



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT SUCCESSION CAUSE NO. 415 OF 2010

IN THE MATTER OF THE ESTATE OF MUTHUNGU MACHARIA (DECEASED)

GEOFFREY KAMOTHO MUTEITHIA.....APPLICANT

V E R S U S

MARY WANGU MUTHUNGU.....RESPONDENT

R U L I N G

The summons general before me is dated 26/5/17 and is brought under Rules 25 and 26 of the Probate and Administration Rules;

It seeks the orders;

1. The Honorable Court be pleased to issue grant of letters of administration intestate to GEOFFREY KIMOTHO MUTEITHIA
2. The costs of the application be in the cause

The application is supported by the affidavit of Geoffrey Kimotho Muteithia sworn of 26/5/2016. According to his affidavit the deceased **MUTHUNGU MUTEITHIA** was a brother to the applicant and the husband to the respondent who is now his widow.

That the deceased was the registered proprietor of **L.R. IRIAINI/GATUNDU/89**. That this land was registered in trust for deceased and himself, and upon his death, the applicant approached the widow to file a succession cause with him (the applicant) but she declined. He proceeded to file the cause by himself and obtained grant of letters of administration intestate on 2/6/1994. He applied for confirmation of the grant on 20/2/1995 so that the only asset of the deceased could be shared equally between him and her, that the court told them to go and share the property and at home but they never did. This is borne by the record which shows that on the 2nd April 1996 they appeared before the DR then J.S Mushelle, and the applicant wanted the land shared but the respondent stood her ground and stated that she wanted the whole parcel transferred to her name.

The applicant further averred that in 2006 the matter was transferred to the High Court. On 4/6/2015 the court issued a notice of revocation and the grant was revoked by the court. That failure to complete the administration of the estate was caused by the lack of cooperation on the part of the respondent, given the opportunity he would now proceed with speed and complete the administration of the Estate.

The respondent was absent during the hearing of the application. Upon perusal of the record I came across an affidavit of protest from the respondent, filed on 21/1/1997, to the effect that the deceased was

her husband, that they had 10 children between them before he died, that the applicant was a stranger to the deceased estate and had no right to inherit anything it, that he had filed the cause without her knowledge. Further that there was no consent filed by the survivors of the deceased, neither had any of them been served with any citation to refuse or accept the granting of the letters to the applicant.

It is only proper that she ought to have been served.

There is an affidavit of service filed on 12/4/17 sworn by Christopher Wanjohi Waweru process server that on 23/3/17 he proceeded to the home of the respondent at Gichira village, met an old lady and another younger woman who introduced herself as daughter in law by name Jane Nyaguthii and accepted service and signed the reverse of the summons.

Before I proceed to the application my view is that this service was not properly effected.

The affidavit gives no details giving the impression that there was no service.

- (1) Who was the old lady referred to in the affidavit?
- (2) What did she say about the papers?
- (3) Why did she not sign documents herself yet she was present if she was the respondent?
- (4) Whose daughter in law is Jane Nyaguthii
- (5) How did the process server know that that was the home of the respondent?

Serving and receiving process are crucial components of any litigation and if not properly done can cause great injustice. A process server has an obligation to not only effect service but also to give a full and complete account of the process.

In this case the detail is lacking and I am not satisfied that service was properly effected.

In view of the fact that the before the grant was revoked there was a protest it was imperative that the respondent be served and a proper return of service filed.

The applicant did not also tell the court the truth when he said that there were only two beneficiaries to the estate of the deceased, himself and his sister in law.

He is also not in priority in the list of persons who can administer the estate of an intestate. Section 66 of LOSA lays down the general rule on the preference to be given to certain persons to administer where deceased died intestate. That;

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference— inter alia

- (a) surviving spouse or spouses, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

It is also clear that he flaunted the clear provisions of the law to notify every person entitled to benefit as required by Rule 26 (1) which 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.

The court is there enjoined by rule 73 of the P&A rules to ensure that there is no abuse of its process and that the ends of justice are met. Hence it is imperative to comply with rule 25(3) of the P&A rules which provides that the court shall **not** make a grant until all inquiries which it may require to be made have been answered to its satisfaction...

There are many questions that need answers before any fresh grant can be issued.

I have perused the entire record as placed before me and what I found is lack of any proof that this parcel of land was registered in trust for the deceased and the applicant so as to form the basis of issuance of a grant to the exception of all the beneficiaries, and in particular the widow of the deceased and her children. Muthungu Macharia died on 27th May 1993. The applicant obtained a letter from the Chief Iriaini Location dated 6th December 1993 to enable him file succession case. It does not talk about the deceased's family. The copy of green card in the file shows that the title deed was issued to MUTHUNGU S/O MACHARIA on 26th May 1958. The applicant has not demonstrated why he never pursued the so called trust all the years that the deceased was alive.

As I have noted herein above the respondent is the widow of the deceased, she averred in her affidavit of protest that the applicant is a stranger to the estate. There is nothing in the record to show otherwise. The court cannot turn a blind eye to that.

Hence I decline to grant the orders sought for now until;

- 1) The respondent is properly served
- 2) Her children who are the next in line as beneficiaries to their father's estate are also served.
- 3) That proper affidavits of service are filed.

As I conclude I noted that the file record is incomplete. The matter was transferred from the lower court and some proceedings appear to be missing. I direct that the in charge probate and administration registry to ensure the record is complete and properly arranged.

The application is dismissed with no orders as to costs.

Dated, signed and delivered this 13th Day of June 2017 at Nyeri.

TERESIA MATHEKA

JUDGE

In the presence of;

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Court Assistant Harriet