



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 667 OF 2014

In the Matter of the Estate of Amina Juma (DECEASED)

GULZAR ABDUL WAIS.....PETITIONER/RESPONDENT

-Versus-

YASMIN R GANATRA.....1ST PROTESTOR/APPLICANT

TARIQ ABDUL RASH.....2ND PROTESTOR/APPLICANT

RIZVAN A RASHID.....3RD PROTESTOR/APPLICANT

NAUSHEEN GANATRA.....4TH PROTESTOR/APPLICANT

RULING

[1] By summons dated 8th February 2019 which is expressed to be brought pursuant to **Section 26, 27, 28, 29 and 76 of the Law of Succession Act CAP 160 Laws of Kenya and Rule 73 of the Probate and Administration Rules**, the applicant seeks among other orders the revocation or annulment of the confirmed grant of probate dated 23rd January 2017. In the alternative the applicant seeks among other orders that the court makes reasonable provision for the applicants and declare they are entitled to inherit wholly land parcel No. NTIMA/IGOKI/5685 and half of NTIMA/NTAKIRA/1597.

[2] The grounds upon which the application is grounded are set out in the application and the supporting affidavit of Yasmin Rashid Ganatra sworn on 8th February 2017. It is contended that the deceased who died on 16th April 2010 had four issues: two sons and two daughters. The 1st applicant is the wife of the deceased's son Abdul Rashid Juma (*deceased*) and the other 3 applicants are their children. The deceased left behind Plot No. 209/4300/109 Nairobi (Pangani), L. R. NO NTIMA/IGOKI/1597 and L. R. NO. NTIMA/IGOKI/5685 worth Kshs. 100,000,000/- , Kshs. 50,000,000/- and Kshs. 20,000,000/- respectively. The deceased willed that the properties go to her two daughters who are the petitioner and Reshma Salim Ganatra but she has not been provided for.

[3] It was stated that in **Meru Succ. Cause No. 290 of 2010** the petitioner had filed proceedings intestate and was appointed joint administratrix with the 1st applicant. Upon discovery of the will on 8th July 2014 the court annulled the grant on the basis that the deceased had left a valid will. This instigated an appeal at the **Court of Appeal No. 45 of 2014** where the majority held that there was a valid will which should be put to probate proceedings where the applicants can advance their case. However, they did not get to do so for the petitioner's failed to notify them of the proceedings herein which acts are clearly dishonest. They now pray that the confirmed grant be revoked and they be heard on their protest and application for provision as dependants.

[4] This was opposed by the petitioner through her replying affidavit sworn on 20th February 2017. She deposed that the grant of representation of the estate of the deceased issued to her was confirmed on 23rd January 2017. Thus, no application by purported defendants for reasonable provision can be brought after confirmation of the grant. Neither can an application for reasonable provision be brought together with or as an alternative to or in disguise of an application for rectification, revocation and annulment of the grant as the applicants purport. In any event it was argued that the applicants have not demonstrated that they are beneficiaries and or dependants. They cannot be claiming to be dependants and at the same time co-proprietors of the properties forming part of the estate.

[5] They averred that it is not true that the 1st applicant's husband completed the 1st floor of the house situate on parcel No. 5685 at the request of the deceased. The applicant's occupation of the alleged buildings was contrary to the deceased's interests and wishes even during her lifetime. The applicants went ahead and attempted to wrestle the deceased in court where they were also enjoined with her sister as co-defendants which has since abated. Even so, the 2nd applicant in **Succession Cause No. 290 of 2010** stated that there was nothing to show their claim of having constructed the said building. The applicants are only being motivated by sheer greed and should not be allowed to keep them in court over frivolous and vexatious suits. Consequently, they concluded that no sufficient grounds have been demonstrated by

the applicants to warrant any rectification, revocation and/ or annulment of the grant herein.

Viva voce evidence

[6] This matter was heard vide *viva voce* evidence. **OB1 Yasmin Rashid Ganatra** tendered her statement and documents filed on 23rd March 2017 as her evidence. She stated that they were living with the deceased and she was helping her and her husband helped the deceased complete the construction of the estate property. She is a dependant since she is the owner of the property as her husband has proprietary legal rights on it. She confirmed that she challenged the will as she was not given any share. She filed suit No. 7 of 2010, 290 of 2010, CA 45 of 2014, Petition 29 of 2015 and 667 of 2014. But they were not informed of the probate proceedings.

[7] In **Succession Cause No. 290 of 2010** her husband's contribution was raised but she did not produce the receipts then as they were not allowed. She also has a live recording where the deceased gives them the property. She filed **Suit No. 7 of 2010** where she cited the deceased as a 1st defendant and was claiming to access her as she had been hidden by and her sister in law could not allow her to access her.

[8] By consent of parties and recorded by the court statements by witnesses filed in these proceedings were admitted in evidence without calling the makers.

Submissions

[9] This matter was then canvassed by way of written submissions. The applicants submitted that the grant was obtained in contravention of **Section 76 (b) of the Law of Succession Act**, for the petitioner lied that the deceased had no dependant yet she had a daughter in law together with her children. She also submitted that the petitioner did not get her consent or inform her of the proceedings. Besides, she urged that the deceased did not provide for them in the will considering they are dependants by virtue of **Section 29 of the Law of Succession Act**. Thus, they beseeched the court to interfere and vary a will in order to provide for them.

[10] The petitioner submitted that the protestors are not dependants of the deceased as the only person who qualifies to be a dependant is a husband according to **Section 29 (c) of the Law of Succession Act**. According to the petitioner, the applicants have not shown by evidenced how they were being maintained by the deceased prior to her death. The protestors cannot claim to be dependants and on the other hand alleging proprietary rights by dint of contributing towards the construction of the property as they are neither dependants nor beneficiaries under the will. Hence, they have not proved any of the conditions stipulated under **Section 76 of CAP 160**. The petitioner further posit that this court has no jurisdiction to entertain the application as according to **Section 30** to extend the period for filing an application for provision after confirmation of grant. Therefore, the protestors are not entitled to inherit wholly L. R NO. NTIMA/IGOKI/5685 and half of NTIMA/IGOKI/1597 for **Section 5 (1) of the Law of Succession Act** allows any person to make a will and deal with his or her properties in any manner they would wish to.

ANALYSIS AND DETERMINATION

Issues

[11] The issues for determination are:

- a) *Whether the applicants are dependants of the deceased*
- b) *Whether to revoke and or annul the grant confirmed on 31st January 2017*

Dependant

[12] **Section 29 of the Law of Succession Act** provides:

“For the purposes of this Part, "dependant" means—

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- (b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom 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; and
- (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

According to the petitioner, **Section 29 (a) and (b)** relate to the estate of deceased males while **sub-section (c)** relates to deceased females which qualify a husband as the only dependant. She referred to the case of **Re the Estate of Cecilia Wanjiku Ndung'u (Deceased) [2013] eKLR** where the court stated:-

“It appears that the respondent cites *Section 29* to support his assertion that he had been adopted by the deceased, by arguing that he was a dependant by dint of having been taken in by the deceased as her own child. This specific definition of

dependant is found in *section 29(b)*. It will be noted that *Section 29(a) (b)* refer exclusively to estates of deceased male persons, while *Section 29(c)* refers to the estate of a deceased females. This then means that under *Section 29(b)* only a child that had been taken into the family of a male person and treated as his own will be regarded as a dependant of such male person. That is not so with respect to a female person taking in a child and treating him as her own. This interpretation of the provision is clear beyond doubt. The provision was construed in the terms by the Court of Appeal in *Willingstone Muchigi Kimari vs. Rahab Wanjiru Mugo* CA No. 168 of 1990. The argument therefore that he had become a son of the deceased by dint of *Section 29* of the Law of Succession Act does not hold.”

[13] I take the following view of section 29 of the Law of Succession Act. By the command of the Constitution in section 7(1) of the Sixth Schedule:-

(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

[14] Applying the constitutional test, the law of succession Act is existing law which should be construed with such alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. The Constitution in article 27 prohibits and outlaws any form of discrimination based on any of the grounds set out therein *inter alia* gender, status or sex. The article also declares that every person is equal before the law and has the right to equal protection, equal treatment in, and equal benefit of the law. As it is relevant to this subject, I should add that article 68(c) (vi) of the Constitution envisages legislation that will protect the dependants of deceased persons holding interests in any land, including the interests of spouses in actual occupation of land. Accordingly, section 29 of the Law of Succession Act in so far as it treats a husband and a wife differently in relation to the estate of his deceased offends the Constitution; it is discriminatory and infringes rights of spouses in a marriage. For the avoidance of doubt, section 29(c) of the Law of Succession Act discriminates against the husband of a deceased wife for it recognizes such husband as a dependant only if the husband was maintained by her late wife immediately before her death. This position may have been influenced by patriarchal biases which recognized the husband as the sole provider of his family and the only person who could own property. The position has changed as every person, man or woman or straight or queer or inter sex is equal before the law and has the right to own property. To understand this argument see section 29(a) and (c) of the Law of Succession Act; (1) in (a) it classifies a wife as a dependant of the deceased for purposes of the law of succession Act **whether or not maintained by the deceased immediately prior to his death**; yet in (c) it states that a husband of a deceased wife is a dependant only **if he was being maintained by her immediately prior to the date of her death**. Section 29(c) is out rightly unconstitutional. In the current constitutional framework, section 29 of the Law of Succession Act should be construed to relate to estate of the deceased whether male or female and the husband like a wife is a dependant whether or not maintained by her prior to her death. It bears repeating that the modifications, adaptations and alterations necessary to bring this section into conformity with the Constitution is to remove the seeming distinction between the estate of a male deceased person and female deceased person and also recognize the husband of the deceased wife a dependant whether or not maintained by the deceased immediately prior to her death. I have said before and I will repeat that section 7 of the Sixth Schedule permits approaches such as read-in but this should not be confused with legislative function that belongs to Parliament. Therefore, I hope the National Assembly will take appropriate legislative action to harmonize this law with the Constitution.

[15] Be that as it may, my view is that there should be no distinction of dependants on the basis of gender. There should also be no distinction whether the deceased is a woman or man; such distinction is not necessary. The law refers to the estate of the deceased.

[16] The applicant is a daughter - in law of the deceased by virtue of being the wife - of the son (also deceased) of the deceased. Whereas the other applicants are grandchildren of the deceased they are entitled to take their deceased parent's share under the principle of representation as read together with **Section 41 of the Law of Succession Act**. In that capacity, they are entitled to take directly the share of their deceased parent, thus, persons beneficially entitled in the estate. Such persons are competent parties in the proceedings. See a persuasive decision by Musyoka J. in the case of **Estate of Veronica NjokiWakagoto (deceased) (2013) eKLR** where it was stated:

“.....grandchildren can only inherit their grandparents indirectly through their own parents, the children of the deceased. The children inherit first and thereafter the grand children inherit from the parents. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grand children step into the shoes of their parents and take directly the share that ought to have gone to the said parents.” [Underlining mine]

Revocation of grant

[17] I now move to the elephant in the room; whether the grant herein should be revoked or annulled. **Section 76 of CAP 160** governs revocation and annulment of grant. The applicants asserted that they were not involved in the probate proceedings and did not give their consent. Moreover, they were not provided for in the will. From these arguments presented, the court should ask whether:-

(a) The proceedings to obtain the grant were defective in substance; or

(b) 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; or

(c) 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

[18] The petitioner argued that these proceedings were duly gazetted and they were under no obligation to serve anyone personally. They also urged that the fact that the applicants on 27th April 2015 appointed their advocates to come on record on their behalf denotes that the applicants were all along aware of the existence of these proceedings. From the record, it is true that the applicants knew about these proceedings. But consent of beneficiaries and defendants in probate proceedings is also a requirement before the proceedings are heard. See **Rule 40 (8) of the Probate and Administration Rules** stipulates that

“Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit.”

[19] Thande J in the case of **In re Estate of Abdulkarim Chatur Popat (Deceased) [2019] eKLR** held as follows:

“19. It should be noted that the consent is to be in Form 37 and further it is of all dependants or other persons who may be beneficially entitled. This rule requires that all dependants of the deceased whether provided for in the will or not and all persons beneficially entitled under the will must give their consent in Form 37.[Emphasis is mine] In the instant case, the record shows that the summons for confirmation of the Grant dated 22.10.14 is not accompanied by the consent in Form 37 of the Applicant or of any of the dependants or persons beneficially entitled to the estate of the deceased under his Will. Further there is no indication on the record that on 20.11.14 when the Grant was confirmed, any of the beneficiaries attended Court. There was therefore no attendance and no consent of the dependants and beneficiaries. Confirmation was therefore done without due regard to the mandatory provisions of the law. To this extent therefore, the proceedings leading to the confirmation of the Grant were defective in substance. This was also the holding of Ouko, J (as he then was) in Charles Mutua M’anyoro v Maria Gatiria [2009] eKLR. He stated:

It is imperative under the rules that all the dependants be in attendance during the hearing of the application for confirmation save where the dependants have signed a consent in writing. See Rule 40(8).”

[20] It has been established that the applicants are dependants of the deceased and from the record is that they did not provide their consent before the confirmation of the grant. Even though they were not provided for in the will, their consent was to be sought. The consent should nonetheless not be unreasonably or maliciously withheld. The case here is that none was sought or obtained. The proceedings leading to the confirmation of the grant are therefore defective in substance.

[21] The foregoing notwithstanding, I note with concern that the applicants seek to be provided for and to inherit wholly land parcel No. NTIMA/IGOKI/5685 and half of NTIMA/NTAKIRA/1597. The 1st applicant argued that she and her family used to live on Parcel No. 5685 for over 10 years before shifting to the county government maisonettes in Meru Town. She also claimed that her husband built the 1st floor of the house situate on the said land parcel which they occupied and enjoyed exclusively up to date. She stated further that they have also enjoyed and occupied the rear shop situate on land parcel No. 1597 which she still occupies.

[22] The petitioner disputed all these things by stating that it is not true that the 1st applicant’s husband built the 1st floor of the house situate on parcel No. 5685. She also questioned the receipts produced by **OB1** in court for they cannot be certified because when this issue was tabled in **Succession Cause No. 290 of 2010** the 2nd applicant told the court that they have no evidence to show that the 1st applicant’s husband built the 1st floor of the estate property. She quipped: How come then they now have receipts to show it if they did not have them to begin with.

[23] It was argued further that in the said succession case it was found that the applicants were not destitute and own several properties including one which Tuskys Supermarket in Meru sits on. Evidence was tendered that the sons had been bequeathed properties by their father and the daughters had not. This was the reason why the deceased eliminated the sons from her will. **OB1** confirmed that her husband was the one who inherited his father’s estate which she is enjoying.

[24] It is apparent that this issue was dealt in length in Succession Cause **No. 290 of 2010** and it is necessary that its record be brought before this court to assist it in making its decision and bring the matter to a close.

[25] Accordingly, I order the following:

- a) **The order of 23rd January 2017 confirming the grant of probate is set aside and the certificate of confirmation of grant dated 31st January 2017 be cancelled.**
- b) **The summons for confirmation of grant dated 24th June 2016 to be reheard on a date to be appointed by the court. Any person qualified in law shall file and serve protest or other pleading permitted in law within 14 days.**
- c) **The record for Succession Cause No. 290 of 2010 to be brought before this court.**

Dated signed and delivered in open court at Meru this 22nd day of October, 2019

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F. GIKONYO

JUDGE

IN PRESENCE OF

M/s Murithi holding brief for Kirimi for protestor

Protestor present

Kilonzo for Petitioners – absent

Petitioners present

.....

F. GIKONYO

JUDGE