REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NUMBER 743 OF 2009

(In the matter of the Estate of Mutahi Kamau (deceased))

KAMAU MUTAHI KAMAU.....APPLICANT

-VERSUS-

1. PATRICK WANJOHI MUTAHI

2. JOSEPH MUTHIGA MUTAHI.....PROTESTERS

JUDGMENT

This judgement is in respect of a summons for confirmation of grant and protests filed against it opposing the distribution of the intestate estate of the late Mutahi Kamau as proposed by the applicant in his affidavit in support of the summons.

The deceased himself died on 2 December 2007. He hailed from Kabaru location in Nyeri County and that was his last known place of residence prior to his demise.

He was survived by his widow and 7 children, three of whom are the applicant and the protesters respectively.

On 14th September 2009, the applicant petitioned this honourable Court for Grant of letters of administration intestate of the deceased's Estate; this was in succession cause no. 680 of 2009. In the affidavit in support of the petition, he named his siblings, including the protesters, and his mother as having survived the deceased. The record shows that no further action was taken on that petition.

The present petition was subsequently filed, more particularly on 15 September 2009, a day after the petition by the applicant was filed. This time around it was filed by the deceased's widow who sought to administer the estate of her late husband. The petition was allowed and the grant made on 19 April 2010. Less than two months after obtaining the grant, the petitioner sought to have it confirmed and her summons in this regard was dated 2 June 2010; it was filed in court on the same date under certificate of urgency, the urgency being that the petitioner was in urgent need of funds to cater for her medication hence the need to access funds in her late husband's estate. The record shows that the summons was allowed on the same date when the petitioner appeared before court, ex parte.

By a summons dated 19th July 2010, Riccada Wanjiru Mutahi, one of the deceased two daughters, sought to have the grant made to her mother revoked or annulled. She contended 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; and, that the grant was obtained by means of untrue allegation of fact essential in a point of law to justify the grant not withstanding that the allegation was made in ignorance or inadvertently.

Amongst her depositions, was the inevitable and irrefutable contention there was an existing petition in respect of the same estate and therefore the present cause was unwarranted. Although this contention was covered in her affidavit it was largely an issue of law that ought to have been addressed as such. Nevertheless, nothing much seems to have turned on it because, by a summons dated 12 October 2009, the original petitioner applied to have the two causes consolidated. Her application was granted on 13 November 2009.

When the summons for revocation or annulment of Grant came up, apparently for directions on 16 November 2010, counsel for the petitioner informed the court that he had just learnt that the petitioner had passed away four days earlier, more particularly on 12 November 2010. The directions were eventually given on 7 November 2012 to the effect that the summons be heard by way of oral evidence.

Meanwhile, by summons dated 29 July 2015, the 1st protester applied to be substituted as the administrator of the estate in place of his deceased mother.

On 11 July 2016, Mr. King'ori, the learned counsel for the applicant, opposed the application for substitution urging that upon the death of the administratrix, the only option open was to revoke the grant and issue a fresh one. It is upon this understanding that he suggested that the applicant and the 1st protester be appointed as joint administrators. The rest of the parties' representatives were in agreement with this suggestion and so, by consent, the grant of letters of administration made to the deceased's widow on 19 April 2010 was revoked, paving the way for the applicant and the 1st protester to be appointed as joint administrators of the deceased's Estate.

Despite his reservations about the revoked grant, the applicant still applied the same grant to be confirmed; this, he did vide a summons dated 22 November 2016 which, as noted, is the subject of this judgment besides the protesters' protests. In the summons, he has, nonetheless, stated in the first prayer that the Grant had been made in the names of the 1st protester and the applicant. To quote him, he has stated thus:

> ***"1. That the grant of probate/or letters of administration intestate (with will annexed) made to the said KAMAU MUTAHI KAMAU and PATRICK WANJOHI MUTAHI in this matter on the 19th day of April 2010 be confirmed".***

This obviously is not true because the grant of 19 April 2010 was made in the name of Loise Chaki and had been revoked at the instance of the applicant himself upon Loise Chaki's demise.

Be that as it may, the protesters opposed the scheme of distribution proposed by the applicant of the deceased Estate. According to that scheme, the deceased's Estate comprising parcels of land referred to as Title Nos. Nyeri/Island Farms/977,978, 979, 980 and 981, and Laikipia/Salama Block 1/1038 ought to be distributed equally among his seven children.

The protesters were of a different view. According to the 1st protester, upon confirmation of the grant of 19 April 2010, part of the estate had been transmitted to the beneficiaries; in particular, Title No. Nyeri/Island Farms/979 and Title No. Nyeri/Island Farms/980 had already been transferred to Joseph Muthiga Mutahi and Patrick Wanjohi Mutahi respectively. The applicant's proposal, so he swore, was contrary to the scheme of distribution adopted in the confirmed grant which, in any event, was in accordance with the wishes of the deceased.

In his view, the unadministered estate, which he listed as comprising Title Nos. Nyeri/Island Farms/977,978, 981 and Laikipia/Salama Block 1/1038 ought to devolve upon Charles Maina Mutahi, Munuhe Mutahi, Peter Kamau Mutahi and Riccada Wanjiru Mutahi respectively.

The 2nd Protester adopted more or less the same position as the 1st protester but reiterated that their sister Riccada Wanjiru Mutahi had been allocated Title No. Laikipia/Salama Block1/1038. He also swore that Riccada had sued the deceased in his lifetime claiming a portion of Title No. Nyeri/Island Farms/108 but that the deceased had declined to accede to her demands.

At the hearing of the protest, the 1st protester testified that the deceased had sub-divided the estate prior to his death into five parcels of land; these are Title Nos. Nyeri/Island Farms/977 to 981 (both inclusive). It was the deceased's intention to transfer them as per the schedule represented on the certificate of confirmation of the grant made to the deceased's widow but which, as noted, was revoked. Unfortunately, the deceased died before the transfers could be effected but the scheme of distribution of the estate adopted by the Court in the certificate of confirmation of grant more or less represented the deceased's wishes.

He denied the suggestion that Riccada could have purchased Title No. Laikipia/Salama Block1/1038, from the deceased; rather, it was his evidence that she was allocated this parcel of land by the deceased and that's all she's entitled to in the present scheme of things.

In his evidence, the 2nd protester was in agreement with his brother, the 1st protester.

When he took to the witness stand, the applicant admitted that in indeed the deceased had sub-divided his land into five different parcels but it was his case that these parcels should be consolidated so that original parcel is restored before the estate can be distributed afresh to the deceased's six, and not seven, children. It was his evidence that Mary Gathoni Githaiga, one of the deceased's children, had renounced her inheritance and that his other sister Riccada had purchased her own land from the deceased; this is Title No. Laikipia/Salama Block1/1038.

Riccada herself testified she had purchased her own land but she was willing to receive whatever the Court would give her out of her father's estate. She admitted that she had a dispute with her late father and even her mother over the deceased's land. She also conceded that each of the deceased children was settled on their respective parcels of land allocated to them.

And with that the applicant closed his case.

Ordinarily, regardless of the magnitude of the controversy that may arise on the distribution of a deceased's estate amongst his surviving children where there is no surviving spouse, the legal guide to an appropriate answer is usually found in section 38 of the Law of Succession Act, cap. 160. This section provides as follows:

> ***38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.***

But the case here appears a little bit different; when I consider the record, the evidence proffered by the contesting parties and the submissions by their learned counsel to boot, the primary question is not the ideal scheme which this honourable court should adopt for distribution of the deceased's estate amongst his children; as a matter of fact, the question of distribution of the deceased's estate shouldn't even arise because, for all intents and purposes, it is a question which, in my humble view, is fait accompli, if the proceedings culminating in the confirmation of the grant on 2 June 2010 can be put in their proper perspective.

As earlier noted, the initial grant of letters of administration was made to the deceased's widow, Loise Chaki Mutahi. Loise proceeded to have the grant confirmed. Her proposed scheme for distribution of the deceased's estate was endorsed by this court and so, by transmission, the 1st protester is now the absolute registered proprietor of Title No. Nyeri/Island Farms/ 980 measuring 0.65 ha or approximately 1.6 acres. The 2nd protester, on the other hand, owns Title No. Nyeri/Island Farms/979 measuring approximately 2.h ha or 5.187 acres.

According to section 81. (g) of the Law of Succession Act, Loise was under a legal obligation to complete the administration of the estate within six months from the date the grant was confirmed. That section reads:

> ***83. Personal representatives shall have the following duties –***
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> ***(a)…***
>
> ***(b)…***
>
> ***(c)…***
>
> ***(d)…***
>
> ***(e) …***
>
> ***(f)…***
>
> ***(g)within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;***
>
> ***(h)…***
>
> ***(i)…***

The grant was confirmed on 2 June 2010 but the administratrix died on 12 November 2010; it is obvious that she died within the completion period but before the administration of the estate was completed.

According to section 81 of the Act, where there are several administrators, the powers and duties are vested in the surviving administrator or administrators where any of them dies; that section states as follows:

> ***81.Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them: Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of the trust until the court has made a further grant to one or more persons jointly with him***.

There is no similar express provision in the Act relating to the death of a sole administrator or administratrix; however, by necessary implication, if a sole administrator or administratrix dies, a new administrator or administratrix would be appointed to complete the administration of the estate. I suppose it is from this perspective that the applicant and the 1st protestor were appointed as joint administrators of the deceased's estate and for the same reason the previous grant made to their mother had to be revoked. According to section 76. (e) the grant had '*become useless and inoperative through subsequent circumstances'*. The subsequent circumstances here being the death of the grantee and, logically speaking, by virtue of this death, the grant had become '*useless and inoperative'*.

But for the administratrix's death, the grant was not vitiated on any of the rest of the grounds prescribed in section 76 of the Act. It was, in every other respect, a valid grant that would stand the test of time and was capable of confirmation; indeed, it was subsequently confirmed.

It is true that a summons for revocation of the grant had been lodged before the death of the deceased by Riccada. But that summons was not pursued apparently because the primary ground upon which it was based was disposed of by the order of 13 November 2009 consolidating this petition with an earlier petition lodged in respect of the same estate. The other ground that the applicant was not consulted has no foundation in law because her mother was not bound to consult her when she petitioned for administration of the estate of her late husband; in any event, section 66 of the Act ranked her mother first in the order of preference for grant of letters of administration.

Prior to the adminstratrix's death, the grant had been confirmed. But the fact of her death did not thereby imply that the newly appointed joint administrators were to start the entire process of administration afresh; they were only to pick up from where the deceased adminitratrix left and with their appointment, they were vested with powers and duties to complete the administration of the estate.

To be precise, and for avoidance of doubt, it is their duty to ensure that the deceased's estate is distributed in accordance with the schedule to the certificate of confirmation of grant dated 2 June 2010.

Having so held, I have to come to the conclusion that the summons for confirmation of grant dated 22 November 2016 and the affidavits filed in protest against it were unwarranted all along. In any case, as I have noted before, the grant sought to be confirmed in that summons is

non-existent; there is simply no grant that was made to the applicant and the 1st protestor on 19 April 2010.

If I have to say anything more, assuming that the summons was properly before court, the allegation that the deceased sold Riccada Title No. Laikipia/Salama Block1/1038 wouldn't hold any water for the following reasons; first, the land was purportedly sold in 2001 yet at the time of the deceased's demise in 2007, six years later, it hadn't been transferred to the purported purchaser. Secondly, apart from the sale agreement allegedly executed on 20 June 2001, there is nothing or evidence of any sort to demonstrate any attempts to transfer the land to Riccada, in her capacity as the purchaser. Thirdly, none of the persons alleged to have been witnesses to the agreement testified.

It is also worth noting that the applicant has listed this particular parcel of land as comprising one of the assets in the deceased's estate and therefore available for distribution as such; as a matter of fact, he has proposed that the land be distributed equally amongst all the deceased's children. Riccada has sworn an affidavit supporting this proposal. The question that neither Riccada nor the applicant could answer is why, if Riccada purchased the land, she does not find anything wrong with the land being distributed amongst the deceased's children as part of his estate.

In the final analysis, I do not find any legal basis for the summons for confirmation of grant dated 22 November 2016 and the protests filed against it. They are all dismissed. The deceased's estate shall be distributed in accordance with the schedule to the certificate of confirmation of grant of 2 June 2010. If any confirmation was necessary for the grant made to the applicant and the 1st protester on 11 July 2016, it would have been confirmed in those terms. Parties shall bear their respective costs. It is so ordered.

Signed, dated and delivered this 13th day of May 2020.

Ngaah Jairus

JUDGE