



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

SUCCESSION CAUSE NO. 39 OF 2015

IN THE MATTER OF THE ESTATE OF JOHN GITAU NGANGA (DECEASED)

BETWEEN

DAMARIS WANJIKU MANINU.....APPLICANT/OBJECTOR

VERSUS

CECILIA NYAGUTHI GITAU.....RESPONDENT

JUDGEMENT

The objector before this court is Damaris Wanjiku Maninu. She is aggrieved that the respondent Cecilia Nyaguthi Gitau petitioned for letters of administration which was confirmed on 17th October, 2013 without her participation. The dispute initially was in respect of the entire estate but by the time of the objection proceedings it zeroed down to leasehold unit flat No. 15 registered in the name of the deceased.

The brief facts and evidence by the objector

The objector in her evidence stated in court that the deceased John Gitau Nganga was her biological son amongst other children. During his life time together with the deceased they purchased property namely LR Unit flat No. CT 15 and Embu/Mwea – Ranch co-operative Sacco Ltd certificate No. 1646. That the deceased died intestate. In its particulars of claim the objector averred that without any notice or participation the respondent filed a succession cause in the Magistrate's Court for grant of letters of administration. Secondly, in the inventory of the properties to the estate she included this particular parcel of land while fully aware that the deceased held in trust for her benefit. In support of the claim the petitioner annexed photographs of her family, the statement of account and receipts confirming payment of rates to National Housing cooperation.

As far as the objector's position is concerned the deceased though married they supported each other financially in acquisition of some of the properties more specifically Unit flat No. CT 15. It was therefore her testimony that the deceased died before he would transfer the parcel of land to her.

The respondent relying on her replying affidavits denied that she is guilty of non-disclosure of relevant material to the probate court about the existence of other dependants to the deceased as alleged by the objector. According to the respondent the grant of letter of administration was made in a procedural manner and in circumstances that all the beneficiaries were notified of the petition. Furthermore the respondent deposed that all the property of the estate as supported by annexure CN 4, CN 5 CN6 CN7, CN8, CN9, CN10, CN11 AND CN 12 were acquired and registered in the name of the deceased prior to his demise.

She dismissed the contention by the objector that particular parcel land No. CT 15 was purchased using her own resources but registered in the name of the deceased to hold in trust for her benefit.

Submissions on behalf of the objector.

Learned counsel for the objector submitted that the court should take into account that she is a widow who raised up eight children on her own including the deceased. He argued and submitted that it has been established that there are other dependants from the 1st wife of the deceased who was not part of petition for grant of letters of administration obtained by the respondent. Learned counsel advanced the argument that since the deceased left other dependants including the objector that alone is a ground for revocation of the grant issued to the respondent. Learned counsel went on to submit that the objector in fact resides in No. CT 15 with other siblings of the deceased and such he urged the court to revoke the confirmed grant for representation on non-disclosure of material facts, representation and for a just cause to make provision for the objector.

Submissions on behalf of the respondent

Ms. Muyungu learned counsel for the respondent submitted that under Section 76 of the law of Succession Act there are no grounds to revoke or annul the confirmed grant issued to the respondent. She further submitted that petitioner/objector has failed to prove to this court that she was a dependant of the deceased as defined in Section 29 of the Act. Learned counsel contended that there is no dispute that the objector was a biological mother of the deceased, but the burden of proving that she was being supported by him before his death has not been discharged on a balance of probabilities. Learned counsel posited that the objector in challenging the validity of the confirmed grant on grounds of mis-representation, fraud, non-disclosure or defects must prove the allegations to the satisfaction of the court. It was her contention that the evidence has not reached the requisite threshold to enable this court to grant the orders of revocation under Section 76 of the Act.

Analysis and Resolution

Having considered the evidence and submissions by both counsels my appreciation of the claim boils down into three broad issues

- (i) Whether the petitioner/objector in this cause has locus standi to impugn the grant of letters of administration issued to the respondent.**
- (ii) Whether the petitioner/objector is entitled to a share or provisions of the estate of the deceased.**
- (iii) Whether the petitioner/objector has satisfied the criteria set under Section 76 of the law of succession Act on revocation of grant.**

Issued No. 1

There is no dispute that the making of a grant of representation recognizes and is dependent upon the category of persons defined in Section 29 of the law of Succession Act. The provision recognizes dependant to mean “*the wife, or wives, or former wife or wives, and the children of the deceased whether mentioned by the deceased immediately prior to his death, (b) such of the deceased parents, step parents, grandparents, grandchildren, stepchildren, when the deceased had taken into his family as his own, brothers, and sisters and half-brothers and half-sisters as were being maintained by the deceased immediately prior to his death-----*”

My understanding of this provision is that the wife/wives, and children of the deceased are entitled to a share of the estate of the deceased without proof of dependency (See Section 29(a) of the Act). Notwithstanding Section 29(a) of the Act, in subsection (b) in case of intestacy there must be proof that they are entitled to the deceased estate for their use and benefit if any dependent on him or her immediately before his or her death. These are the words which give a dependant to qualify within the meaning of subsection 29(b) of the Act and to be considered as a dependant of the estate of the deceased.

In the instant case, it is true that the objector is a biological mother to the deceased. As a result of section 29(b) of the Act the objector has the locus standi to challenge the grant of letters of administration obtained by the respondent.

Issue No. 2

The paramount consideration is whether the objector has discharged the burden of proof that she was a dependant of the deceased prior to his death.

The petitioner nevertheless a dependant for purposes of the law of succession Act and in particular Section 29(b) can only be entitled to reasonable financial provisions if she presents evidence to that effect. The objection in her affidavit and evidence on oath claimed that she depended on the deceased at all times until his demise. It was her testimony that as the surviving parent she qualifies and is eligible to the part of the property left behind by the deceased. However counsel for the respondent vehemently opposed that line of evidence and argument that based on the law of succession the objector was not a dependant.

In summarising the issue on locus standi and whether the objector was a dependant of the deceased, I take note of the following: Firstly, in light of Section 29(b) of the Act the objector as the mother to the deceased is prima facie recognized as a dependant. Secondly, in the words of the Subsection any class and or category of members specified in section 29(b) could claim dependency in the intestacy proceedings. On that ground alone the objector can be said to have locus standi to bring a claim against the estate of the deceased.

However when it comes to laying claim to inheritance for a share of the property the construction of the statute in section 29(b) distinguished the rule with 29(a) upon such dependants to prove they were being maintained by the deceased immediately prior to his or her death. Section 27 of the Act provides as follows: “*In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.*”

In this context the concept of maintenance incorporates day to day living expenses and other basic provisions. The objector brought this application against the respondent for this court to determine that she is entitled a portion of the deceased estate. The law of succession in Section 26 and 27 of the Act contains provisions for family and dependants under this category to apply to the court for a provision to be made from the estate of the deceased. The circumstances in which a court exercises discretion under Section 27 of the Act will depend on the peculiar facts of the claim.

The question that inevitably follows is whether the objector has discharged the burden of proof as stipulated in Section 107(1) of the

Evidence Act. That she depended on the deceased for maintenance immediately prior to his death. The legal treatment of parents as dependants is underpinned in the principles of customary law. The Judicature Act gives credence and recognition to African Customary law in its provisions appropriately referred to as **“the High Court, the court of appeal, supreme court and all subordinate courts shall be guided by African Customary Law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all cases according to substantive justice without undue regard to technicalities of procedure and without undue delay”**

The general scheme of law of succession is that parents are direct descendants of their deceased children depending on the hierarchy of survivorship between the spouse(s) or children of the deceased and the parents a deceased estate may devolve wholly or partially to his parents; as descendants. This is more so where there are no surviving spouse(s) or children of the deceased.

In the case of parents there is always a legitimate expectation in accordance to the African culture and customs that children will make some contributions for welfare and maintenance. An important part of the whole scheme of inheritance is the fact that their children also get married and have the responsibility to support their family. So whether in terms of the law or morality there is need to ensure that they are not subjected to undue burdens of maintenance beyond the scope of their immediate next of kin, spouse and children. The position of surviving parent is therefore most precarious where his or her child is married with or without children and the beneficial interest has to devolve to the immediate family. Balancing against the concerns for surviving parents and spouses to the deceased who happen to be a son the court in the case of *Joshua Orwa Ojodeh 2014 eKLR* echoed the guiding principles **“that recognized that a child has the moral duty and not legal duty to support his or her parents and vice versa and each accordingly.”**

The value of such support must be on the basis that they are in a position to do so within the extent of their abilities. There is no structure which gives a surviving parent a statutory provision to inherit their children estate where there is a surviving spouse and children. It is clear from the regime of law including customary law that there is no legal duty for children to support their parents.

In the light of these principles looking at this objection proceedings broadly there is no evidence that encompasses that immediately prior to the death of the deceased she was maintained wholly or partially by the deceased. In a relatively rare case the objector seemed to have given valuable consideration for the benefit to the deceased in the acquisition of the properties i.e CT – 15. It is also not in dispute that she has been housed in one of the premises for some time together with some of her siblings. The property in question is however registered in the name of the deceased. The range of arguments made in favour of the objector does not exclude this parcel of land from the provisions of Section 3 of the law of Succession. In other words, upon death of the deceased it reverts to his estate.

It is worth to note that under the current law property CT- 15 may be on license occupation by the objector but that alone to me does not qualify her as a dependant under Section 29(b) of the Act. In the circumstances of this case the objector rent free accommodation in one of the properties did not amount to a tenant in common or joint owner of the house with the deceased. Regardless of the sentimental value acquired over time by the objector over the property bequeathing such a share will cause significant unfairness to the estate of the deceased.

Surviving parent’s right to share in their children estate as dependant is upon proof that the deceased had assumed responsibility of maintaining any one of them during his or her lifetime. The moving objector had the burden of proof on the elements of dependency. I must also stress that having parents to jostle and fight for a share of inheritance of the estate of their deceased children could prove very problematic. It also runs the risk of provoking unnecessary litigation where there might be no need for any in the first place.

Besides the above position in the law of intestacy and inheritance may have applied to this case if the objector proved existence of a gift *inter vivos* over the property identified as CT – 15. There is no dispute that the claimant had lived for many years in one of the houses namely CT – 15 but the nature of the agreement with the deceased did not come out clearly in her testimony. That evidence remotely *prima facie* does establish that the deceased was supporting the objector in some way up to the time of his death. The nature of the circumstances as explained by the objector may give rise to a claim of maintenance. What is missing from the pleadings and evidence is whether the support accorded to the objector as his tenant was to continue even in his death? It is not lost that under African culture and customs families have for generations provided for each other within their scope and means of financial resources. In my considered view this claim as turned out in the objector’s evidence given her needs and age consideration in the form of financial provision should be made by the respondent from the estate of the deceased for her maintenance and relocation to her matrimonial home. Since there is no telling list of what the actual sum would be befitting the moderate provision for the objector the essentials are left to be agreed upon with the respondent.

In the succession cause before me the objector went to very great lengths to prove that she is entitled to a share of her deceased son estate. The point is this even if that evidence was to be treated as true, it did not matter under Section 29 of the Act she lacks the capacity to qualify as a dependant. On this ground the objection proceedings fails.

Issue No. 3

(c) Whether there exist a justifiable ground established by the objector under Section 76 of the Act to revoke or annul the confirmed grant of letters of administration obtained by the respondent to administer the estate of the late John Nganga. The substantive law on revocation or annulment of grant is provided for in Section 76 of the Succession Act, which states as follows *inter alia*:

(a) A grant of representation whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion.

(b) That the proceedings to obtain the grant were defective in substance.

(c) 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.

(d) That the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the revocation of the grant notwithstanding that the allegation was made in ignorance or inadvertently.

(e) The grant has become useless and inoperative in circumstances of the case.

(f) The bone of contention as stated in the testimony of the petitioner/objector is to the effect that the widow of the late John Nganga obtained the impugned grant of letters of administration without taking into account the other beneficiaries.

The evidence by the objector dwelt mainly on the contribution made to the deceased to purchase certain properties more so CT 15. There was also deference in the pleadings that the administrator made untrue allegations by omitting the names of other children of the deceased in the response filed by the respondent, who is the administrator of the estate. She denied any such allegations of false representation, concealment of material fact, and failure to include the names of other dependants entitled to inherit the estate of the deceased. The decisions from the superior courts has reaffirmed the legal provisions under Section 76 of the Act that letters of grant of administration may be revoked or annulled if there was no consent obtained from the dependants of the estate, it was substantially defective, failure to issue notice to the beneficiaries to the estate or any just case.

It is no defence under these provisions that the grant holder made the false statements in ignorance or inadvertently. See in *Re Estate of Wahome Mwenje Ngomono deceased 2016 eKLR, in the estate of Ezekiel Mwenda Masai probate and administration NO. 4 of 1992 at Eldoret. In the matter of the estate of Ngaii Gatumbi alias James Ngaii Gatumbi deceased succession cause no. 4783 of 1993 at Nairobi.*

In reappraising the facts and evidence presented by the objector/petitioner and the tenor of the affidavits sworn by the respondent I find that there is no material before me to bring the objector within the scope of Section 76 of the Act. In the instant case the alleged dispute that the children of the deceased and herself were not provided for remained a mere allegation without credible evidence to sufficiently prove existence of that fact. There is also no evidence that the proceedings to obtain the letters of confirmed grant of administration was defective in substance, or it was made through fraud or concealment of material facts to the court.

I am of the ample view that the objector in her position as a mother to the deceased did not raise a valid objection to persuade me to revoke the grant. It is undisputed that the properties being contested by the objector were all registered in the name of the deceased. It is also not disputed that the objector seemed to have worked closely with the deceased while acquiring the National Housing properties. In other words under Section 3 of the succession Act the intestate property was free property to be distributed to the spouse, children and other legal dependants of the deceased. In her claim the petitioner/objector has petitioned the court in her capacity as a mother of the deceased what she failed to do was specifically to conclusively deal with the allegations and claims against the respondent to prove that she was a heir to the deceased estate. So, although having decided against the objector's prayer of being recognized as a dependant the administrator has a moral obligation to make moderate provision for her benefit as a durable solution to this litigation. In overall it must follow from this that the objection proceedings does not lie in principle. It remains incompetent and do hereby strike it out with no order as to costs. Accordingly the letters of grant of administration obtained by the respondent Cecilia Nyaguthi Gitau remain in force.

Dated, signed and delivered in open court at Kajiado this 17th day of January, 2019.

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R. NYAKUNDI

JUDGE

Representation:

Mr. Ongeri for Ondieki

Applicant

Respondent

Mr. Kinuthia for respondent