REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CASE NO. 132 OF 2003

IN THE MATTER OF THE ESTATE OF JOHN KING'ORI WANYEKI

HANNAH NYAGUTHI WANYEKI.....APPLICANT

-VS-

NAFTALY KIUGU KING'ORI.....RESPONDENT

JUDGMENT

The grant of letters of administration intestate in respect of the estate of John King'ori Wanyeki (hereinafter referred to as "the deceased") was made to one of his sons, Naftaly Kiugu King'ori, the respondent in this cause, on 27 May 2003. The deceased had died on 11 August 1971 while domiciled in Kenya; his last known place of residence was Ihithe location in Nyeri County.

The grant was subsequently confirmed on 21 February 2005 and the certificate of confirmation of grant of the even date issued to that effect.

The deceased's net intestate estate comprised a parcel of land Title No. Thegenge/Ihithe/416 measuring approximately 17.6 acres and according to the schedule to the certificate of confirmation of grant it was distributed amongst his surviving children named as:

1. Naftaly Kiugu King'ori
2. Nehemiah Wambugu King'ori
3. Shiphira Wanjiru King'ori
4. Josephat Wanyeki King'ori (deceased)
5. Rufus Muigua King'ori (deceased)

The sixth child, Rahab Wamuyu Mwangi, renounced her right to inheritance and therefore she did not get any share of the estate.

By a summons for revocation of grant dated 18 December 2012, the applicant sought to have the grant revoked or annulled on the ground that it was obtained fraudulently and subsequently, the estate distributed before the grant was even confirmed.

According to the affidavit she swore in support of the summons, she is the widow of Josephat Wanyeki King'ori who, as noted, is one of the children of the deceased but died during the pendency of this cause. The applicant deposed that the petition for grant of letters of administration was shrouded in secrecy; in particular, the petitioner did not obtain her consent and neither was she or her late husband informed of the confirmation proceedings. The intention, according to the applicant, was to transfer the deceased's estate fraudulently, a fact that was clearly demonstrated when the titles to particular parcels excised from the estate and shared out amongst the deceased's beneficiaries were processed before the grant was confirmed.

The applicant further deposed that as the wife of the Joseph Wanyeki King'ori, she was entitled to part of the deceased's estate and in particular she ought to be given the specific parcel of land where 7621 of tea bushes had been planted and which, in her view, was her late husband's share.

The summons was opposed and one of the people who filed a replying affidavit in this regard was the applicant's own son, Peter Gathatwa Wanyeki. In this affidavit which he swore on 10 April, 2013 and filed it in court on the following day, Peter deposed that his father died on 1

July, 2012.

He swore further that in 1979 the applicant and his late father had a domestic dispute as a result of which the latter deserted the matrimonial home and settled in in Ol joroorok town where he lived until 2012 when he returned home; he died almost immediately after his return, more particularly, three days after he came back home.

As far as he was aware, his father never complained about the distribution of the deceased's estate; more so, he renounced any claim he may have made to the land parcels known as Thegenge/Ihithe 731, 732, 733 and 734.

The deponent denied the allegations of his mother that his late father never consented to the petition for and subsequently to the confirmation of the letters of grant of letters of administration to the deceased's estate. Contrary to his mother's allegations, so he deposed, his father signed the consent to the grant of letters of administration of the late John Kingori Wanyeki. More, importantly, the family of the late Josephat Kingori Wanyeki had never authorised the applicant to represent him and, accordingly, she does not have the requisite authority to pursue his purported interests in the deceased's estate.

Rahab Wamuyu Mwangi and Shiphira Wanjiru Kingori, two of the deceased's daughters also swore their respective replying affidavits contesting the applicant's summons; they more or less reiterated the position taken by Peter Gathatwa Wanyeki in his replying affidavit. Rahab Wamuyu deposed further that the tea bushes claimed by the applicant were planted by their mother, Jedidah Gatheru Kingori and never belonged to Josephat Wanyeki Kingori at any time. Rahab also confirmed that she had renounced her inheritance.

On her part, Shiphira Wanjiru Kingori added that the deceased's only asset was land known as Title No. Thegenge/Ihithe/416; it was located in such a way that there was public road traversing in its middle part; according to the proposed scheme of distribution which was eventually endorsed by the court, each of the parcels on either side of the road was divided into five equal portions and distributed amongst the deceased's five children including the applicant's deceased husband. Due to what I suppose is their common interest in their parents' homestead, a smaller portion comprising the homestead was excised and registered in the joint names of the deceased's children.

This scheme was acceptable to all his children and, in the absence of any objection, the grant was confirmed on 21 February 2005.

Besides the replying affidavits, counsel for the respondent also filed a notice of preliminary objection to the applicant's summons on the ground that the applicant was neither a dependant of the deceased nor a beneficiary of his estate. Accordingly, she lacked the necessary locus standi to institute any proceedings against the respondent.

By its very nature, I should dispose this issue at the outset. Section 76 of the Law of Succession Act cap. 160, which is the primary provision that the applicant invoked in her summons is to the effect that the court may revoke or annul a grant either on its own motion or on an application by 'any interested party'. Considering its centrality to the applicant's summons, I would do well if I reproduced it here in its entirety; it reads as follows:

> ***76. Revocation or annulment of grant***
>
> ***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—***
>
> > ***(a) that the proceedings to obtain the grant were defective in substance;***
> >
> > ***(b) 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;***
> >
> > ***(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;***
> >
> > ***(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—***
> >
> > > ***(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or***
> > >
> > > ***(ii) to proceed diligently with the administration of the estate; or***
> > >
> > > ***(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or***
> >
> > ***(e) that the grant has become useless and inoperative through subsequent circumstances.***

The court has been called upon by the applicant to intervene and annul or revoke the grant; everything else being equal, she would properly be described as the 'any interested party' envisaged in this provision of the law. But her capacity to apply for nullification or revocation of the grant has been questioned; it follows that, in these circumstances, this honourable court has to interrogate what the words 'any interested party' would entail.

These words or rather the expression has not been defined in the Act; by necessary implication, this means that the expression does not bear any technical connotation but that it should be understood in its literal or ordinary sense. Applied to the present circumstances, I would think that an interested party is one who, in one way or the other, has some interest whether direct or indirect, in an intestate's estate. The burden to prove such an interest is on the party claiming to fit the description of 'any interested party'.

In **Musa Nyaribari Gekone & 2 others v Peter Miyienda & another [2015] eKLR the C**ourt of Appeal said of this expression as follows:

> ***The expression "any interested party" as used in that provision, in its plain and ordinary meaning, is in our view wide enough to accommodate any person with a right or expectancy in the estate.***

My understanding of the applicant's case is that her basis of her grievances against the respondent is her indirect interest in the deceased's estate; I say so because she has not, and she has not even suggested, that she brings the present summons in her own right either as a dependant of the deceased or as beneficiary to his estate; instead she has persistently invoked the name of her late husband in this application. In other words, she has effectively held herself out as the representative of her husband's estate.

Going by what I think the words 'any interested party' mean, there wouldn't be anything wrong if the applicant stood out in her own right to seek redress for her grievances, if at all she can prove any; however, when she holds herself out as representing the interests of a deceased person or his estate, then she is bound to demonstrate that she has the authority to do so, more so in such a case where her standing in that regard has been questioned by none other than her own son. In the absence such requisite authority, I would agree with the learned counsel for the respondent that the applicant's summons is nullity ab initio. To this end, I adopt and follow the Court of Appeal decision in **Troustik Union International Ingrid Ursula Heinz versus Jane Mbeyu & Another in Civil Appeal No. 145 of 1990** reported as (1993) eKLR. In that case it was decided that under section 82(a) of the Law of Succession Act the power to agitate by suit any cause of action vested in the deceased at the time of his death vests in his personal representative who in turn is defined in section 3 of the Act to mean executor or administrator of a deceased person. And 'administrator' means the person to whom letters of grant of administration has been made under the Act.

In the present application no grant of letters of administration has been made to the applicant; as will be noted later in this judgment, the grant was made to the Public Trustee with the knowledge and consent of the applicant.

The deceased having died in 1971 one may ask, and validly so, whether the Law of Succession Act which came to for ten years later would apply to the administration of his estate. This question was not raised and therefore it is not surprising that nothing turned on it. In any event, the applicant herself invoked the provisions of the Act in pursuit of the prayers in her summons.

If I have to, all I can say about this issue is that going by the provisions of section 2 of the Law of Succession Act, the application of the Act in such circumstances is only restricted but not ousted altogether. This is because as much as the Act applies to distribution and administration of those estates of persons who died after the commencement date 1 July 1981, its application is still open to *administration* of estates of persons who died prior to the commencement of the Act notwithstanding that such estates would be subject to the written laws and customs applicable at the time of the death. In the absence of any proof of any written laws and customs applicable to the deceased's estate at the time of his demise, there is absolutely nothing wrong in applying the Act to the distribution and generally administration of his estate.

Having upheld the respondent's preliminary objection, this should be the appropriate point at which this matter ought to be concluded but assuming, for a moment, that I am wrong and the applicant was quite in order to file the present summons and seek the sort of orders she has prayed for; in that event, the pertinent question for interrogation would be whether indeed the petition, the grant and the subsequent confirmation of the grant made to the respondent was vitiated by fraud.

To answer this question, one needs look no further than section 76 of the Act which has been quoted earlier in this judgment.

Of the grounds set forth for annulment or revocation of grant in that part of the Act, the most obvious one that comes out in the applicant's application is that of fraud. As I understand the applicant, the basis of her allegations of fraud against the respondent is that neither her late husband nor herself was aware or even involved in the petition for grant of letters of administration of the deceased estate and in the subsequent confirmation proceedings.

The record, however, tells a different story. To begin with, there is a consent filed in court on 7 April 2003 pursuant to rule 26(2) of the Probate and Administration Rules in which the applicant's husband, amongst other children of the deceased, is clearly indicated to have consented to the making of the grant to the respondent. It has not been demonstrated that the applicant's husband's signature was forged or was obtained under duress or any other form of undue influence. Prior to his death, more than ten years after the consent was filed in court, the applicant's husband himself never questioned the authenticity of this consent on any ground or for any reason whatsoever.

As far as the confirmation proceedings of 21 February 2005 are concerned, the record shows that all the beneficiaries except Rufus Muigwa Kingori whom the court noted was represented by his wife were present in court on the material date and further that none of the beneficiaries, including the applicant's deceased husband, protested against the scheme of distribution of the estate as proposed by the respondent. The court proceeded to confirm the grant against this background. Again, the applicant's husband never questioned the integrity of the proceedings on the date in issue for the more than seven years he lived after the grant was confirmed.

To compound the applicant's application even further, an uncontroverted supplementary affidavit sworn by Peter Gathatwa Wanyeki on 27 October 2017 and filed on the even date shows that the applicant and her children instituted a succession cause for the administration of the estate of Josephat Wanyeki Kingori in which some of the assets listed as comprising his estate are those properties which he benefited from the estate of John Kingori Wanyeki; the cause was initially filed through the Public Trustee who, with the blessings of the applicant, subsequently petitioned for grant of letters of administration in this court in Probate and Administration Cause No. 416 of 2014. In particular, these properties are listed as Title No. Thegenge/Ihithe/726 and Thegenge/Ihithe/730. The grant was made and confirmed and according to the schedule to the certificate of confirmation of grant issued in that cause and more particularly dated 14 April 2015 these

particular properties devolved upon the applicant subject to life interest.

It is intriguing, to say the least, that while the applicant herself has benefited from the entire process leading to the administration and the ultimate distribution of the estate of her late father-in-law, she still insists that the process was fraudulent and that she has been denied what, in her view, was her husband's share of her father-in-law's estate.

My assessment of the applicant is that other than being simply disgruntled, for whatever reason, she has no legitimate grievances against the respondent or the administration of the estate of the late John Kingori Wanyeki. In a nutshell, she has not satisfied me that the grant of letters of administration in respect of the estate of the late John Kingori Wanyeki should be annulled or revoked on any of the statutory grounds stipulated in section 76 of the Act; in particular, it has not been proved that the respondent or any members of the deceased's family were fraudulent in any way. In the ultimate, I have to come to the conclusion that the applicant's summons for revocation of grant dated 18 December 2012 lacks any merit and it is hereby dismissed with costs to the respondent. It is so ordered.

Dated, signed and delivered in open court this 12th day of July, 2019

Ngaah Jairus

JUDGE