



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 71 OF 2016

IN THE MATTER OF THE ESTATE OF THE LATE SAMUEL MURIITHI WATATUA (DECEASED)

REBECCA WARUKIRA WAITHIMA.....APPLICANT

VERSUS

MARY MUTHONI WATATUA.....RESPONDENT

RULING

1. The estate relates to the late **Samuel Muriithi Watatua (Deceased)** who died on the 23rd June, 2015;
2. The Grant in dispute was issued on the 3rd October, 2016 to the respondent herein one Mary Muthoni Watatua who is the mother of the deceased; on the 24/05/2017 she proceeded to apply for the Confirmation of the Grant and the Certificate of Confirmation was issued on the 12th March, 2019;
3. The applicant filed this instant application under a certificate of urgency on the 18/12/2019 under the provisions of Section 76 of the Law of Succession Act and Rules 44(1) and 49 of the Probate and Administration Rules; and sought the following orders:
 - (a) Spent
 - (b) Spent
 - (c) That this Honorable Court be pleased to issue a temporary injunction restraining the respondent her agents, servants and /or employees from withdrawing and/or transferring funds accounts from Account Nos. [...] Cooperative Bank of Kenya, [...] Equity Bank of Kenya, [...] First Community Bank Wabera Fina Bank/GT Bank [...] Bank Of Africa Monrovia Branch, [...] Family Bank [...] Diamond Trust Bank Ltd Nation Centre, Cash Bail in Milimani Courts CMCC No.121/2012 Receipt No.0104209 and [...], [...] and [...] CFC-Stanbic Bank in the name of the deceased or in any other manner dealing with the said Accounts pending the hearing and determination of this application and/or until further orders of this court;
 - (d) That the Grant of Letters of Administration issued by this Honourable Court to **MARY MUTHONI WATUTUA** on the 3/10/2016 and consequently confirmed on 12/03/2019 be revoked.
 - (e) That this Honourable Court be pleased to order an investigation of Account Nos. [...] Co-operative Bank of Kenya, [...] Equity Bank of Kenya, [...] First Community Bank Wabera Fina Bank/GT Bank [...] Bank Of Africa Monrovia Branch, [...] Family Bank [...] Diamond Trust Bank Ltd Nation Centre, Cash Bail in Milimani Courts CMCC No.121/2012 Receipt No.0104209 and [...], [...] and [...] CFC-Stanbic Bank in the name of the deceased and in the event any amount is found to have been withdrawn and/or transferred to third parties, this honourable court do order for such disclosure from the respondent and order the status quo for such accounts to be maintained and/or the amount therewith be deposited to this honourable court.
4. The applicant relied on the grounds on the face of the application and on the Supporting Affidavit made by **REBECCA WARUKIRA WAMAITHA**;
5. At the hearing hereof the applicant was represented by learned counsel Miss Muguro whereas the respondent was represented by learned counsel Mr.Nganga; both made oral submissions; hereunder is a summary of the applicant's case and the petitioner's response;

APPLICANT'S CASE

6. The applicant is the protestor's wife who is a son of the respondent; she stated that she was seeking preservative orders restraining the respondent and or her agents from transferring or disposing of the parcel known as Kiambaa/Ruaka/2979 pending *inter partes* hearing of the application; and also from withdrawing or transferring of funds from Account Nos. [...] Co-operative Bank of Kenya, [...] Equity Bank of Kenya, [...] First Community Bank Wabera Fina Bank/GT Bank [...] Bank Of Africa Monrovia Branch, [...] Family Bank [...] Diamond Trust Bank Ltd Nation Centre, Cash Bail in Milimani Courts CMCC No.121/2012 Receipt No.0104209 and [...], [...] and [...] CFC-Stanbic Bank all in the name of the deceased;

7. That the Grant was obtained fraudulently by misrepresentation and concealment of material facts as the respondent had ignored the interests of the applicant's husband; and contends that the respondent's sole intention was to disinherit Paul Kabuthu Watuatua (Paul) who was a close brother to the deceased, and also a business partner as both had constructed a storied apartment on Kiambu/Ruuaka/2197; Paul was also a confidante as well as a dependant of the deceased; that Paul had gone missing and his mysterious disappearance had been reported to the police and the OB entry was annexed to the application;

8. Before his disappearance Paul is said to have not been in good standing with the respondent; the estate is valued at Kshs.250 Million and in 2017 Paul had filed a Protest upon realizing that his mother had excluded him from the proceedings; in 2012 Paul had raised bail for the deceased in the sum of Kshs.1,000,000/- in two criminal cases No.s 307/2012 and 121/2012 and the respondent was fearful that Paul would claim it from the estate; the applicant has children and the respondent was their grandmother and contends that the respondent had failed to disclose to the court that there were other beneficiaries;

9. Her prayer was that it would be in the best interest of justice if the Grant which had already been confirmed was revoked.

RESPONDENT'S CASE

10. The respondent in answer stated that the deceased died intestate and was not married and had no children or known dependants; the only survivor was his mother who is the respondent herein; the applicant had not annexed any proof of dependency; that the applicant was not a beneficiary to the deceased's estate and she also had no '*locus standi*' and therefore her status was in question;

11. The brother of the deceased named Paul Kaburu (Paul) had disappeared in 2019; under the provisions of Section 118 of the Evidence Act, the presumption of death is after seven (7) years therefore the application was premature as his death cannot be presumed only after a few months;

12. That there was no proof of evidence of marriage between the applicant and Paul and that she was a mere stay-in partner; the applicant therefore has no legal basis in bringing the application; and has not convinced this court that she will succeed in her application to revoke the grant;

13. The only evidence on record that Paul had intended to file a Protest is the appointment of counsel but due to lack of instructions the Protest was dismissed for want of prosecution and the Grant was confirmed; that the instant application was mischievous and a tactic employed to derail and delay transmission of the Grant;

14. Counsel urged the court to allow the respondent to proceed with the Grant under the provisions of Section 82 of the Law of Succession Act; and prayed that the application be dismissed.

REJOINDER

15. In her rejoinder the applicant reiterated that she was an Interested Party and had a right to apply for the Revocation of the Grant under the provisions of Section 76 of the Law of Succession Act as Paul was her husband; that she met the criteria as she was the daughter in law of the respondent; at the hearing of the main application she would tender evidence on the existence of the marriage; further the deceased and Paul were business partners and that she would suffer irreparable damage if there was continued wastage of the estate.

ISSUES FOR DETERMINATION

16. After hearing the submissions of the parties and upon reading their respective affidavits this court has framed the following issues for determination;

(i) Whether the applicant has the *locus standi* to bring this application.

(ii) Whether the applicant has made out a prima facie case for preservative orders;

ANALYSIS

Whether the applicant has locus standi to bring this application

17. The applicant submitted that she was married to the brother of the deceased and brings this application on behalf of her husband whom she claims had gone missing and his mysterious disappearance had been reported to the police and the OB entry was annexed to the application;

18. This brother he claims was a close confidante of the deceased; he was also a business partner and also a dependant; therefore by implication her alleged husband was a beneficiary to the estate of the deceased;

19. This brother is said to have disappeared in 2019; on presumption of death the applicable law is found at Section 118 of the Evidence Act which provides as follows;

“Where it is proved that a person has not been heard for seven years by those who might be expected to have heard of him if he were alive there shall be a rebuttable presumption that he is dead.”

20. Firstly, before this presumption can be applicable the person has to have been unheard of for a period seven years; from the averments made by the applicant the brother has been missing for less than a year; secondly presumption of death is a rebuttable presumption which can be reversed if sufficient evidence is adduced to the contrary; therefore before this assumption is made sufficient evidence has to be adduced in court to prove this presumption of death; reference is made to the case of **Re. E N K [2017] eKLR**;

21. This court finds from the material placed before it that at this stage the presumption of death under the law has not arisen and therefore the applicant has no right to appear on behalf of her alleged husband or be heard in these current proceedings;

Whether the applicant has made out a prima facie case for preservatory orders:

22. Had the applicant satisfied the issue of **‘locus standi’** this court would have found that she had made out a prima facie case and was deserving of the preservatory orders sought; refer to the case of **Giella vs Cassman Brown [1973]E.A. 358**; and would have made a finding that the issues of proof of marriage and dependency be left to be canvassed at the main hearing of the application for Revocation of the Grant;

23. The application is found to be premature and lacking of merit for want of *locus standi*.

FINDINGS & DETERMINATION

24. In the light of the forgoing this court makes the following findings and determination;

- (i) The applicant is found to have no **‘locus standi’** as there is non-compliance with the provisions of Section 118 of the Evidence Act;
- (ii) The application for preservatory orders is found to be incompetent and it is hereby struck out.
- (iii) The interim orders made are hereby lifted.
- (iv) The applicant shall bear the costs of this application.

It is so ordered accordingly.

Dated, Signed and Delivered Electronically due to the pandemic at Nyeri this 1st day of October, 2020.

HON. A. MSHILA

JUDGE