REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1568 OF 1994

IN THE MATTER OF THE ESTATE OF PAUL MWAURA THUO (DECEASED)

RULING

1. The application to be determined is a summons dated 6th June 2013, for confirmation of the grant herein made on 16th December 2013. The said application is brought at the instance of Patricia Wanjiku Mwaura, in her capacity as administrator of the estate of the deceased. She lists herself as the sole survivor of the deceased, and proposes that the entire estate be devolved upon her absolutely.

2. There is an affidavit of protest to the confirmation of the grant sworn on 28th October 2015 by Monica Wanjiku Thuo. She avers to be bringing the protest on her own behalf and that of her son, daughter-in-law and grandchildren. She states that the deceased had voluntarily taken her in with her family and expressly recognized and accepted her as his family and maintained her and her family at his last known place of address. She appears to suggest that she is a dependant in terms of sections 3(2) and 29(b) of the Law of Succession Act, Cap 160, Laws of Kenya. She alleges that the deceased had given her and her family all his estate when he was ill, and they all took possession. The property was allegedly made to her and her family as a gift in contemplation of death. He then followed that up with a written will made on 30th December 1993. She also mentions that he had also written a letter to his lawyers, Kamere & Company Advocates, expressing those wishes and intentions. It is alleged that he lived with the deponent and her family for three years. The administrator and her mother and sister, now deceased, are said to have surfaced only after he died. She states that Kubo J. had ordered that the administrator herein do undergo a DNA test but she refused. She asserts that the administrator is not a biological daughter of the deceased. She adds that even if the administrator was a daughter of the deceased, she had been provided for by being given the assets listed in the deponent's affidavit at paragraph 19.

3. The administrator has responded to the application through an affidavit sworn on 10th February 2016. She asserts that she is the only child of the deceased. She avers that the will alleged by the protestor was rejected by the court in a ruling delivered in this matter on 16th December 2011. She states that the protestor had denounced Mr. Kamere, the advocate who allegedly prepared the alleged will, saying that he took advantage of the deceased's ill to prepare a false will. She says that it was because she was a daughter of the deceased that Bosire J. ordered that the deceased's body be released to her for burial. She contests the allegation that the court had ordered that she undergoes a deoxyribonucleic acid (DNA) test. She asserts that the protestor's husband is alive.

4. There is a second protest by Julius Joseph Gitau Njuguna, through an affidavit sworn on 28th October 2015. The said affidavit is on all fours with that of the first protestor, Monica Wanjiku Thuo. He alleges that the deceased took them in and maintained them immediately prior to his death by virtue of sections 3(2) and 29 of the Law of Succession Act. He and his family allegedly lived with the deceased in his plot at Kasarani and that the family did subsistence farming at his plot at Ngundu where the deceased was buried. She asserts that they were lodging their claims as per the orders made on 16th December 2011 and

2nd October 2015. He alleges that the property was given to his family by way of gifts in contemplation of death. He repeats the allegations made by the first protestor that the deceased had made a will in which he had named her as sole executrix and trustee of his estate. He refers too to that letter to Kamere & Company, Advocates where the deceased had allegedly expressed his final wishes. He alleges that they took possession of the property and all the documents of title, and they have been living on the estate of the deceased for over twenty years and that was the only place they knew as home, and therefore the property rightfully belonged to him and his family. He asserts that the administrator and her family did not take care of the deceased when he was in hospital, and that they only materialized after his death to lay a stake to the estate.

5. The administrator has responded to the said affidavit by her affidavit sworn on 10th February 2016 where she advances arguments similar to those made in her affidavit sworn on 10th February 2016 in reply to that sworn by Monica Wanjiku Thuo.

6. The first protestor swore another affidavit on 17th June 2016 in reply to the summons for confirmation where she advances arguments similar to those made in her earlier affidavit. There is also a joint affidavit by Beatrice Wambui Njuguna, Simon Chege Njuguna, Irene Wanjiku Njuguna, Antony Kibutu Njuguna, Anna Njeri Njuguna and Gabriel Maina Njuguna, all supporting the position taken by the first protestor.

7. According to section 71 of the Law of Succession Act, which provides for confirmation of grants, the court confronted with such application has to address itself to two matters: appointment of administrators and the administration itself on one part and distribution of the estate. In other words, the court is called upon to consider whether the grant of representation was made properly, whether the administrator is and will carry on properly with administration; and secondly it has to consider how the estate is to be distributed. I will consider each of the two broad areas in part.

8. On the issue of appointment of administrators, I have perused the record and established that an order was made on 16th December 2011 appointing the applicant herein, Patricia Wanjiru Mwaura, administrator of the estate of the deceased in intestacy. This was after the court had conducted a trial where the issue of the will that the protestors have raised in the protest came up for consideration. It was found that the deceased had died intestate and that his estate fell for distribution in intestacy. The allegation by the protestors that the deceased had in fact died testate having made a will in which he had appointed the first protestor an executrix and trustee is clearly *res judicata*. There is nothing on record to indicate that that decision was ever challenged on appeal, or that the said orders were ever reviewed. They therefore remain valid. The appointment of Patricia Wanjiru Mwaura remains valid, and the conclusion that there was no valid will remains intact. The holding that there was no valid will can only mean that the first protestor could not possibly be an executrix and trustee as alleged. There is therefore no basis upon which I should not confirm the appointment of Patricia Wanjiru Mwaura as administrator of the estate of the deceased. That is how I shall dispose of the first part of the application.

9. For the second part, I do note that the estate is to be distributed in intestacy. The provision which addresses this aspect is the proviso to section 71(2) of the Act, which states as follows -

> *'Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled: and when confirmed the grant shall specify all such persons and their respective shares.'*

10. My understanding of the above is that the court has to consider three things. The first thing is that the court should determine who the survivors of the estate are, or at least the persons beneficially entitled to a share in the estate. Secondly, the court should determine the assets that are available for distribution. Finally, the court should consider how the assets found to comprise the estate of the deceased are to be shared out as between the persons who are found to be entitled to a share in that estate.

11. On the persons entitled to a share in the estate of the deceased, I shall be guided by the decision of Dulu J. delivered on 16th December 2011. In that matter, the court was handling objection proceedings

where oral evidence was taken from witnesses. In the end the court concluded that the mother of the administrator applicant herein had been married to the deceased. It was also found that the administrator was a child of the deceased. The protestors had raised the issue of the paternity of the administrator in those proceedings and insisted that she produces DNA results. The court noted that the deceased had not raised the issue of the child's paternity, and therefore it was not up to anybody else to raise it, after all the deceased had treated the administrator applicant as his child, and the DNA test was therefore not necessary in the circumstances. The court concluded that since the administrator applicant was born during cohabitation between the deceased and the applicant's mother, and the deceased had treated her as his child she was a child of the deceased.

12. What about the protestors? The court focused its mind on the administrator and concluded that the she was the heir apparent to the estate. It was held that the protestors could be persons interested in the estate of the deceased, and if so, they had to prove their claim in the estate. In the final orders, the court ordered that any person with claim to the estate was to file their claim in the proceedings stating clearly their claim for the court to make a determination. The court made specific orders directed at the protestors, to file their claim and propose a distribution. I have carefully perused through the record and noted that the protestors filed no such claim, and waited till after the administrator had filed for confirmation of the grant and stake their claim through affidavit of protest.

13. The court has made a finding that the deceased died intestate. It has also identified the administrator to be the sole heir to the estate. She is identified as a child of the deceased. Distribution of estates in intestacy is provided for in Part V of the Law of Succession Act. The deceased herein was survived by a child but no spouse. Distribution in such circumstances is governed by section 38 of the Act, which provides as follows –

> *'Where an intestate has left a surviving child but no surviving 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.'*

14. Given that the deceased was survived by a child but no spouse, the entire intestate estate ought to devolve wholly upon her as per the provisions of section 38 cited above. Sections 41 and 42 of the Act do not apply in the circumstances. Section 41 provides for the handling of the interest of children who are underage, the applicant herein is not underage. Section 42 provides for various previous benefits that the court ought to take into account. The question of previous benefits has not arisen in these proceedings and therefore the provision is not relevant to what is for determination in these proceedings.

15. As the estate is for distribution only to the administrator as the sole surviving child of the deceased as per section 38 of the Act, any other claimant has to come as a dependant as defined under section 29 of the Act. Dependancy is defined in Part III of the Law of Succession Act. Any person who seeks to have the court provide for him must move the court under section 26 of the Law of Succession Act, which provides as follows –

> *'Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.'*

16. From the provisions of section 26 it is clear that the court will make provision for a dependant upon the said dependant moving the court to order that reasonable provision. The protestors have not moved the court under section 26 of the Act. There is no application before me brought under section 26, and the administrator has not been given an opportunity to confront an application properly brought under that provision. What is before me is an application for confirmation of grant, and I am bound to deal with it within the confines of the provisions of section 71 of the Act. If the protestors desired that the court

considers them as dependants of the deceased and to make provision for them, then they should have brought an application under section 26. Dulu J. gave them that window in the ruling delivered on 16th December 2011, however, it would appear, the protestors did not avail themselves of the opportunity. As there is no application before me for reasonable provision properly brought under section 26 of the Act, there is no basis for me to find that the protestors were dependants of the deceased and to make provision for them in the circumstances.

17. I note that the protestors have cited section 3(2) of the Act, to justify their claim to the estate. Section 3(2) defines the terms 'child' and 'children,' as used in the Law of Succession Act. According to that provision, a child of the deceased includes any person that the deceased had 'recognized or in fact accepted as a child of his own or voluntarily assumed permanent responsibility over.' To a large extent the issue as to whether the protestors were persons who could be considered as children of the deceased for the purpose of succession is *res judicata*. The matter came up before Dulu J. but it was concluded that the deceased had only one child, the administrator who was the sole heir to his estate. That decision has not been challenged on appeal and that holding stands. I cannot deal with it without reopening the matter. In any event, it I my view that a person cannot be said to have assumed parental responsibility over both a mother and her children. I do not think that section 3(2) was meant to apply to such circumstances. The only remedy available to the protestors should have been to move the court under section 26 of the Act.

18. In view of everything that I have stated above, it is my conclusion that the protestors are not beneficially entitled to the estate of the deceased.

19. The assets that are said to comprise the estate of the deceased are set out in the affidavit sworn by the applicant in support of the application. The protestors have raised issues concerning some of the assets. They argue that the deceased had gifted some of assets to them in contemplation of death. They have cited section 31 of the Act to justify that assertion.

20. A gift of contemplation of death is defined as one made during lifetime that is conditional on the death of the maker of the gift. There must be a gift and it has to be conditional on death. From the material placed before me, the protestors only allege that the deceased allowed them to live on estate property, but there is neither allegation nor proof that the deceased made gifts of the said property to them and that the making of such gifts was conditional on the deceased dying within some reasonable period of time. There are two other conditions attached to the validity of a gift in contemplation of death. One being that the gift must have been delivered to the donee by the donor. No evidence of any kind was tendered to prove that the assets that make up the estate of the deceased were ever delivered to the protestors by the deceased. There is therefore no proof that that condition was ever complied with. The other condition is that the property the subject matter of the gift must be movable. The bulk of the estate of the deceased is immovable, and therefore the assets could not possibly have been the subject of gifts in contemplation of death. There were shares in corporate firms, moneys in the bank and motor vehicles. These could be subject to gifts in contemplation of death, unfortunately no evidence was presented of the delivery of these assets to the protestors by the deceased, or proof that they were gifts intended to be effective upon the death of the deceased. I find no basis upon which I can hold that the deceased had made a gift of his entire estate or part thereof to the protestors as gifts in contemplation of death.

21. Overall, I have no basis for finding that all the assets listed in the applicant's application are not available for distribution.

22. The only matter that awaits determination is how the estate ought to be distributed. I have found that the administrator is the sole heir to the estate as the protestors have not proved their dependancy and they have not proved to be children of the deceased. The intestate estate is available for distribution in terms of section 38 of the Act.

23. In the end I am moved to make the following orders: -

(a) That l hereby allow the application dated 6th June 2013 and dismiss the protests on record brought against the said application;

(b) That the grant of letters of administration intestate made herein on 16th December 2011 to Patricia Wanjiku Mwaura is hereby confirmed;

(c) That the estate of the deceased shall be distributed as per paragraph 5 of the affidavit of the applicant sworn on 6th January 2013 in support of the application;

(d) That a certificate of confirmation of the said grant shall issue accordingly; and

(e) That the applicant shall have costs of the application.

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

W. MUSYOKA

JUDGE