



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MILIMANI**

**SUCCESSION CAUSE NO. 1506 OF 1997**

**IN THE MATTER OF THE ESTATE GEORGE RAGUI KARANJA (DECEASED)**

**RULING**

1. There are two applications for determination. One is dated 11<sup>th</sup> May 2012, while the other is dated 22<sup>nd</sup> October 2014.
2. The application dated 11<sup>th</sup> May 2012 seeks substitution of the two administrators of the estate, Grace Waithera Ragui and Edward Karanja Ragui, who are said to have died on 26<sup>th</sup> June 2008 and 15<sup>th</sup> January 2012, respectively. Copies of their death certificates are attached. It also seeks that the certificate of confirmation of grant be rectified so as to change the terms of the distribution. The application is at the instance of a son and a grandson of the deceased.
3. Although there are copies of consents to confirmation of grant and to the mode of distribution/rectification of the grant and certificate of confirmation of grant, both dated 11<sup>th</sup> May 2012, the same are not signed by the persons whose names appear on them.
4. The reply to the application takes the form of an affidavit of protest sworn on 30<sup>th</sup> May 2012 by Koigi wa Wamwere. He avers to be an executor of the will of Grace Waithira Ragui and an interested party in the estate of the deceased herein, and states that he swears the affidavit with the consent of some eight (8) beneficiaries. He dismisses the application dated 11<sup>th</sup> May 2012 as incompetent on account the consents attached to it being unsigned by the named beneficiaries. He avers to have been appointed executor of the will of one of the administrators of the estate of the deceased, who is now also dead, and he has since obtained representation to her estate in HCSC No. 838 of 2012. He asserts that as executor of the will of dead administrator only he is qualified to substitute her as administrator of the estate of her dead husband.
5. The executor of the will of the dead administrator further avers that the proposed redistribution of the estate of the deceased would have the effect of defeating the terms of the will of Grace Waithera Ragui, as the subject assets had come to her by virtue of the distribution in the certificate of confirmation dated 27<sup>th</sup> May 1999. He pleads that the matter of the substitution and redistribution of the estate be stayed to await conclusion of administration of the estate of Grace Waithera Ragui. It is also contended that the two applicants did not get along with the dead administrator and with the other beneficiaries hence her decision to make a will.

6. Attached to the affidavit of protest is a consent form duly signed by eight (8) individuals, being son and daughters of the deceased, indicating that they would like the said executor take the place of Grace Waithera Ragui as administrator of the estate of the deceased.
7. One of the applicants, Lincoln Kimwaki Ragui, swore a supplementary affidavit on 18<sup>th</sup> July 2012. He states in it that their application was made in good faith, noting that until they filed their application none of the beneficiaries made an attempt to have the dead administrators substituted. He also observes that the protestor, Koigi wa Wamwere, was neither a child nor beneficiary of the estate of the deceased, and blames him for the problems in the family. He urges that an administrator be appointed from among family members. He accuses the protestor of intermeddling with the estate by collecting rents without the consent of the beneficiaries.
8. The protestor then swore on 17<sup>th</sup> September 2012 a further affidavit in response to the supplementary affidavit of Lincoln Kimwaki Ragui. He says that the two applicants are not suitable substitutes to the dead administrators for they were trouble makers who impeded the dead administrators in the discharge of their duties as administrators during their lifetime. He states that the two opposed the wishes of the late Mr and Mrs George Ragui Karanja to have their eight (8) daughters provided for and did everything possible to stop Grace Waithera Ragui from implementing those wishes. He avers that the eight beneficiaries have not consented to the application by the applicants.
9. The application dated 22<sup>nd</sup> October 2014 is at the instance of the executor of the will of Grace Waithera Ragui and eight (8) beneficiaries of the estate. It seeks the appointment of the executor, Koigi wa Wamwere, Nelly Wanjiku Kuria and Jane Nduta Koigi as administrators of the estate of the deceased in substitution of Grace Waithera Ragui and Edward Karanja Ragui. There is also a prayer that the certificate of confirmation of grant be amended so that the untransferred assets belonging to the state are distributed as per the written will of Grace Waithera Ragui or equally subdivided amongst the beneficiaries.
10. There are two affidavits sworn in support of the application. One is by the executor of the will of Grace Waithera Ragui and the other is jointly sworn by all the other applicants – Nelly Wanjiku Kuria, Emily Wairimu Ngugi, Frashiah Wangari Ragui, Jane Nduta Koigi, Edwin Muchene Ragui, Pauline Nduta Muthee and Rachael Wambui Ragui. Both were sworn on 22<sup>nd</sup> October 2014.
11. In his affidavit, the executor of the will of Grace Waithera Ragui states that he had been appointed by Grace Waithera Ragui to be the executor of her will, and goes on to give details of how the testatrix disposed of her estate, the bulk, if not all, of which she inherited from her deceased husband whose estate is the subject of this cause. He says that Grace Waithera Ragui had instructed her to take over the administration of the estate in this cause as she did not get along with the applicant and the widow of her co-administrator.
12. In their joint affidavit, the other applicants state that they consent to Koigi wa Wamwere, Nelly Wanjiku Kuria and Jane Nduta Koigi being appointed administrators in the place of the two who have died. They add that their mother, Grace Waithera Ragui, made a will specifically so that she could avoid difficulties with the administration of her estate given the problems she had faced with her youngest son, Lincoln Kimwaki Ragui. They have further deposed that their mother had appointed an executor outside the family for the same reasons. They then proceed to make proposals on the redistribution of the estate for reasons stated.
13. The respondents, Lincoln Kimwaki Ragui and George Ragui Karanja, responded to the application through a joint affidavit sworn on 2<sup>nd</sup> December 2014. They state that the application dated 22<sup>nd</sup> October 2014 is similar to theirs dated 11<sup>th</sup> May 2012 for both seek similar orders. They assert that it is not in dispute that the administrators died before administration of the estate had been completed and therefore there was need for them to be substituted by persons who would then wind up the estate. Their position is that the executor of the will of Grace Waithera Ragui is

an outsider and that administrators ideally ought to come from the family in keeping with the prescriptions of the Law of Succession Act, Cap 160, Laws of Kenya, adding that the mere fact that Koigi wa Wamwere was executor of the will of Grace Waithera Ragui did not qualify him to administer the estate. They urge that as two factions have emerged on the matter, the court should consider appointing administrators from the two sides.

14. There is a rejoinder by the executor of the will of Grace Waithera Ragui, in an affidavit sworn on 8<sup>th</sup> December 2014. The gist of it is that Lincoln Kimwaki Ragui and George Ragui Karanja are not suitable substitutes to the dead administrators. One, because they do not have the support of the other family members. Two, the two are responsible for the acrimony which has impeded the completion of the administration of the estate. Three, their application dated 11<sup>th</sup> May 2012 was incompetent and incurably defective for want of consents. Four, George Ragui Karanja is a grandson of the deceased and is therefore not competent to administer the estate. Finally, that Lincoln Kimwaki Ragui was generally uncooperative and detested the other beneficiaries.
15. Directions were taken on 27<sup>th</sup> January 2015 that the two applications would be disposed of simultaneously by way of written submissions. Both sides complied with the directions and filed their respective written submissions. The applicants in the application dated 22<sup>nd</sup> October 2014 filed their written submissions, dated 17<sup>th</sup> February 2015, on 19<sup>th</sup> February 2015; while the applicants in the application dated 11<sup>th</sup> May 2012 filed theirs dated 20<sup>th</sup> March 2015 on even date.
16. I have gone the applications herein, inclusive of the affidavits and annexures, very carefully. I have also considered the written submissions filed herein. I have also perused through the entire record.
17. It emerges that there are two matters that I need to rule on. One, concerns the individuals that I should appoint as substitutes to the administrators on record who have since died. There is no consensus on who should take their place. The second issue is about the redistribution of the estate proposed by both sides.
18. My inclination is to deal only with the question of the appointment of fresh administrators, but not with redistribution. The persons who are making the application for the redistribution of the estate are not themselves the administrators of the estate of the deceased. That issue, in my humble view, ought to be addressed only after new administrators have been put in place. In any event, distribution of an estate cannot be revisited through a rectification application, for such applications are ideal for correction of errors and omissions going by the language of section 74 of the Law of Succession Act. Redistribution amounts to a revision of the orders made by the court at the confirmation of grant. Such orders should be disturbed only through appeal or review or by the consent of the parties.
19. I am persuaded that the substitution of the administrators is the matter of more immediate concern, for an estate should not be left without administrators for long for it would be exposed to wastage and depletion.
20. I have noted from the material before me that two distinct groups have emerged. One group is fronted by the applicants in the application dated 11<sup>th</sup> May 2012, while the other coalesces around the executor of the will of Grace Waithera Ragui. The first group would like the grant made to them, or otherwise to members of the family, and it is opposed to the executor of the will of Grace Waithera Ragui being appointed as administrator. The other would like the executor of the will of Grace Waithera Ragui appointed administrator, jointly with others, and believe that the other group is not suitable.
21. The Law of Succession Act does not expressly provide for substitution of personal representatives who die in office, particularly in cases where the estate is left without one. The closest provision is section 81 of the Act, which provides for vesting of the powers and duties of personal

representatives in the survivor or survivors of a dead personal representative. The provision provides as follows –

***‘Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executor or administrators shall become vested in the survivors or survivor of them:***

***Provided that, where there has been a grant of letters of administration which involve any continuing trust a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him.’***

22. It would appear to me that once all the holders of a grant die, section 81 of the Act would be of no application. Indeed, the said grant becomes useless and inoperative, and liable to revocation under section 76(e) of the Law of Succession Act, to pave way for appointment of new administrators. The appointment of fresh administrators to take the place of the previous ones following their death is subject to the provisions of sections 51 through to section 66 of the Act.

23. All the administrators of the estate of the deceased in this case have died. The circumstances arising therefrom cannot be addressed through 81 of the Law of Succession Act. The grant made to the dead administrators has to be revoked to pave way for appointment of new administrators. There is no application before me, premised on section 76(e), for revocation of the grant herein on account of its having become useless and inoperative. However, section 76 gives the court discretion to revoke any grant of representation on its own motion. This should be a classic case where I can exercise such discretion.

24. In determining who should be appointed administrators to replace the dead ones, I should be guided by section 66 of the Law of Succession Act, which provides as follows –

***‘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 –***

- 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 in Part V;*
- c. *The Public Trustee; and*
- d. *Creditors.’*

25. The order of preference set out in section 66 of the Law of Succession Act is not binding to the court. It is discretionary. Section 66 refers to it as ‘a general guide.’ The court can appoint administrators without following the order of preference. Priority is given to surviving spouses, followed by the other beneficiaries entitled in intestacy as set out in Part V of the Act, then the Public Trustee and creditors. The persons entitled in intestacy according to Part V, in their order of preference, include children (and grandchildren where their own parents are dead), parents, siblings, half-siblings and other relatives who are in the nearest degree of consanguinity up to and including the sixth degree.

26. The surviving spouse of the deceased in the instant cause is dead and therefore the next in line of appointment as administrators are the children. The appointment of grandchildren is qualified, in the sense that they rank in priority only where their own parents are dead. Going by the above, Nelly Wanjiku Kuria, Jane Nduta Koigi and Lincoln Kimwaki Ragui, being surviving children of the deceased qualify for appointment. George Ragui Karanja qualifies too, but being a grandson he ranks lower in priority in comparison with the other three. However, the fact that his father, a child of the deceased, is dead places him at par with the other three.

27. The executor of the will of Grace Waithera Ragui does not fall in any of the categories set out in section 66 and Part V of the Act. He seeks appointment in his capacity as executor of the will of a person whose estate is a beneficiary in the estate of the deceased. He could in a sense be put in the same league with creditors and therefore he ranks bottom in priority.
28. He has asserted that the testatrix had instructed that he be appointed to take her place as administrator of the estate of her husband. However, no documentary evidence of such instructions has been provided, nor have the circumstances of the giving of the instructions been laid coherently in the affidavits before court. I agree that the mere fact that he had been named executor of the will of the wife of the deceased, did not give him prior right of appointment over anybody else. Neither is there anything in law that would confer power on a wife during lifetime to give instructions on who should become administrator of the estate of her dead husband.
29. It is one thing for a person to be qualified for appointment as administrator of an estate, and totally another for them to merit or be suitable for appointment. The question of suitability has been raised with respect to Lincoln Kimwaki Ragui and Koigi wa Wamwere.
30. Regarding Lincoln Kimwaki Ragui, it's argued by the opposing side that he had a very difficult relationship with his deceased mother, and that was in fact the reason she decided to make a will to obviate the sort of problems that he was likely to cause. He was also said to be disdainful of the other survivors, and was described as uncooperative. For these reasons he was said to be unsuitable.
31. Koigi wa Wamwere, on the other hand, is not a family member, in terms of him not being either a child or grandchild of the deceased. His interest in the administration of the estate is pegged to his executorship of the will of Grace Waithera Ragui. It is argued that the fact he is not an immediate family member makes him unsuitable. It is even suggested that he is the source of confusion in the administration.
32. The problems that Lincoln Kimwaki Ragui had with his mother have not been detailed in the affidavits on record. Neither has it been stated in what respects he differs with his siblings. The only facts brought out relate to the objection that he filed in the cause relating to his mother's estate, which by itself should not make him unsuitable. There is therefore nothing on record that persuades me that he would be unsuitable as administrator. Furthermore, as a son of the deceased he has a stake in the estate as heir, and that should grant him entitlement to administration.
33. Going by the principle stated by Waki J., in *In the Matter of the Estate of Aggrey Makanga Wamira* Mombasa HCSC No. 89 of 1996, to the effect that surviving spouses and children have priority in administration, and other relatives as set out in section 39 of the Act should only come in where no spouse or children survived the deceased, or the surviving spouse or children are unsuitable; it would appear on the face of it that Koigi wa Wamwere should be locked out of the administration on the ground of unsuitability. That is to say, on the basis that it would be undesirable to appoint as administrator a person of lesser priority over the children where the children have not been found to be unsuitable.
34. However, I do note that the said Koigi wa Wamwere is executor of the will of one of the beneficiaries of the estate, that is to say the estate of Grace Waithera Ragui. The estate of the latter is a key stakeholder in the estate of the deceased for Grace Waithera Ragui was the surviving widow of the deceased before she herself died, and certain assets devolved upon her estate according to the certificate of confirmation of grant on record. Furthermore, Koigi wa Wamwere is proposed by the majority of the survivors of the deceased as a substitute to the dead administrators. By so endorsing him, the said survivors, who have prior right to administration, have waived their rights or entitlement to administration and handed it over to Koigi wa Wamwere. That in my view clothes him with suitability.
35. In view of everything that I have said above, I feel inclined to make the following orders;

- a. That the grant of letters of administration intestate made herein on 23<sup>rd</sup> September 1997 to Edward Karanja Ragui and Grace Waithera Ragui is hereby revoked for having become useless and inoperative following the deaths of the two administrators;
- b. That I hereby appoint Koigi wa Wamwere, Lincoln Kimwaki Ragui, Nelly Wanjiku Kuria and George Ragui Karanja administrators of the estate herein in the place of the said dead administrators;
- c. That a grant of letters of administration intestate shall accordingly issue to them;
- d. That the prayers in both applications for the redistribution of the estate are hereby rejected, instead the new administrators shall apply, if need be, for a review of the confirmation orders on record to facilitate redistribution, which application should have the consent of all the beneficiaries;
- e. That any administrator or administrators and beneficiary or beneficiaries opposed to the application referred to in (d) above shall present their respective cases through replying affidavit or affidavits to facilitate a final disposal of the issue at a proper hearing; and
- f. That each party shall bear their own costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 5<sup>TH</sup> DAY OF FEBRUARY, 2016.**

**W MUSYOKA**

**JUDGE**