



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

MISC APPLICATION NO. 37 OF 2013

IN THE MATTER OF THE ESTATE OF DANIEL MWARIRI MATHENGE -DECEASED

ANNAH WANJIKU MWARIRI.....1ST APPLICANT

LUCY WANJIKU MWARIRI.....2ND APPLICANT

VERONICA WAIRIMU.....3RD APPLICANT

V E R S U S

ALFRED MICHAEL MURIMI.....RESPONDENT

RULING

1. By summons for Annulment of Grant dated 4/12/09 the applicants Annah Nyaguthii Mwariri, Lucy Wanjiku Mwariri and Veronica Wairimu Mwariri seek an order that the Letters of Administration issued to Julia Nyawira Mwariri and confirmed on 14/9/01 be annulled or revoked. The application is based on the grounds that the grant was obtained and confirmed fraudulently or by concealment from court something material to the case. That the proceedings to obtain the said grant were defective in substance.

2. The applicants contend that they were to get a share of the estate but were not informed of the proceeding until the issuance of the grant. That as the daughters of the respondents they were deprived of their rightful inheritance.

3. The summons is supported by the affidavit of Annah Nyaguthii Mwariri. It is averred that the applicants were not informed when the cause was filed. They became aware when they were threatened with eviction from land parcel No. Mwerua/Mukure/780 by some of the beneficiaries. The respondent failed to disclose that the applicants were beneficiaries who had been living on the land, developed the land and have built their homes.

4. The applicants further contend that the estate of the deceased was worth Kshs 200,000/- and the Magistrate's court lacked jurisdiction. They propose that they be included in the distribution of the estate with other beneficiaries. That the estate should be distributed among the following who are children of deceased.

a) Annah Nyaguthii Mwariri - Daughter

b) Lucy Wanjiku Mwariri - Daughter

c) Veronica Wairimu Mwariri - Daughter

d) Joseph Murithi Mwariri - Son

e) Alfred Michael Murimi - Son

f) Juliah Nyawira Mwariri - Widow.

5. On her part, the respondent, Juliah Nyawira Mwariri contends that she is the wife of the deceased. That the estate was registered in common equal shares between herself, the deceased and Alfred Michael Murimi.

6. That deceased left the following children:-

- **Alfred Michael Murimi**
- **Joseph Muriithi Mwariri**
- **Anne Nyaguthii Mwariri**
- **Lucy Wanjiku Mwariri**
- **Veronica Wairimu Mwariri**
- **Mary Wambui Mwariri**
- **Alice Wanjiru Mwariri**

7. It is her contention that all the beneficiaries knew of the succession cause and she was to hold the deceased's share in trust for all the daughter's a fact which they knew and she is ready to give them a share. The respondent, passed away on 24/01/2011 during the pendency of this application and was substituted by Alfred Michael Murimi.

8. The deceased respondent Julia Nyawira Mwariri had sworn affidavit on 25/3/10. The substituted respondent Alfred Michael Murimi did not file a replying affidavit despite being served not did he attend court. The counsel for the applicants filed submissions.

9. It is submitted that the grant obtained was defective in substance. That the grant was obtained fraudulently by making a false statement or by concealment from court of something material to the case.

10. I have considered the application. The issues which arise are:-

- a) **Revocation/annulment of grant.**
- b) **Whether the court had jurisdiction to issue the grant.**
- c) **Distribution of the estate.**

Revocation/Annulment of Grant.

The **Law of Succession Act** (to be referred to as the **Act**) provides that a Grant of Letters of Administration whether or not confirmed may be revoked for various reasons. The Act gives the court discretion to revoke or annul the grant and make orders as may be expedient. **Section 76 of the Act** which deals with revocation or annulment of grant provides:-

“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;”

Where a party proves any of these grounds the court will exercise its discretion to order revocation or annulment of the grant.

11. The applicant submits that the grant obtained was defective in substance as the estate of the deceased comprised in land parcel No. Mwerua/Mukure/780 was valued at Kshs 200,000/- and as such the trial Magistrate had no jurisdiction entertain the matter.

12. Jurisdiction has been variously stated to be everything and without it the Judge must down its tools. The Court of Appeal while dealing with the issue of jurisdiction in the of **Joseph Njuguna Mwaura & 2 Others –v- Republic (2013) eKLR** stated while quoting with approval the words of Nyarangi J. The owners of **Motor Vessel Lilian S –v- Caltex Oil Kenya Ltd (1989) I KLRI –**

“Jurisdiction is everything. Without it, a court has no power to make one step, where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.”

It is incumbent upon any court intending to render an opinion or determine a matter to first ascertain the entry point to the doors of justice, and that is jurisdiction. The authority of the court is determined by the existence or the lack of jurisdiction

to hear and determine disputes. In essence, jurisdiction is the first hurdle that a court will cross before it embarks on its decision making function.

13. A court dealing with a matter must therefore be satisfied that it is clothed with the necessary jurisdiction. If it acts without jurisdiction, the proceedings are null and void and any orders issued are of no consequence as the court lacked the authority to make such orders.

14. Courts jurisdiction is derived from the statute. The jurisdiction of the Magistrates to deal with succession matters is donated by **Section 48(1) of the Law of Succession Act** which provided (this was before it was amended by Act No. 26/2015 -).

“(1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a Resident Magistrate shall have jurisdiction to entertain any application other than an application other than an application under Section 76 and to determine any dispute under this Act and pronounce such decrees and make such orders therein in respect of any estate the gross value of which does not exceed the One Hundred Thousand Shillings.”

15. The grant conferred jurisdiction in Resident Magistrate’s Court where the gross value did not exceed Kshs 100,000/-. The grant was issued on 14/9/2001 by the Principal Magistrate Kerugoya whose jurisdiction was Kshs 100,000/-.

16. The question is what was the value of the gross estate of the deceased. The value which the court must consider is the value of the estate of the deceased at the time of filing the succession cause. The Act defines estate as follows:-

“means the free estate of a deceased person,”.

17. The estate of the deceased was stated to be Mwerua/Mukure/780. The green card showed that the land was registered in the names of Daniel Mwariri and Julia Nyawira Mwariri and Alfred Michael Murimi in equal shares as of 25/10/84. The estimated value which was indicated on form P & A 5 was Kshs 200,000/-.

18. The trial Magistrate acted without jurisdiction in view of the value of the subject matter. Without jurisdiction the court acted in vain as it failed to confirm that it had jurisdiction. The proceedings by a court which has acted without jurisdiction are defective and orders issued are null and void.

Distribution:-

The petitioner failed to disclose that the deceased had other dependants. The petitioner had listed herself, Alfred Michael Murimi and Joseph Muriithi Mwariri as the only dependants. The applicant has deponed that the deceased had other dependants who were not disclosed. It is not denied that the deceased had other dependants. The respondent Julia Nyawira Mwariri had sworn a Replying Affidavit where she stated that the deceased had left other dependants apart from those she had listed in the petition who are the applicants and others. Though the respondent has deponed that the daughters who are the applicants were aware of the proceedings, this is not supported by the record.

The respondent depones that she was to hold her share intrust for the applicants. However, this is not borne out by the record as the grant confirmed in 14/9/2001 shows that the respondent was to share the estate with the other two equally. The certificate of official search annexure ANM 3 shows that Julia Nyawira Mwariri was registered as the absolute owner and she was issued with a title deed.

19. The deceased Daniel Mathenge died on 31/1/1997. By virtue of **Section 2(1) of the Law of Succession Act Cap 160** his estate ought to have been administered in accordance with the Act.

The Section provides:-

“(1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.”

The commencement date of the Act is 1/7/1981.

20. The **Act** provides for the distribution of the estate to the dependants without discrimination. **Section 35 of the Act** provides that the estate shall be divided equally among the surviving children. The grant did not make provision for the applicants

In to **Mary Rono v Jane Rono & another [2005] eKLR**

The Court of Appeal in setting aside the distribution of land and substituting with an order that the estate be shared out equally between the sons and daughters of the deceased stated:

The Constitution, which takes hierarchical primacy in the mode of exercise of jurisdiction, outlaws any law that is discriminatory in itself or in effect. That is section 82(1).....

The superior court was of the view that section 27 of the Act donates unfettered discretion to the court in the sharing of the estate considering the definition of “dependant” in section 29 to include the “wife and the children of the deceased”.....

I think the discretion, like all discretions exercised by courts, must be made judicially or to put it another way, on sound legal and factual basis. The possibility that girls in any particular family may be married is only one factor among others that may be considered in exercising the court's discretion. It is not a determining factor.....

More importantly, section 40 of the Act which applies to the estate makes provision for distribution of the net estate to the "houses according to the number of children in each house,...

There is no discrimination of such children on account of their sex.

21. Failure by the petitioner to include all the children of the deceased in petition was fraudulent. **Section 76(b) of the Act** states that the grant maybe revoked where it was obtained fraudulently by the making of a false statement or concealing from the court of something material to the case. The applicants have proved grounds to warrant setting aside. The grant did not make provision for the applicant who have deponed that they live on the land. The land was registered in common between the deceased, Juliana Nyawira and Alfred Michael Murimi. The share of the deceased which was 1/3 of the estate was available for distribution to his dependants. The grant did not put that into consideration and the estate was distributed to the three and excluded other beneficiaries who were entitled to the estate.

22. In conclusion:-

The applicants have proved that the proceedings to obtain the grant were defective in substance for want of jurisdiction by the trial court and the grant was obtained fraudulently by concealment from court something which was material to the case and disinheriting the applicants. The application has merits and is allowed.

23. I order that the grant of Letters of Administration confirmed on 14/09/2001 in Succession Cause No. 209/2000 shall be revoked. I make no orders as to costs.

Dated at Kerugoya this 9th Day of July 2019.

L. W. GITARI

JUDGE