



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
SUCCESSION CAUSE NO. 2356 OF 2003
IN THE MATTER OF THE ESTATE OF EUGENIA WAMUCHIE WAWERU
also known as EUGENIA WAMUCHIE HILDEBRAND (DECEASED)

RULING

1. The deceased herein died on 14th January 2002. Representation to her estate was sought in a petition lodged herein on 28th August 2003 by Margaret Muthoni Waweru and Kariuki Waweru in their capacities as sister and brother, respectively of the deceased. The deceased was expressed to have been survived by two siblings, that is the petitioners herein, and two children, Mara and Chantal Hildebrand. She was expressed to have died possessed of Delamere Flat D12. A grant of letters of administration intestate was accordingly made on 17th October 2003, which was rectified on 21st May 2007 to add aliases to the name of the deceased. The grant was confirmed on 11th December 2007, the estate was devolved to the two siblings of the deceased, Margaret Muthoni Waweru and Kariuki Waweru, in equal shares.
2. The summons dated 30th May 2014 seeks revocation of the grant of letters of administration made to Margaret Muthoni Maina and Kariuki Waweru herein on 17th October 2003. It is brought at the instance of Chantal Eileen Hildebrand and Sarah Wanjiku Waweru, and it is supported by the affidavits of the applicants and Mohamed Zahir Ud-din Ahmad Malik.
3. The grounds upon which the application is premised are found on the face of the application and the facts are set out in the affidavits sworn in support of the application. It is pleaded that at the time representation was sought the eldest child of the deceased had attained the age of majority and her consent ought to have been obtained by the administrators. The administrators failed to disclose at the confirmation of the grant that Mara and Chantal Hildebrand were the only beneficiaries entitled to inherit from the deceased. The administrators also wrongly presented themselves as the sole beneficiaries. Since confirmation of the grant the administrators have been wrongfully collecting rent from the Delamere flat which they do not account to the children of the deceased. The administrators subsequently sold the flat for Kshs. 7, 000, 000.00. The administrators are accused of not acting honestly and diligently in the administration of the estate.
4. The reply to the application is by an affidavit of Erastus Kariuki Waweru sworn on 13th February 2015. He avers that after the deceased was divorced from her children's father, the children abandoned her in Kenya and moved to the United States of America with their father. They did not leave a forwarding address of their whereabouts in the United States of America, and therefore he had no means of contacting them with regard to the succession cause. He alleges that their elder brother, Augustine Ngunjiri Waweru, took over the flat and a car belonging to the deceased, a Mazda KAA 177Z. The said Augustine, who is since deceased, is said to have proceeded to rent out the flat and sell the car. The deponent

therefore contests the allegation that the administrators took over the flat. He alleges that the deceased's personal belongings were taken to Sarah Wanjiku Waweru's rented house at a place called Mukuyu Market in Murang'a for storage. He denies suppressing any information from the court. He said that the administrators sold the flat and the shares as the father of the child showed no interest in the said property. He blames the father of the children of the deceased for driving the deceased to her death through depression. He states that the children and their father showed no interest even after the death was reported to them and they did not even attend the funeral of the deceased.

5. There is also an affidavit by Joseph Peter Maina, a brother-in-law of the deceased. He accuses the children of the deceased of having vanished completely and disowned the deceased. He relates to an incident in 1997, after the deceased was divorced from the father of her children, when he allegedly took her to where her children lived at Muthaiga with their father and the eldest child is said to have insulted the deceased and told her that she was not their mother. He claims that the deceased thereafter suffered depression which eventually led to her death.

6. There are several supplementary affidavits sworn by various persons to respond to the averments made in the affidavits in reply.

7. It was directed on 21st July 2015 that the application dated 30th May 2014 be disposed of by way of written submissions. Both sides complied with the directions and filed their respective submissions. I have had time to peruse through the said submissions as well as the authorities that have been cited.

8. It is not in dispute that the deceased was survived by two daughters. Their names were disclosed in the petition filed herein, as well as in the letter lodged herewith the petition from the local provincial administrator of the rural home of the deceased in Murang'a. The deceased herein died intestate, a fact which is not in dispute. She was divorced from her husband, and therefore the question of a surviving spouse does not arise. She was therefore survived only by the two daughters.

9. The law that governs distribution of the estate of an intestate who dies after 1st July 1981 is Part V of the Law of Succession Act, Cap 160, Laws of Kenya. As the deceased was unmarried as at the date of her death and was survived by children the relevant provision would be section 38 of the Act, which provides as follows –

'Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.'

10. It should be pointed out that Part V of the Act has set out a scheme indicating how the estate of an intestate is to be dealt with. The heirs are categorized into spouse, children, parents, siblings and so on. Under that arrangement, the surviving spouse enjoys priority, followed by the children, the parents of the deceased and his siblings. Where there is a surviving spouse, he takes the household and personal items absolutely. He is entitled to a life interest in the net intestate estate, with the property ultimately devolving upon the children in the event the life interest determines. That is stated in section 35 of the Act. Where there is no surviving spouse, the children take everything absolutely, according to sections 35(5) and 38 of the Act. Where there is no surviving spouse nor children, the next in line would be the parents of the deceased, who again take the entire estate absolutely. The siblings only have access where the intestate is not survived by spouse, children or parents.

11. It is plain from the facts before me that the persons who were entitled to the estate of the deceased herein were her children, Mara and Chantal Hildebrand. By the scheme of things they were entitled to take the entire estate absolutely, meaning that they were not to share it with anybody else. The administrators at the confirmation of grant ought to have had the estate devolved the property to the two children. If the children were not available in Kenya to immediately take over the property and manage it themselves, the administrators ought to have asked the court to confirm the property to them as administrators to hold the same in trust for the children until such time that the children were available to take the matter into their own hands.

12. It has been averred that the children had abandoned and renounced the deceased. The proposition that where a child abandons or denounces a parent loses her right to a share of the parent's intestate estate is not supported by the law. Whatever happens between a child and her parent does not in any way affect that child's inheritance rights, unless of course the child is convicted of the murder of the parent. The child is at liberty to waive or renounce her right. It is only the parent himself who can limit or extinguish the inheritance rights of such child by making a will where he disinherits the child for reasons given in the will. Even in such case, the child would still have the window provided by section 26 of the Law of Succession Act to ask the court to make reasonable provision for him.

13. It was pleaded that the administrators did not have contact with the children of the deceased. The language used is that they vanished. It was not pleaded that the administrators made any effort to trace the children nor was any evidence placed before me of any such efforts. It must be pointed out that when a person is appointed administrator, they become a trustee of the estate vested in them. The definition of trustee in section 2 of the Trustee Act, Cap 167, Laws of Kenya, includes personal representative. For avoidance of doubt, the said provision states as follows -

'... the expressions 'trust' and 'trustee' extend to implied and constructive trusts, and to cases where the trustee has a beneficial interest in trust property, and to the duties incident to the office of a personal representative, and 'trustee' where the context admits, includes a personal representative ...'

14. The vesting of property in administrators by virtue of section 79 of the Law of Succession Act consists them legal owners thereof, in the sense that the administrators would have the same powers over the property, subject to some restrictions, as the deceased himself would have had had he been alive. That notwithstanding, the administrators hold the property for the benefit of others, including themselves in some cases. That ideally puts them in a position of trust. The property ideally does not belong to them. They hold it only for a period, and for the sole purpose of distributing it to all those persons who are entitled to it. They therefore stand in fiduciary position with regard to the property and the beneficiaries. It is for this reason that they incur the burden of accounting of their management of the property to the beneficiaries.

15. One of the primary duties of an administrator is distribution of the estate. To facilitate distribution, the administrator must apply for confirmation of the grant as required by section 71 of the Law of Succession Act. Distribution must be to the persons entitled. Where the deceased died testate, it would be to the people named in the will. In intestacy it should be to the persons entitled as per Part V of the Act. It is the duty of the administrators to ascertain those persons. The process of ascertaining them may require the administrators to incur expenses in hiring investigators and buying space in the media to put up notices.

16. To the charge that the administrators had benefitted from rents collected from the Delamere flat, the respondents have pointed accusing fingers at their elder brother, Augustine. They claim he took over the property, procured tenants and collected rents that he never accounted to them. They also allege that he took charge of a motor vehicle.

17. Under section 83 of the Act, the administrators have a duty 'to get in all the free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death.' This is what is described as the duty to call in or collect or gather the estate. The property of the deceased was vested in the administrators herein upon their appointment to that office in 2003. They cannot plead helplessness with respect to the conduct of their elder brother. It was them who were the administrators, it was them therefore who incurred the duty to take charge of the flat. It was equally their duty to collect the rents, and to recover the amounts that he had collected before he died, and to recover the proceeds of sale of the motor vehicle from him. They also had opportunity to recover those funds from his estate upon his death.

18. Section 82 of the Act gives the administrators power to do these things. However, it would appear that the administrators were either ignorant of what they were supposed to do, or they were unwilling, or they were simply incompetent. Either way there was lack of diligence on their part in the way they handled the

estate. It is clear to me that estate property was lost at their watch. It is also clear that there were assets that the administrators did not collect. They themselves mention a motor vehicle. The draft will of the deceased placed on record by their sister mentions three bank accounts and shares. Yet when the administrators moved the court they only mentioned the Delamere flat. They had a duty to ascertain the assets. Clearly, they did not discharge their duty to ascertain the assets nor to collect them in readiness for distribution. It would appear that they were only interested in appropriating the most lucrative property to themselves.

19. The applicant pleads that her elder, Mara, was of age at the time the cause herein was being initiated in 2003. She complains that Mara was not consulted prior to the petition being lodged in court. She has attached a birth certificate serial number 138648 dated 28th September 1983 as proof of her assertion. The certificate indicates that Mara was born on 12th August 1983. The certificate of death on record indicates that the deceased died on 14th January 2002, which would mean that at the date of her death Mara was at age of eighteen and some months. The petition herein was lodged in court on the 22nd August 2003, at which time Mara was twenty years and ten days old. The petition put her age at seventeen.

20. In intestacy, the priority with respect to representation is given to the surviving spouse followed by the children, followed by parents and the siblings of the deceased. That is the effect of section 66 of the Law of Succession Act. Going by that provision, it is obvious that the administrator's right to administration of the estate of the deceased was inferior to that of Mara as she had attained the age of majority by then. She had a prior right to representation to her mother's estate over the administrators.

21. Section 66 has to be read together with Rule 7(7) of the Probate and Administration Rules, requires the person with an inferior right to administration, who petitions for a grant in intestacy, to satisfy the court that the person with prior right has renounced their right or has consented in writing to the grant being made to the petitioners or has been issued with citations. I have not seen any renunciation or consent by the applicant, nor is there proof that citations were issued at the instance of the administrators for service upon Mara.

22. The application for determination seeks revocation of a grant. The law on revocations is section 76 of the Law of Succession Act. The provision identifies three general grounds for revocation – where the process of obtaining the grant was fraught with irregularities, where the administration process had difficulties and where a grant has become useless and inoperative.

23. The applicant appears to found her case on the general ground that there were irregularities in the process of obtaining the grant. She points to the fact that although she was of age, and should have been consulted she was not consulted. There is evidence that she was of majority age at the time. According to section 66, her right to apply for administration was superior to that of the administrators. Under Rule 7(7) she should have been consulted, so that she could either renounce her right or consent to the administrators' petition. The omission to consult her, and in particular the failure to comply with Rule 7(7) constitutes a defect in the proceedings. I do not think the administrators can plead ignorance of the age of the applicant. She is their niece; they should have had an idea as to her age. In any event they had access to the deceased personal items, from which it is presumed they could access information on the applicant's age.

24. Related to the above is the fact that the administrators stated her age in the petition at seventeen. That information was no doubt incorrect. Given the blood relationship between the parties, and what I have alluded to above, that the administrators had access to the deceased personal belongings after she died, one may conclude that the administrators suppressed information as to the age of the applicant at the time they sought representation. It could be argued that they practiced fraud and misrepresentation which is a ground for revocation.

25. I have noted above that it would appear that there were assets of the estate that were not collected. The administrators talk of their elder brother having had taken over the flat and the car. He used to collect rent. He sold the car. When they took over as administrators they appear to have done nothing to recover the money collected by him as rent and received by him as sale proceeds for the car. It would appear that

there are three bank accounts that were not brought on board. There were shares too in a company that were not administered. Under section 76(d) (ii) of the Act the failure to proceed diligently with administration of the estate is a good ground for revoking a grant. It would appear to me that the administrators herein focused on just two assets and did not do due diligence to unearth the other assets of the estate and to bring them on board.

26. I note too that although the two children of the deceased were listed as survivors of the deceased, they were not provided for on distribution. As survivors they were entitled to be updated on the goings on regarding the administration of the estate of the deceased, inclusive of the distribution. There was and there still is a duty to account to them.

27. I am constrained to allow the application dated 30th May 2014 in the following terms –

- a. **That the grant made herein on 17th October 2003 is hereby revoked;**
- b. **That the matter shall be mentioned on a date to be given in court at the delivery of this ruling for appointment of new administrators;**
- c. **That as a consequence of (a) above, the orders made on 11th December 2007 confirming the said grant are hereby set aside, and the certificate of confirmation of grant derived from the said orders hereby cancelled;**
- d. **That all transactions founded on the said certificate of confirmation of grant are hereby nullified;**
- e. **That the administrators appointed by the grant of 17th October 2003 are hereby directed to place before the court a true and accurate account of their administration of the estate herein from 17th October 2003 to date;**
- f. **That the said account to be filed in court within thirty (30) days from the date of this ruling; and**
- g. **That the applicant shall have costs of the application.**

DATED, SIGNED and DELIVERED at NAIROBI this 20TH DAY OF JANUARY, 2017.

W. MUSYOKA

JUDGE