



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 545 OF 2014

IN THE MATTER OF THE ESTATE OF PETER MWANIKI MAGONDU DECEASED

GRACE KANINI.....PETITIONER

V E R S U S

SAMUEL MAINA.....1ST PROTESTOR

DORIS WANJIKU MWANIKI.....2ND PROTESTOR

JUDGMENT

This matter relates to the estate of Peter Mwaniki Magondu (deceased) who died intestate on 26/3/1999 while domiciled in Kirinyaga. Temporary Letters of Administration were issued to Daniel Mugo Mwaniki and the certificate of Confirmation of Grant was issued on 8/12/2006. The estate of the deceased was distributed as follows:-

- Samuel Maina Mwaniki – Inoi/Kariko/1700 – Whole share.
- Daniel Mugo Mwaniki – Inoi/Kariko/1699 – Whole Share.
- Doris Wanjiku Mwaniki – Inoi/Kariko/1528 Jointly Share
- Mary Wanjiru Mwaniki - “ “ “
- Grace Kanini Mwaniki – Inoi/Kariko/1529 - Whole Share.

Prior to the confirmation of grant a protest was filed by Grace Kanini Mwaniki. After the protest was heard, the trial court ordered distribution of the estate as shown above.

An application for revocation of grant was filed by Doris Wanjiku Mwaniki who claims that she is one of the wives of the deceased. That she had two children namely GMM and DRM who were still minors (as at time of filing) and despite this the grant was issued to one administrator despite the existence of a continuing trust. That she was wrongly considered as a daughter of the deceased in the final judgment. As a result she was to share land parcel No. Inoi/Kariko/1528 with other daughters. This despite the fact that the deceased had sub-divided the land parcels and she was to get 1 ½ acres on land parcel No. Inoi/Kariko/1528. That all the daughters of deceased were to get land parcel No. Inoi/Kariko/1529 which is the land they use while she uses Inoi/Kariko/1528. She prays that the grant be revoked so that the wishes of the deceased can be realized.

In reply one of the beneficiaries Grace Kanini Mwaniki filed a replying affidavit and deposes that the applicant was a party in the proceedings and did not protest to the confirmation of grant. That if the applicant was not satisfied with distribution she could have filed an appeal and not a revocation of grant. She further deposes that the application is not properly before this court.

The court gave directions that the application proceeds by way of oral evidence. Parties adduced evidence.

I have considered the application. The issue which arise is the revocation of grant. ***Section 76 of the Law of Succession Act*** gives the circumstances which may lead to the revocation of the grant. These are where the proceedings to obtain the grant were defective in substance, the grant was obtained fraudulently by making of false statement or concealment from the court of something material or by making of untrue allegations. Where any of these circumstances are proved, the court will revoke the grant.

Section 76 of the Law of Succession Act Cap 160 states;

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

In Jamleck Maina Njoroge v Mary Wanjiru Mwangi [2015] eKLR

The court stated;

The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.

The Judgment of the trial Magistrate was that Doris Wanjiku was also a daughter and was getting 0.575 Ha which is twice the size given to her sister and there was no explanation. He proceeded to rule that the estate should be shared equitably.

The applicant produced a marriage certificate showing that she was married to the deceased Peter Mwaniki under The African Christian Marriage and Divorce Act Cap 151 Laws of Kenya on 16/6/94, Exhibit P-1-. The decision of the trial Magistrate was therefore in error as the applicant was the wife of the deceased and not a daughter. Due to this error, the trial Magistrate proceeded to make a wrong determination on distribution though stating that the distribution was equitable.

The applicant participated in the proceedings before the trial Magistrate and even filed a protest. Though she depones that she had minor children and there was a resulting trust which necessitated that there be two administrators, she never brought this issue to the attention of the court. Looking at the documents which were filed by the administrator, they did not state that the applicant was a wife. It was also not indicated that the applicant had two minor children. Though the names are given on form P&A -5- it is not indicated that they were minors.

There was clearly a concealment from the court of facts which were material to the case. That is why the trial Magistrate proceeded to state that the applicant was a daughter whereas she was a wife.

The proceedings were also defective since it has emerged that there were two minor children of the deceased who were beneficiaries. Section 58(1) of the Law of Succession Act provides:

“where a continuing trust arises –

a. no grant of Letters of Administration in respect of an intestate shall be made to one person alone except where that person is the Public Trustee or a trust Corporation.”

Where the Court is dealing with the succession of the estate of the deceased, all facts which are material must be disclosed to the court to enable it make an informed decision on the distribution of the estate. The issue as to who are the beneficiaries is a material factor which should be disclosed to the court. Failure to disclose beneficiaries and their status is a ground upon which the court will order a revocation of grant.

Be thus as it may the applicant has deponed that the minors are now adults and she should get her share in accordance with the wishes of the deceased so that she can share with her sons.

This has not been disputed and as the Will of the deceased will show the land was left to her.

When the protestor in the lower court, that is Grace Kanini testified, she never disclosed that the deceased had left a Will on how he wished his property to be distributed. The respondents did not help either as they only stated that the deceased had sub-divided the land. The trial Magistrate never referred to the Will in his judgment. Again this was a material none disclosure.

The applicant produced a document which she testified was the last Will of the deceased. The Will was produced as Exhibit -2-. The applicant testified that the deceased had given her 1 ½ acres and she was satisfied. He had given his daughters ½ an acre. He called PW-2- Francis Anthony Gichira who confirmed that the deceased had made a Will and had distributed his land. This was also confirmed by PW-3- Peter Githinji Mugo.

The respondent Grace Kanini denied knowledge of the Will. She admitted that she was given half of an acre. She called DW-2- who contradicted her testimony by stating that DW-1- was married but later returned home. DW-1- had stated that she was never married. The contradiction shows that DW-1- was not truthful and her testimony is not reliable nor credible.

DW-3- Samuel Maina who is a son of deceased confirmed that the deceased had distributed his land. He said they were four brothers and each got a share. The deceased was left with 1 ½ acres. One son died in 1996. Each brother got two acres and deceased was left with two acres. He confirmed that he was aware of the Will as he was present with all the sons of the deceased. The deceased had given Kanini and

her sisters half an acre (1/2). In short the witness stated that he stands by the Will of the deceased as he was aware of it.

Having considered the evidence, I find that it is proved that the deceased had made a Will which was produced in this court as Exhibit 020. The Will states that he had sub-divided ½ acre where his daughters will occupy. He has left 1 ½ acres to himself which belongs to him and his wife Doris Wanjiku. The deceased appended his signature in the presence of members of his family.

The petitioner Samuel Maina Mwaniki confirmed that the will executed by the deceased was true. None of the witnesses raised any objection to the validity of the same and/or sought to nullify the same It should therefore be considered as the last testament of the deceased.

In addition, the will is valid as per **Section 11 of the Law of Succession act** which states;

No written Will shall be valid unless—

a. the testator has signed or affixed his mark to the Will, or it has been signed by some other person in the presence and by the direction of the testator;

b. the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a Will;

c. the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the Will, or have seen some other person sign the Will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

As seen above, the testator had capacity to make the Will, he appended his signature in the presence of six witnesses and no dependant has claimed that they were left out of the Will. Consequently, the Will dated 22/02/1999 was properly executed by the testator and conformed with the formal requirements under **Section 11 of the Law of Succession Act**. In that regard, the deceased's estate should be divided as proposed in the Will.

Though the parties alluded to the deceased having distributed his estate when they appeared before the trial Magistrate, the Will was not produced as evidence. I am of the view that since the deceased had left a valid Will which even the petitioner has confirmed, the estate of the deceased should be distributed in accordance with his wishes as expressed in the Will which was his last testament.

In Conclusion

1. I find that the applicant has established grounds to warrant this court to revoke the grant. I order that the grant shall be revoked.

2. The estate shall be distributed as follows:-

- Doris Wanjiru Mwaniki shall get 1 ½ acres comprised in land parcel No. Inoi/Kariko/1528.
- The daughters – Mary Wanjiru Mwaniki & Grace Kanini Mwaniki shall get ½ an acre which is comprised in Land Parcel No. Inoi/Kariko/1529 which they will share equally.
- Samuel Maina Mwaniki will get whole share of Inoi/kariko/1700.
- Daniel Mugo Mwaniki to get whole share of Inoi/Kariko/1699.

The grant shall be confirmed and certificate be issued on those terms. This being a matter involving family members, I make no orders as to costs.

Dated at Kerugoya this 5th day of December 2018.

L. W. GITARI

JUDGE

Read out in open court.

Parties present

C/A - Naomi