



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 412 OF 2013

IN THE MATTER OF THE ESTATE OF JACKSON NDUVA KATHULA (DECEASED)

TABITHA KALEKYE KIMEU.....1ST PETITIONER

PATRICK MUTHUI KATHULA.....2ND PETITIONER

VERSUS

CECILIA MWELU NDUVA.....APPLICANT

RULING

A grant of letters of administration intestate was issued herein on 26th February 2015 to the 1st and 2nd Petitioners herein, with respect to the estate of Jackson Nduva Kathula (hereinafter referred to as “the Deceased”). The two Petitioners subsequently filed a summons for confirmation of grant on 14th August 2015.

While the said summons was pending hearing, the Applicant filed a Summons for revocation of grant dated 27th November 2015 seeking orders that the grant issued to the Petitioners be revoked, and that the Court be pleased to include the Applicant as the sole administrator/beneficiary of the estate of the Deceased. The Court at the hearing on 11th October 2016 directed that the Applicant’s summons be heard and disposed of by way of written submissions.

The grounds for the application are that the Applicant and Deceased were married on 11th May 1991, and the Petitioners despite being aware of the marriage proceeded to apply for a grant of administration intestate without informing or including the Applicant. The Applicant attached a copy of the marriage certificate, and stated that she is the only person entitled to apply for letters of administration as the deceased was not married to any other person.

The Applicant further averred that the procedure followed in the grant of letters intestate to the Petitioners was substantially flawed and defective for material non-disclosure for the following reasons:

- a) The Applicant herein was never disclosed as beneficiary of the deceased during the whole process of the application for letters of administration intestate .
- b) Despite the Applicant being the only person entitled to apply for the grant of letters of administration intestate, the said Applicant was never notified of the intention to apply for grant of letters of administration.
- c) The Applicant's consent was never obtained before filing of the petition for grant with no

affidavit being filed as required under Rule 26 of the Probate and Administration Rules, and the Applicant not having renounced probate nor having received any citation.

d) The letter from the chief attached to the petition for grant of letters of administration intestate is not from the area chief where the deceased hailed from.

e) The Petitioners are strangers to the estate of the deceased.

The Applicant denied that the 1st Petitioner is a second wife of the deceased or that the deceased had two wives, and claimed that the Deceased's funeral arrangements and announcements recognizing the 1st Petitioner as a wife were done by the 1st Petitioner and the Deceased's siblings without her consultation and in her absence. She also annexed an affidavit sworn on 16th February 2016 by Augustine Muthinzi Kasilia, the area Chief of Tungutu location, who stated that the Applicant was found to be the only legal wife of the deceased after a family meeting.

These averments were made in the Applicant's supporting and supplementary affidavit sworn on 27th November 2015 and 10th February 2016 respectively, and in submissions dated 18th November 2016 filed by Mutinda Kimeu & Company Advocates, the counsel for the Applicant. The said counsel relied on sections 76 of the Law of Succession Act, Rule 26 of the Probate and Administration rules and various judicial authorities for the arguments made.

The Response

The Petitioner filed a replying affidavit she swore on 13th January 2017, wherein she claimed that she is the 2nd wife of the deceased and they had one child called Esther Ndele, and lived with the deceased at his Nairobi residence until his death. She attached a copy of the child's birth certificate showing the Deceased as her father, and of the burial programme where she and her daughter were recognized as part of the deceased family.

Further, that the deceased's family recognised her as his wife and she attached affidavits by Patrick Muthui Kathula, Rose Kavithe Mutia and Joseph Kiema Kathula, who are the deceased's brother, stepsister and another brother respectively. The said deponents attested to the Deceased having two wives, namely the Applicant and 1st Petitioner, and one daughter, and to having been told so by the Deceased before his death.

The Petitioners' legal counsel, M.M. Kimuli & Company Advocates, did not file any submissions despite being given the opportunity to do so.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the Applicant and Petitioners. The issue to be decided is whether the grant issued to the Petitioners should be revoked. The grounds for revocation of a grant are provided in section 76 of the Law of Succession as follows:

“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 has ordered or allowed; 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.”

The Applicant asks for revocation of the grant on account of non-disclosure of her status as the Deceased's sole beneficiary. The Petitioners admits that the Applicant is the 1st wife of the Deceased. However, the Petition for grant of letters of administration intestate and affidavit in support thereof that the Petitioners filed herein on 3rd July 2014, and their summons for confirmation of grant filed on 14th August 2015 do not include the Applicant as a beneficiary, neither is her consent to the said Petition and summons given.

It is thus evident that the proceedings by the Petitioners did not conform with the procedure required to be followed in applying for grant of representation of the estate of a deceased person. Section 51 of the Law of Succession Act provides as follows in this regard:

1) Every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.

(2) Every application shall include information as to—

(a) the full names of the deceased;

(b) the date and place of his death;

(c) his last known place of residence;

(d) the relationship (if any) of the applicant to the deceased;

(e) whether or not the deceased left a valid will;

(f) the present addresses of any executors appointed by any such valid will;

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then

deceased;

(h) a full inventory of all the assets and liabilities of the deceased; and

(i) such other matters as may be prescribed.

(3) Where it is alleged in an application that the deceased left a valid will—

(a) if it was written, the original will shall be annexed to the application, or if it is alleged to have been lost, or destroyed otherwise than by way of revocation, or if for any other reason the original cannot be

produced, then either—

(i) an authenticated copy thereof shall be so annexed; or

(ii) the names and addresses of all persons alleged to be able to prove its contents shall be stated in the application;

(b) if it was oral, the names and addresses of all alleged witnesses shall be stated in the application.

(4) No omission of any information from an application shall affect the power of the court to entertain the application.

Rule 7(1) of the Probate and Administration Rules reiterates the procedure to be followed and details to be provided.

The requirements as to giving of consent to an application for grant of administration intestate by any Applicant is found in Rule 7(7) of the Probate and Administration Rules as follows:

“(7) Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has—

(a) renounced his right generally to apply for a grant; or

(b) consented in writing to the making of the grant to the applicant; or

(c) been issued with a citation calling upon him either to renounce such right or to apply for a grant.”

Rule 26 of the said Rules in addition requires notice to, and consent by all persons entitled to a grant in equality or priority to the Applicant as follows:

“(1) 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.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

(3) Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree.”

The Applicant's summons for revocation of grant dated 27th November 2015 is therefore found to have merit for the foregoing reasons. This Court accordingly orders as follows pursuant to section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules:

1. The grant of letters of administration intestate issued herein to Tabitha Kalekye Kimeu and Patrick Muthui Kathula on 26th February 2015 with respect to the estate of Jackson Nduva Kathula (Deceased), be and is hereby revoked.
2. The Summons for confirmation of grant dated and filed herein by the Petitioners on 14th August 2015 is hereby expunged from the record.
3. The issue as to whether Tabitha Kalekye Kimeu is a legal wife of the Deceased shall proceed to hearing by *viva voce* evidence, and the Applicant and Petitioners shall file and serve their witness statements and/or affidavits of witnesses they shall call and within 60 days of the date of this Ruling.
4. There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 7th day of March 2017.

P. NYAMWEYA

JUDGE