



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CAUSE NO. 100 OF 2017

IN THE MATTER OF THE ESTATE OF WILSON WAIYAKI GITHIEYA (DECEASED)

RULING

1. Before me are two applications filed on 12/05/2017 and 05/10/2017 respectively. The first application is a Summons for Rectification of a Confirmed Grant expressed to be brought under Sections 47 and 74 of the Law of Succession Act, Rules 43 and 73 of the Probate and Administration Rules. The Applicant seeks an order:-

“THAT this Honourable court be pleased to order rectification of the Certificate of Confirmation of the grant herein dated the 9th day of June, 1994 in the Schedule by removing the name of Rahab Waithira Githieya and her share of inheritance thereof and leave the other three beneficiaries thereof with their shares as follows:-

Benjamin Githieya Waiyaki Son 33 1/3 %

Samuel Hinga Waiyaki Son 33 1/3 %

George Mwaura Waiyaki Son 33 1/3 %”

2. The application is supported by the Supporting Affidavit of the Applicant **HILDA MUTHONI HINGA** the sole surviving administrator of the estate herein. She deposed that the estate was previously being administered by the Public Trustee who failed to distribute the estate in accordance with the Kikuyu Customary Law, the deceased having died before the enactment of the Law of Succession Act and that in the event, **Rahab Waithira Githieya**, the widow of the deceased herein, was only entitled to a life interest contrary to the Public Trustee's award of 40% share. In the circumstances she wishes to rectify the grant.

3. Subsequently, **BENJAMIN GITHIEYA WAIYAKI** filed his affidavit on 5th October, 2017 in support of the application herein and urges the court to grant the prayers sought therein.

4. The Respondents through their counsel filed their Grounds of Opposition on 10th April, 2019. It was stated that the application herein is an abuse of the court process as the court has already given directions on the succession process regarding the share of **RAHAB WAIHIRA WAIYAKI**.

5. The second application is a Summons for Substitution of a deceased administrator brought under Section 47 of the Law of Succession Act, Rule 73 of the Probate and Administration Rules. The Applicant sought an order:-

“THAT this Honourable court be pleased to substitute the name of GEORGE MWAURA WAIYAKI one of the administrators herein who is deceased with the names JANE WAIRIMU KIMANI and WILSON WAIYAKI MWAURA.”

6. The application is based on the ground that one of the administrators of the estate herein, **George Mwaura Waiyaki** is now deceased and as such the Applicants **JANE WAIRIMU KIMANI** and **WILSON WAIYAKI MWAURA** the widow and son respectively, should be allowed to substitute the deceased administrator. The application is supported by the affidavit of the Applicants who deposed that the deceased administrator passed away on 9/04/2017 and that they have obtained a Limited Grant ad-litem vide **Kikuyu Succession Cause No. 201 of 2017** in respect of his estate to enable them be substituted so as to proceed with the matter herein.

7. The Respondents through their counsel filed their Grounds of Opposition on 10th April, 2019. It was stated that the application herein is an abuse of the court process as the Applicants cannot be substituted until they acquire a proper grant in respect of the estate of the said **George Mwaura Waiyaki** (deceased). The applications were canvassed by way of written submissions.

8. Parties argued the applications through written submissions. The Applicant through her advocate submitted that the deceased herein **Wilson Waiyaki** died in the year 1977 prior to the enactment of the Law of Succession Act and as such the succession regarding his estate

ought to be governed by Kikuyu Customary Law. It was contended that the daughters of the deceased are all married and therefore not entitled to a share in the estate of the deceased under Kikuyu Customary Law. The court was urged to distribute the deceased's estate as proposed by the Applicant. Reliance was placed on the case of ***In Re the Estate of Kiguta Mukei alias Kiguta Mukii (Deceased) (2013) eKLR*** where it was held that the estate in question was subject to Kikuyu Customary Law as the deceased died before the Law of Succession Act came into operation.

9. Subsequently, the Respondents filed their written submissions in respect of the two applications. The Respondent submitted that the said court further held that the estate herein was distributed in 1994 and that the Applicants should apply for representation to the estate of their mother. Counsel submitted that the court declared itself *functus officio* on the issue of distribution of the estate herein. The application was said to be an abuse of the court process and the court was urged to dismiss the same and uphold the grounds of opposition.

10. In regard to the application filed on 5/10/2017, the Respondents submit that when they had earlier sought to substitute **Rahab Waithira Githieya** the Applicants herein then objected and argued that one must seek a Grant of Letters of Administration a position which was upheld by the court. That the present Applicants must also seek a Grant of Letters of Administration or a Limited Grant prior to making an application for substitution in a suit in which the deceased George Mwaura Waiyaki had been a party as held ***In the matter of the estate of M'tworuchiu M'mwanja Succession Cause No. 58 of 1992***. It was contended that the distribution of the share of George Mwaura Waiyaki cannot be undertaken in the cause for a limited Grant ad litem filed in the lower court at Kikuyu; that the entitlements of the beneficiaries of George Mwaura Waiyaki (deceased) can only be determined in a separate substantive succession cause as per the Ruling of Musyoka J. herein.

11. The court has considered the material canvassed in respect of the two applications. First off, the application filed on 12/5/17 cannot be entertained. It represents a clear attempt by the Applicants to circumvent the ruling of **Musyoka J** delivered on 3rd February 2017. I say so because the application seeks to redistribute, through a purported prayer for rectification of grant, the estate herein which was distributed in 1994.

12. To reiterate the decision of **Musyoka J**, the learned judge observed that:

“4. The estate herein was distributed in 1994. The matter of distribution cannot be revisited in the manner proposed in the instant application. In any event, the court became function officio so far as the issue is concerned.

5. What the applicants should do is to apply for representation to the estate of then mother, and have their mother's share of the estate herein devolved upon her estate so that the same can be shared amongst those entitled.”

13. The present application filed on 12/5/17 seeks to distribute among three children of the deceased, the 40% share that had been assigned to their mother **Rahab Waithira Waiyaki**, now deceased. The application is a non-starter for these reasons and is accordingly dismissed.

14. As regards the application filed on 5th October, 2017, I agree with the Respondent's submission that the Applicants ought to obtain a grant of letters of administration or an appropriate limited grant prior to seeking their substitution in place of the deceased administrator **George Mwaura Waiyaki**. The grant *ad litem* issued by the Magistrates court at Kikuyu a copy of which is attached to the supporting affidavit of the Applicants as annexure **JWK** and **WWM2** cannot do for the purposes of this case.

15. There is a purpose in the provisions of the Law of Succession Act requiring that a grant of letters be preceded by due publication of the Petition for grant; it gives notice to other parties who may be beneficially entitled in an estate. It is possible that the deceased **George Mwaura Waiyaki** had other beneficiaries who may be entitled to apply or to receive notice of any Petition for grant in respect of the estate. In view of this and the history of this matter, this court cannot allow substitution on the basis of a mere grant *ad litem* as the real purpose of substitution in this case goes beyond mere substitution being the limited purpose stated in the grant *ad litem*, i.e. for “*purposes only of being substituted and until further representation.*” The application filed on 5th October 2017 is therefore dismissed.

16. However, the court notes that with the death of **Mwaura Waiyaki George** who had been appointed jointly with his sister-in-law **Hilda Muthoni Hinga** as administrators of this estate on 22nd September 2014, only the latter administrator remains. The court further notes that an undisputed beneficiary and son of the deceased herein, one **Benjamin Githieya Waiyaki** is still living. He is the deponent to the affidavit sworn on 4th October 2017 and filed on 5/10/17 in support of the application under consideration.

17. The court has also perused the contents of the Replying affidavit filed into court in response to an application dated 21st May 2012 seeking to revoke the grant in favour of the Public Trustee and sworn by **Mary Njoki Njuya**, a Senior Deputy Public Trustee on 17th September 2012. It appears that despite the distribution of the estate herein having been completed in 1994, the complete administration of the estate by transfer of the beneficiaries' shares had not been done by 2012, and has not subsequently been done. 18. In the circumstances, the court invokes its discretion under Section 47 and Section 66 of the Law of Succession Act, and in order to move this matter forward and to have the administration completed, the court appoints **Benjamin Githieya Waiyaki** to be a Co-administrator with **Hilda Muthoni Hinga**. A new grant will issue accordingly. The court directs further, that the said administrators do proceed expeditiously to complete the administration of the estate, and in any case, within 9 (**nine**) months of today's date and to render accounts to this court in accordance with Section 83(i) of the Law of Succession Act. For this purpose, there will be a mention of this case on 26th November 2020.

18. At the same time, the parties who have survived **Rahab Waithira Githieya**, **George Mwaura Waiyaki** and other deceased beneficiaries to the present estate are directed to file appropriate succession proceedings in respect of those deceased persons so that the assets to devolve upon the said estates may be distributed accordingly amongst the persons entitled persons.

Parties will bear own costs.

DELIVERED AND SIGNED AT KIAMBU THIS 6TH DAY OF FEBRUARY 2020

C. MEOLI

JUDGE

In the Presence of:

Mr. Njehu holding brief for Mr. Gatitu for the Respondent

Applicant – no appearance

Court Assistant – Kevin/Nancy