



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 429 OF 2009

IN THE MATTER OF THE ESTATE OF DANIEL MUSYOKA WAMBUA (DECEASED)

ALEX MBEVA MUSYOKAPETITIONER/RESPONDENT

VERSUS

ROSE KAMENE.....OBJECTOR/APPLICANT

RULING

The Summons

The Petitioner herein was substituted as administrator of the estate of the deceased Daniel Musyoka Wambua in the place of his deceased mother, Teresia Kalondu Musyoka, who was the one initially issued with a grant of administration with respect to the said estate. The Objector herein claims to be a wife of the deceased Daniel Musyoka Wambua, and has filed an application by way of summons for revocation of grant dated 9th June 2015, wherein she seeks the following orders:

- That the Respondent be restrained from disposing, acting or in any manner dealing with the estate of the deceased in purported administration of the estate pursuant to the grant the hearing and determination of the application.
- That the grant of letters of administration issued to Teresiah Kalondi Musyoka who died on 7/2/2011 and confirmed to Alex Mbeva Musyoka on 10/9/2014 be revoked and/or annulled.
- The objector herein, her two daughters Beth Mukulu Musyoka, Nduku Musyoka and her niece Faith Mukonyo be included in the list of beneficiaries of the estate of Daniel Musyoka Wambua.
- The assets which were not listed in the petition particularly Mitaboni/Ngiini/143, Mitamboni/Ngiini/1468, Mitamboni/Ngiini/1477, Mitamboni/Ngiini/1769 and death gratuity civil aviation to be included in the estate of the late Daniel Musyoka Wambua.

The application is supported by an affidavit sworn by the Objector on 9th June 2015 and a further affidavit she swore on 7th October 2015. The grounds thereof are that the Respondent is denying the Objector and other beneficiaries access to assets of the deceased, that he did not include Mitaboni/Ngiini/1437, Mitamboni/Ngiini/1468, Mitamboni/Ngiini/1477, Mitamboni/Ngiini/1769 and death gratuity civil aviation in the estate of the late Daniel Musyoka Wambua, and that he has failed to list the Objector, her two daughters Beth Mukulu Musyoka and Nduku Musyoka, and her niece Faith Mukonyo and her family as beneficiaries.

The Objector also stated that the Petitioner's deceased mother Teresia Kalondu Musyoka had been divorced for a long time, which divorce was witnessed by elders. She averred that the Petitioner's mother clearly stated in an affidavit dated 6th June 2009 that the late Daniel Musyoka Wambua was a

polygamous man, but that she failed to list all the dependants of the estate of the Late Daniel Musyoka Wambua in the two petitions she lodged in court in succession Cause No. 510/2009 and 429/2009, and did not include the Objector herein and her family in the list of dependants. The Objector also claimed that there was a burial dispute between herself and her co-wives in Machakos CMCC 636 of 2005, and she attached a copy of the pleadings in the said case.

The Objectors' learned counsel, Andrew Makundi & Co Advocates, filed submissions dated 15th December 2015, in which it was argued that the Respondent's mode of service was defective as the court process server served the Objector in person and not the advocate on record. Secondly it was argued that from the proceedings and judgment of the lower court in Machakos CMCC 636 of 2005, the Petitioner's mother knew of the existence of the Objector as a wife of the deceased and had fraudulently concealed this from court.

In addition that the Objector, her daughters and niece were dependants within the meaning of section 29(a) of the Law of Succession Act. The Objector submitted that she knew all the assets of the deceased and argued that she was not an intermeddler in the deceased estate, and was in possession and occupation of the said parcels of land by virtue of being the deceased wife and also a beneficiary of the estate. She referred to the decision in **In the matter of the estate of Simon Peter Maingi Mbuba Kitaa-Weleje, Succession Cause 1127 of 2002** in this respect.

The Response

The Petitioner filed a replying affidavit in response sworn on 24th September 2015. He denied that the Objector was excluded from the grant dated 11th July 2014. The Petitioner stated that he was aware that his late mother duly followed due procedure with respect to the petition for letters of administration intestate, by listing all the proper beneficiaries of the deceased and itemizing all his assets as known to her. He averred that he also followed the due procedure upon substitution of his name in place of his mother.

The Petitioner averred that his late mother was the legitimate wife of the deceased at the time of his death, and was not divorced as alleged by the Objector. Further, that the Objector was never a wife to the deceased under any recognized legal regime, nor had she lived or cohabited with the deceased in circumstances indicative of marriage. Therefore, that the Objector and her two daughters and niece could not be considered as beneficiaries in accordance to section 29 of the Law of Succession Act.

According to the Petitioner, neither his mother nor himself were aware of the properties listed by the Objector namely, Mitaboni/Ngiini/1437, Mitamboni/Ngiini/1468, Mitamboni/Ngiini/1477, Mitamboni/Ngiini/1769 and death gratuity civil aviation, when applying for the letters of administration. He prayed that the said assets be included in the schedule to the confirmed grant to facilitate proper administration of the deceased estate. He further urged the court to declare that the Objector was intermeddling with the said additional property of the deceased, since she had undertaken farming and other development on the assets.

The Petitioner declared that the Objector had been aware of the petition, grant and subsequent confirmation in both succession causes 510 of 2009 and 429 of 2009, and had been duly served but failed to attend court on the appointed dates.

J.G. Wathigo Advocates, the learned counsel for the Petitioner filed submissions dated 10th November 2015, where the format of the Objector's summons for revocation of grant was faulted claiming that it should be dismissed for departing from what is prescribed in form 107 of the Probate & Administration Rules. It was also submitted that the Petitioner was not guilty of the conduct stipulated in Section 76 of the Act so as to justify revocation or nullification of the grant.

It was contended by the Petitioner that there was no evidence that the Objector was a survivor of the deceased, a dependant or a beneficiary, and cannot claim the deceased estate. He restated that the additional properties claimed by the applicant should be added in the schedule of assets and court should

make appropriate orders on the same. Reference was made to the decisions in The Estate of Edith Wangui Kahindo (Deceased), Succession Cause No. 426 of 2014, The Estate of Mary Njeri Mwaniki (Deceased), Succession Cause No. 283 of 2006; and in The Estate of John Mwangi Njoroge (Deceased), Probate & Administration Cause No. 1723 of 2004 in support of these arguments.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the Petitioner. The issue to be decided is whether the Respondent's confirmed grant of letters of administration should be revoked. This court has jurisdiction to revoke or annul the grant as is clearly set out in section 76 of the Law of Succession Act (Chapter 160 of the Laws of Kenya) which provides 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.”

In the present application the Objector claims to be a wife of the deceased Daniel Musyoka Wambua, and that other beneficiaries including her daughters and niece have been left out of the administration of the deceased estate. The status of the Objector as wife of the deceased is disputed by the Petitioner. I also note that the Objector referred to previous disputes between her and the Petitioner's mother, in which she claims it was found that she was a wife of the deceased. No such order or judgment to this effect by a court of law was however annexed. There are however references in the pleadings filed both in this suit and Machakos CMCC 636 OF 2005 to other wives of the deceased which need to be established.

The Objector also claims that some properties of the deceased are not included in the administration. I note in this regard that there was no evidence brought to show that the said properties were owned by the deceased.

It is thus my view that additional evidence is needed to establish who are the true wives and beneficiaries of the deceased before this Court can grant orders of revocation of the grant issued to the Petitioner, or any other orders as to the estate of the deceased. I have also gone through the proceedings herein, and note that on 26th April 2010 Waweru J. did order that the Petition by Teresia Kalondu Musyoka be gazetted, and that the Objector could then file her objection and cross-petition. However, the Objector did

not comply with these directions, and the Petitioner subsequently filed the summons for confirmation of grant which were granted. It is after all these proceedings had been completed, that the Objector then decided to file the instant summons for revocation of grant.

In light of this history, the competing claims to the deceased's estate, and allegations as to various assets not included in the distribution of the deceased's estate, I order as follows pursuant to the provisions of section 47 of the Law of Succession Act:

1. **The confirmation of grant issued to the Petitioner on 31st July 2014 be and is hereby revoked.**
2. **The Objector shall file and serve her affidavit of protest to the Petitioner's summons for confirmation of grant dated 11th June 2014 within 60 days of the date of this ruling.**
3. **The hearing of the summons for confirmation of grant and affidavit of protest shall proceed by way of *viva voce* evidence.**
4. **The *status quo* obtaining as at the date of this ruling with respect to the occupation and possession of the properties belonging to the deceased estate shall continue to obtain and be maintained pending the hearing and determination of the summons for confirmation of grant and affidavit of protest. There shall however be no further transfer of the said properties, and/or further destruction, wastage, and/or development on the same by the Petitioner and Objector, and/or their agents and servants, pending the hearing and determination of the said summons for confirmation of grant and affidavit of protest.**
5. The summons for revocation of grant dated 9th June 2015 is dispensed with on the terms of the foregoing orders, and each party shall meet their respective costs of the said summons.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 9th day of February 2016.

P. NYAMWEYA

JUDGE