



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NUMBER 354 OF 2010

IN THE MATTER OF ESTATE OF FAI AMARIO ALIAS PETER GILBERT NJOROGE NGANGA (DECEASED)

BERNICE NJERI KAMAU.....APPLICANT

VERSUS

MONICA WANJIRU AMARIO & 3 OTHERS.....PETITIONERS

RULING

1. What is before me is the Summon for Revocation of Grant dated 2nd of February 2017 brought under Section 76 of the Laws of Succession Act and Rule 44 of the Probate & Administration Rules.

2. The Summons seeks orders:-

1. Spent.

2. THAT the grant of letters of administration to MONICA WANJIRU AMARIO, MIKI NGANGA NJOROGE, SHEENA AUSTON AMARIO AND MASH DEE AMARIO ALI made on 23rd September, 2010 be revoked.

3. Spent on 2/2/17.

4. Spent on 2/2/17

5. THAT this Honourable Court be pleased to set aside and/or review the consent dated 8th June, 2016 and adopted as an order of the court on the 9th day of June, 2016 and the status quo existing before the said consent be reverted to.

6. THAT this Honourable Court be pleased to order for a valuation of the estate of the deceased and the administrators herein to file an inventory of all the properties and/or accounts and more specifically, FAI AMARILLO WINERIES LTD, relating to the estate herein from the date of the demise of FAI OMARIO.

3. On 25th July 2018 parties agreed to do written submissions for the application.

4. In the interim, parties sought time to negotiate. On 20/5/19 they got 60 days to negotiate and file consent.

5. By 15/10/2019 when matter landed in my docket, the parties had not recorded a consent. Parties sought to go for mediation. The matter was referred for mediation. On 27/1/2020, the Deputy Registrar noted that parties were unable to come to an amicable settlement and sought that the matter be settled by court.

6. The Summon is based on the grounds on its face and the affidavit of Bernice Njeri Kamau and Monica Wanjiru Kamau sworn on 2nd February 2017.

7. The main issue is that Bernice Njeri Kamau was married to the deceased on 19/6/2004 as is evidenced by a certificate of marriage of that date and a bunch of photographs taken on the said date, and annexed to the affidavit.

8. She depones that by virtue of that certificate of marriage, she is evidently a widow of the deceased, a fact which the administrators herein concealed from the court. That even being aware of her marriage to the deceased, they left her out of the proceedings.

9. Both the applicant and her mother depone to the strain that landed on the marriage soon after as both the deceased and the applicant were arrested in 2005 on account of the deceased's business dealings. They were in custody for a while. She remained in custody till 2006, and according to her mother, she had to leave the country because of threats to her life. That she only learnt about his demise from her parents. That there was mutual agreement between her and the 2nd Administrator that the succession matters would be held on hold to enable the school going children get an education without any interference of the estate, and she kept out of the affairs of the estate for that reason until she learnt of this cause and that he had not kept their side of the bargain.

10. That the consent dated 9/6/2016 was entered into without the knowledge and completely disinheriting her. The contents of the consent are;

a. THAT the issue of SHEILA WANGARE be and is HEREBY marked as settled.

b. THAT 25% of the net Estate be and is HEREBY given to Monica Wanjiru Amario and Hot Gee upon the valuation of the Estate.

c. THAT the remaining 75% of the net Estate subsequent to the valuation, be and is HEREBY shared equally between the other beneficiaries:-

i. Miki Nganga Njoroge

ii. Sheena Euston Amario

iii. Masha Dee Amario

iv. Yuri Gilbert Amario

d. THAT parties to agree on a joint Land Valuer within 14 days from the date of adoption of this consent, failure to which each party shall be at liberty to appoint an independent land valuer within 7 days.

e. THAT valuation be conducted within 60 days of the appointment of a valuer pursuant to Clause (4) above.

f. THAT the costs of the valuation of the estate shall be borne by the Estate.

g. THAT each party shall bear its own cost of the suit.

h. THAT upon valuation the beneficiaries shall hold a joint meeting to agree on the distribution of the net estate as per Clause 2 and 3 above within 21 days of valuation.

i. THAT if parties shall manage to conduct a joint valuation as per Clause (4) above, the said valuation report shall be filed with the court AND in the event that parties conducts individual valuation, the respective reports shall be immediately shared between the parties and the same shall be filed in court.

j. THAT if the parties fail to reach a settlement in respect to the distribution of the deceased estate as per clause 2 and 3 respectively following the meeting stipulated under Clause 8 above, parties shall apply to the court for purposes of distribution of the estate in accordance with respective valuation report(s) filed with the court.

k. THAT all the parties herein agree to have land reference No Naivasha/Mwichiringiri/block 4/3609 and No Naivasha/Mwichiringiri/block 4/3555 sold by the administrators and the proceeds be utilised towards the medical expenses to be incurred by Masha Dee Amario and the balance thereof be shared in accordance with Clause (2) and (3) above.

l. THAT the conveyance of the aforesaid properties under Clause 11 herein above shall jointly be conducted by the advocates on record for the respective parties herein.

m. THAT subject to the court's convenience, parties shall take a mention date at the Court Registry to confirm compliance with the terms of this consent and confirmation of this Grant.

n. THAT the matter be mentioned on 24th August 2016 to monitor progress of implementation.

11. In response the 2nd respondent swore an affidavit to the effect that the applicant had remarried and in any event, before the deceased died, he had filed for divorce in Milimani Chief Magistrate Court; Divorce Cause No 198 of 2008.

12. These averments were not responded to by the applicant. i.e as to whether she had remarried after the deceased had died, and whether, she had been divorced as at the time of the passing of the deceased.

13. Parties had been directed to file written submissions and at the time of writing this ruling only the applicants were on record.

14. This court fixed the matter for directions with directions that the date be served on all the other parties but still there was no appearance on 13/7/2020, when Ms Kinuthia submitted that she had indeed served them via email.

15. I have perused the entire file and considered the applicants submissions.

16. The only issue for determination is whether the grant ought to be revoked.

17. The deceased died on 23/5/2010 aged 56. The respondents filed this Petition and listed themselves and 2 others as the beneficiaries. The appellant was not listed.

18. It is also evident that the deceased left a vast estate as can be seen from the valuation report filed by Dantuvaluers Ltd on 23/9/2016.

19. It is not in dispute that the applicant was briefly married to the deceased. They wedded on 19/6/2004 and in 2005, on a date she does not disclose, she was arrested and held in custody until 2005. She then left the country on a date she does not reveal and only learnt of the death of the deceased from her parents.

20. On her own admission, she was aware of the impending succession proceedings which she depones she agreed with 2nd respondent to keep on hold. She provided no evidence of such an agreement. She also states that she chose to keep off the estate so that the minors in the family would get an education without interference, yet in 2017, she was before this court seeking access to the 'matrimonial home' a place she had not lived in since 2006. A visit by the Deputy Registrar and the report filed clearly demonstrated that she had not been living in the said house and could not establish when she was last in that house.

21. Hence the facts as presented to me are such that the applicant left after her release from custody and it is not clear from her papers whether she attended the burial. What is clear is that by 2005 her marriage to the deceased was already strained.

22. But the big question is what stopped her from filling for succession all these years? That has not been explained could it be because she had changed status as alleged? In her supporting affidavit she said that the reason she kept off the estate was so that the children would get an education, yet she was quick to obtain restraining orders against the sale of 2 properties to pay medical fees for one of the children who required surgery.

Hence despite the fact that the applicant was married to the deceased there are facts presented by herself that demonstrate that there were serious issues between her and the deceased that made her keep away. One can see the uncertainty of her status at Paragraph 21 of her affidavit;

“That I have been advised by my advocate on record whose counsel I verily believe to be true that under Section 29 of the Law of Succession Act, I am a dependant therein hence entitled to benefit from the estate herein”.

By calling upon Section 29 of the Law of Succession Act the applicant brought up the related provisions of Section 26, 27 & 28 of the same Act with regard to dependency. That means that the court may determine what share of the estate ought to go to her without necessarily revoking the grant.

For these reasons I do not find that the grant is up for revocation and that part of the application is denied.

23. Should the consent dated 9/6/2016 be set aside?

24. Taking into consideration that the applicant is beneficially entitled to the estate, I would allow the prayer to set aside the consent. However, I do not think it would be prudent to set it aside in its entirety but to the extent to allow her to participate in the distribution of the estate. To that end Clause 2 & 3 which deal with distribution is set aside.

21. The administrators are directed to report on what happened to Masha Dee Amario's treatment after the order staying the sale of the properties at Clause 11, and the status of the said properties

22. A valuation report is in the file for all the properties except for one property titled "Thika Plot". The valuation report for this property be filed by the administrators together with the Summons for Confirmation of Grant.

23. In Conclusion:

i. The prayer seeking revocation of the grant is denied.

ii. The prayer seeking the setting aside of the consent: Clause 2 & 3 of the consent is set aside.

iii The applicant be included in the list of beneficiaries.

iv. Within 60 days hereof: The Administrators;

a. to file Summons for Confirmation of Grant including the applicant among those beneficially entitled

b. to file a report on what happened to Masha Dee Amario's treatment after the order staying the sale of the properties at Clause 11 of the consent.

c. to report on the status of the said properties

d. to file the valuation report for the 'THIKA PLOT'.

vi. In the meantime, the status quo as at the filing of this application be maintained.

Dated this 30th day of September 2020

Delivered and signed at Nakuru this 9th October 2020

Mumbua T. Matheka

Judge

In the presence of

Court Assistant Edna:

For Applicant: Mwangi for Kahiga for applicant

For Respondents; Ndegwa Njiru for one of the protesters: Monica Wanjiru Fai

HB brief for Mr Muge for Masha Fai

Mr. Ndegwa: I seek guidance in respect of the valuation: For purposes of harmony we request the court to appoint a government valuer so that parties can maintain confidence.

Mr. Mwangi: I request for mention date to enable us read the ruling and seek instructions.

Mention on 26th of October 2020 for directions