



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO 23 OF 1993

IN THE MATTER OF ESTATE OF THE LATE ELIJAH NDAMBUKI (DECEASED)

BETWEEN

JOSEPH MUTISYA MUASYA

GEORGE KISIO KIETI.....ADMINISTRATORS/RESPONDENTS

VERSUS

MICHAEL MAITHYA NDAMBUKI.....OBJECTOR/APPLICANT

RULING

1. By Summons for Revocation of Grant dated 20th February, 2019, the Applicant/Objector, **Michael Maithya Ndambuki**, seeks an order that the grant of letters of Administration issued to **Joseph Mutisya Muasya** and **George Kisoi Kieti** on 17th September, 2018 be revoked.
2. According to the applicant, he is a son of the deceased herein. It was his case that those who rank in priority in this petition (the sons and wives of the deceased) are listed as beneficiaries as opposed to the petitioners herein. It was averred that the petitioners never sought the consent of the said persons before seeking to be administrators of the estate of the deceased. It was the applicant's case that the petitioners recently obtained a suspicious letter from the chief dated 23rd April, 2018 which excluded the right persons.
3. It was averred that the initial administrators are all dead hence the grant has become useless and inoperative and cannot be rectified. However, the present petitioners are in the process of disposing of the deceased's properties and are threatening to evict the other beneficiaries.
4. In his submissions, the applicant relied on Part VI Rule 26(1) of the **Probate and Administration Rules**. He also relied on section 52 of the Act. It was submitted that the petitioners are grandsons of the deceased and hence do not rank in priority to the applicant who is a son of the deceased. He reiterated that the consent of the other beneficiaries was never obtained hence the initial grant has become useless and inoperative. It was therefore submitted that the applicant has met the threshold under section 76(a), (b) and (c) of the **Law of Succession Act**.
5. In response to the summons, the administrators through **Joseph Mutisya Muasya**, a co-administrator, averred that they were appointed new administrators to the estate of **Elijah Kituku** on 17th September, 2018. They deposed that the applicant is their uncle and though he was invited to attend the family meetings meant to appoint new administrators, he chose to ignore all the said efforts as a result of which the family met in his absence and decided to appoint the current administrators to the said estate.
6. It was the respondent's case that all the beneficiaries were involved in the process of appointing the new administrators and only the applicant was absent. The administrators however denied that they were in the process of disposing of the deceased's property and contended that the letter from the Chief dated 23rd April, 2018 is a genuine letter. To them the applicant was well aware of the need to appoint new administrators but chose not to participate in the process of doing so. They therefore denied that the deceased's estate was being wasted and contended that they were in the process of preserving the same instead.
7. On behalf of the Respondent, it was submitted that the allegations made by the applicant have not been proved since there is no evidence to support the allegation that the chief's letter is a forgery. It was further submitted that the applicant has not proved that the grant was obtained by fraudulent means nor that it has become inoperative. To the Respondents, under section 76 the Court has discretionary power to make the orders it considers fit in the circumstances. It was submitted that Rule 20 of the 5th Schedule empowers the court to appoint new administrators where an executor dies leaving part of the estate un-administered. It was submitted that the applicant herein is simply trying to frustrate the administration of the estate of the deceased as per the confirmed grant.

Determination

8. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

9. Section 76 of the *Law of Succession Act* provides as hereunder:

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.

10. In this case, the basis of the application is that the current administrators of the estate of the deceased do not rank in priority to the other beneficiaries since there are widows and sons of the deceased, the applicant being such son.

11. Section 66 of the *Law of Succession Act*, Cap 160, Laws of Kenya provides that:

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

12. It is therefore clear the rule regarding priority is a general rule but the court has discretion to determine who ought to administer the estate of the deceased. Rule 73 of the *Probate and Administration Rules* provides that:

Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

13. In this case, the court exercised its discretion in the matter. The Respondents have averred that though the applicant was invited to a meeting meant to move the administration forward, the applicant declined to attend. This allegation has not been responded to by the applicant and remained uncontroverted. Accordingly, there is no basis upon which I can, based on that uncontroverted allegation, revoke the grant.

14. As regards the issue of alleged forgery of the Chief's letter there is no evidence to support that serious allegation apart from bare averment.

15. I agree with the position adopted by Muigai, J in *Mary Wangari Kihika vs. John Gichuhi Kinuthia & 2 Others [2015] eKLR*, that in exercising its discretion the Court ought to take into account the effect of either revoking the grant or relieving all the administrators of their duties and where more injustice would be caused by such action to instead opt for an alternative that would ensure that the estate is properly administered.

16. In the premises I find no merit in this application which I hereby dismiss but with no order as to costs.

17. It is so ordered.

Read, signed and delivered in open Court at Machakos this 7th day of October, 2019.

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Geoffrey