



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**SUCCESSION CAUSE NO. 185 OF 2011**

**IN THE MATTER OF THE ESTATE OF WILLIAM WAWERU NJOROGE (DECEASED)**

**VERONICA WANJIKU.....OBJECTOR/APPLICANT**

**VERSUS**

**ROSEMARY WANJIKU KIHURA.....ADMINISTRATOR/1<sup>ST</sup> RESPONDENT**

**JWW.....ADMINISTRATOR/2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before this court for determination is an application for revocation of grant brought by way of summons dated 28<sup>th</sup> September, 2016 and filed on 29<sup>th</sup> September, 2016. The Objector/Applicant is seeking that the grant of letters administration issued to Rosemary Wanjiru Kihura and JWW on 25<sup>th</sup> May, 2012 be revoked and a fresh grant issued.

2. The application is premised on the grounds that the proceedings to obtain the grant were defective in substance and the grant was obtained fraudulently by making of false statements, concealment of material facts and untrue allegations of facts. It is supported by an affidavit sworn by the Objector on 28<sup>th</sup> September, 2016. The Objector also filed a statement and a list and bundle of documents all dated 16<sup>th</sup> November, 2018 in support of her case.

3. The gist of the Objector's case is that she was married to the deceased and that they lived together as husband and wife. That she was recognized as a wife even at the time of his death. A copy of an obituary published in the local dailies which recognizes the Objector as a wife of the deceased is on the record together with a copy of the deceased's burial permit. The Objector states that the proceedings to obtain the grant issued hereto were defective in substance since the Objector was never informed of the petition and neither was her consent sought even though she was a wife of the deceased and therefore a beneficiary of his estate.

4. It is the Objector's averment that the deceased worked with the Netherlands Ministry of Foreign Affairs and was based at the Royal Netherlands Embassy in Nairobi, and listed the Objector as his wife in his employment records. That upon his demise, the Netherlands Ministry of Foreign Affairs through the Royal Netherlands Embassy in Nairobi, in recognition of the Objector's status as wife of the deceased, made out to her a one-time payment of Kshs. 86,702.19/= as benefits of the deceased.

5. The Objector asserted that despite being one of the surviving widows of the deceased, the Administrators have left her out of the management and administration of the deceased's estate. That the Administrators' actions are intended to deprive her of her rightful share in the estate of her late husband.

6. According to the Objector, the deceased's known assets were a bank account with Barclays Bank; Terminal benefits and Pension with the Royal Netherlands Embassy and Shares with FINNLEM SACCO.

7. On 19<sup>th</sup> February, 2019 the court directed that the application be disposed of by way of viva voce evidence. The matter came up for hearing on 27<sup>th</sup> May, 2019.

8. Veronica Wanjiku the Objector herein, gave sworn testimony in which she stated that the deceased was her husband. They got married in the year 2007 and lived together as husband and wife until the deceased's death in 2009. She asserted that whereas she and the deceased did not have a church wedding, the deceased visited her home in August 2008 accompanied by one Baba Brigit to know her parents officially. At the time of the marriage, Veronica was aged 20 years while the deceased was in his late forties.

9. The Objector testified that when the deceased died, the death announcement in the local dailies recognized her as a widow of the deceased. The death announcement was paid for by the funeral committee. She stated that Rosemary, the 1<sup>st</sup> Administrator/Respondent was not part of the committee but that she attended the funeral. The deceased was buried at his father's home at Karura in Ndenderu.
10. It was the Objector's statement that after the deceased's death, his last employer Royal Netherlands Embassy paid her a sum of Kshs. 86,000/= as maintenance. She further asserted that Rosemary's child also received money from the Embassy. She did not however tender evidence in support of her assertion.
11. The Objector stated that in applying for the grant of letters of administration, the Administrator/Respondents never notified her of the application and neither did they involve her in any way. She asked that the grant issued to the Respondents be revoked and a fresh one issued to include her as an administrator. Further that the deceased's terminal benefits be released to her as the Embassy had informed her that that was the deceased's wish. She did not however call a witness from the Embassy or tender evidence in this regard.
12. A copy of a letter from the Royal Netherlands Embassy dated 14<sup>th</sup> December, 2009 and addressed to the Objector for a 'One-time payment Suppletion' is on record. The letter does not however indicate in what capacity the Objector was receiving the benefits or if the deceased had intended that the terminal benefits are paid to her.
13. Rosemary Wanjiku Kihura, the 1<sup>st</sup> Administrator/Respondent, gave sworn testimony in opposition to the Objector's case. She stated that the deceased was her husband having married her in 1992 under Kikuyu customary law. They were blessed with one child named Catherine Wacuka Waweru. She stated that at the time of the marriage, she already had a child one JWW who was aged four (4) years.
14. It is Rosemary's testimony that in the year 2006 she left the matrimonial home because the deceased had become violent towards her. She stated that she and the deceased fought a lot but what prompted her to leave the home in 2006 is when the deceased brought home another woman and assaulted the 1<sup>st</sup> Administrator/Respondent.
15. Rosemary asserted that in petitioning for the grant, she included the Objector as her co-wife because she had seen her name in the deceased's eulogy. Further that the District Commissioner (D.C) at Banana had summoned her to his office and asked her to include the Objector in the petition for grant. She did not however include the Objector as an administrator since she could not trace her and phone calls made to her went unanswered. She did not however tender evidence to show that she attempted to contact the Objector.
16. The Respondents called one witness, Elizabeth Njeri Nguge, who gave sworn testimony in support of their case. She stated that she knew the deceased as a husband to Rosemary and that they were family friends and she had known them since they got married. That the deceased and Rosemary lived in Gachie and had two children named Wanjiku and Wacuka. She urged that Rosemary and the deceased lived together until 2007 when the deceased beat up Rosemary prompting her to leave the matrimonial home.
17. Elizabeth contended that sometime in 2009, the DC summoned Rosemary and asked her to include the Objector as her co-wife failure to which her children would not be educated. She denied any knowledge of the Objector as the deceased's wife stating that she first saw her at the deceased's funeral. She stated that Rosemary was also present at the funeral but that she did not sit at the front owing to her strained relationship with the deceased's family.
18. Learned counsel Mr. Mandala filed written submissions dated 13<sup>th</sup> June, 2019 on behalf of the Objector and asked the court to issue a fresh grant in the sole name of the Objector. He urged that the Objector has demonstrated that the Administrators failed to obtain the mandatory consent from all beneficiaries and as such, the grant should be revoked.
19. Mr. Mandala contended that as the legal wife of the deceased, the Objector is better placed to administer the deceased's estate as she ranks higher in priority. That under **section 66(b)** of the **Law of Succession Act**, the persons given priority over an intestate estate are the surviving spouse and children of a deceased. He urged that in any event, the Administrators failed to obtain the mandatory consent from the Objector as stipulated under **rule 26** of the **Probate and Administration Rules**. To buttress his arguments, Counsel cited the persuasive decisions in **Re Estate of George Muriithi Gitahi (deceased) Succession Cause No. 20 of 2018 [2019] eKLR**.
20. It is Mr. Mandala's submission that the grant issued to the Administrators herein was obtained fraudulently by the concealment of material facts reasons for which it ought to be revoked. He urged that as such, the Objector had fulfilled the requirements of **section 76(a), (b) and (c)** of the **Law of Succession Act** to warrant the revocation of the grant as sought. Further that upon revocation, the court should order that a fresh grant be issued to the Objector and that the Objector is entitled to the deceased's estate by virtue of being the deceased's wife.
21. In opposition, learned Counsel Mr. Muhuni filed written submissions dated 15<sup>th</sup> July, 2019 on behalf of the Administrator/Respondents in which he submitted that the instant application is unmerited and intended only to frustrate the Administrators in the distribution of the deceased's estate.
22. Mr. Muhuni contended that the Objector had failed to demonstrate that she and the deceased contracted a valid Kikuyu customary marriage to support her assertion that she is a widow of the deceased. Counsel asserted that the evidence presented by the Objector does not point to a *ngurario* (Kikuyu customary marriage contract), having taken place. This he says is because the fundamental component of the *ngurario* ceremony is the slaughtering of a ram or goat, an event the Objector never testified to. He urged that the *ngurario* is an integral ceremony which signifies the existence of a Kikuyu customary marriage without which there cannot be a valid Kikuyu customary marriage.
23. Mr. Muhuni submitted that whereas the Objector tendered evidence of cohabitation with the deceased, she did not call any witnesses to buttress her testimony that she and the deceased lived together as husband and wife. Counsel asserted that the mere fact that the Objector was recognized as a wife to the deceased during the burial, coupled with the fact that the 1<sup>st</sup> Administrator mentioned her as such does not qualify

her as a wife of the deceased in the absence of concrete evidence. Counsel urged that the evidence tendered by the Objector does not meet the threshold for invoking a marriage by cohabitation and her claim for marriage cannot therefore be accommodated.

24. I note that whereas Mr. Muhuni submitted extensively on whether the Objector qualifies as a wife of the deceased, this issue was never disputed during the hearing of this application.

25. From the record, it is evident that in petitioning for the grant of letters of administration, the Administrators listed the Objector as one of the dependants of the deceased in her capacity as a second wife of the deceased. This is shown at paragraph 4 of an affidavit sworn jointly by the Administrators on 15<sup>th</sup> September, 2011 in support of their petition for a grant. A letter dated 27<sup>th</sup> April, 2010 from the District Officer Kiambaa which also lists the Objector as one of the widows who survived the deceased is annexed to the Petition.

26. It is curious that the Administrators would on one hand admit that the Objector is the 2<sup>nd</sup> wife of the deceased while on the other dispute this at their convenience. The Administrators/Respondents through their various Counsels indicated to this court that they do not refute that the Objector was the second wife of the deceased. This is shown in the proceedings of 4<sup>th</sup> June, 2018 and 21<sup>st</sup> January, 2019.

27. It is suspect that the Administrators would choose to raise the argument of whether the Objector was a legal wife of the deceased at this point in time. Though a valid argument, I note that it is being raised too late as a mere afterthought since it was never relied upon during the course of these proceedings. To raise this argument now is to deny the Objector an opportunity to avail evidence to rebut the same.

28. In any event, there is on record two letters dated 22<sup>nd</sup> February, 2010 and 13<sup>th</sup> October, 2010 from the Royal Netherlands Embassy in Nairobi both of which recognize Veronica Wanjiku, the Objector herein, as the legal wife of the deceased. In the letter of 13<sup>th</sup> October, 2010 the Embassy states that its recognition of the Veronica was based on information given to the Embassy by the deceased before his demise. As such, I am inclined to hold that the Objector was the second wife of the deceased and therefore a beneficiary of his estate.

29. It is noteworthy that in this case, neither the Objector nor the 1<sup>st</sup> Administrator/Respondent led evidence as to what ceremony took place to signify their marriage to the deceased. All the 1<sup>st</sup> Administrator/Respondent did on her part was state that she was married to the deceased under Kikuyu customary law but failed to tender evidence that a Kikuyu customary marriage ceremony, if any, took place.

30. What follows then is for this court to deliberate on whether the Objector has made out a case to warrant the revocation of the grant as sought. The circumstances that can lead to the revocation of grant are set out in **section 76** of the **Law of Succession Act** which provides thus:

**“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;....”**

31. **Rule 26(1)** of the **Probate and Administration Rules**, provides that letters of administration shall not be granted to any Applicant without notice to every other person entitled in the same degree as or in priority to the Applicant. From the record, it is evident that the Administrators herein named the Objector as a dependant in petitioning for a grant of probate as shown at paragraph 4 of the affidavit sworn jointly by the Administrators in support of the petition. Further that the Objector was duly served with a citation dated 12<sup>th</sup> May, 2015 as demonstrated by the Affidavit of Service dated 13<sup>th</sup> October, 2015 sworn by a duly licensed process server. The Citation invites the Objector to appear in court to argue to the proposed mode of distribution of the deceased’s estate or show cause why she does not consent to the same.

32. In the premise, I find that the Objector was duly notified that the Administrators were petitioning for a grant of letters of administration. As such, the Objector’s claim that the proceedings to obtain the grant were defective because she was neither notified nor her consent obtained has no basis.

33. Based on the foregoing, I find that the Objector has not made out a case for revocation of grant as sought. The Administrators shall henceforth file an application for confirmation of the grant issued to them on 25<sup>th</sup> May, 2012 with a mode of distribution that caters for the Objector. The estate of the deceased shall be preserved under **section 45** of the **Law of Succession Act** until confirmation of the grant.

It is so ordered.

**SIGNED DATED AND DELIVERED IN OPEN COURT THIS 3<sup>RD</sup> DAY OF DECEMBER, 2019.**

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**L. A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of .....Advocate for the Objector/Applicant.**

**In the presence of.....Advocate for the Administrators/Respondents.**