estate of the deceased and therefore the Petitioner/Respondent was not under a duty to include them as such.

23. The Petitioner/Respondent who did not even know about their existence did not conceal material facts from the court.

24. The objector said that he had filed another case in Nakuru High Court in respect of the estate of the deceased. I direct that the said file be transferred to Nairobi forthwith as it is a requirement that only one Succession Cause should be opened in respect of the same estate and also to avoid a situation where courts are giving contradictory orders in the same estate.

25. On the issue as to whether this grant should be revoked, I find that the answer is NO. The reason being that the same was NOT fraudulently issued. Under section 76 of the Law of Succession Act this court has wide and unfettered discretion to annul or revoke a grant whether or not confirmed at any stage on the following grounds:-

(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 has ordered or allowed; 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.”

26. The objector has not established existence of valid reasons for revocation of the grant made to the Petitioner/Respondent on 10.8.2001 and confirmed on 16.9.2002.

27. I accordingly dismiss the summons for revocation of grant dated 21.3.2007 with costs to the Petitioner/Respondent and I direct as follows:

(i) THAT Succession cause No. 12 of 1998 filed in Nakuru High Court in respect of MWANGI KURIA (the deceased herein) be transferred to this Court forthwith to avoid a situation where parallel orders are issued in the same estate.

(ii) THAT the Deputy Registrar of this Court to call for the said file forthwith.

(iii) THAT the summons for revocation filed by the Objector is dismissed with costs.

(iv) THAT the Objector will meet the costs of the summons for revocation

(v) THAT this case will be mentioned on 7.3.2020 for compliance.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 7TH DAY OF FEBRUARY, 2020

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.