REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO.66 OF 1985

IN THE MATTER OF THE ESTATE OF M'MBOROKI M'MANYARA ALIAS MBOROKI IMANYARA ALIAS MBOROKI M'MANYARA

JULIA MUTUNE M'MBOROKI……....…….……PETITIONER

VERSUS

JOHN MUGAMBI M'MBOROKI……APPLICANT

GIKUNDI M'MBOROKI…….…… ……OBJECTOR

LINET NTHIORI NDINGU……....……1ST INTERESTED PARTY

NAOMI GATIMBA……..…..…….2ND INTERESTED PARTY

RULING

[1] There are two applications in this Succession Cause. The first one (hereafter the 1st application) is a Chamber Summons Application filed in court on 3rd September 2012 in which the applicant John Mugambi seeks the following orders:

1. ***That the applicant John Mugambi M' Mboroki be appointed as an administrator to the estate of M'Mboroki M'Manyara in place of Julia Mutune.***
2. ***That the temporary Letters of Administration and confirmed Letters of Administration issued by the court be amended by deleting the names of Julia Mutune and the same be issued in the name of the applicant.***
3. ***That the distribution of the asset forming the estate the same being Land Parcel Number NYAKI/KITHOKA/373 be as shared out in the confirmed Grant of Letters of Administration initially issued by the court and per the court order issued by E.M Githinji.***

[2] The 1st application is premised on two major grounds namely:

1. ***That Julia Mutune was appointed as the Administrator of the estate on 10th October 1985. She, however, died on 8th February 2000 before completing distribution of Land Parcel Number Nyaki/Kithoka 373 constituting the estate property. This property is yet to be transmitted to the beneficiaries. Therefore, there is need to appoint an administrator to complete the process of distribution of the shares in the estate to the respective beneficiaries.***
2. ***That the beneficiaries, namely Gikundi M'Mboroki and John Mwangi M'Mboroki had consented to the Applicant being appointed the Administrator of the estate.***

[3] The other application (hereafter the 2nd Application) is a Chamber Summons filed in court on 23rd October 2012 in which the Interested Parties seek the following orders:

1. ***That the Grant of Letters of Administration issued to Julia Mutune M'Mboroki and confirmed by E.M Githinji be revoked and/or annulled.***
2. ***That upon revocation and annulment of the Letters of Administration issued to Julia Mutune M'Mboroki all consequential orders be set aside.***

[4] The 2nd application is premised on the following grounds:

1. ***That the Grant was obtained fraudulently by making a false statement and concealment from the court of something material to the case.***
2. ***The proceedings to obtain the Grant were defective in substance.***
3. ***The Grant was obtained by means of an untrue allegation of fact essential in point of law to justify the Grant.***
4. ***That the Grant has become useless and inoperative through subsequent circumstances.***
5. ***That one Julia Mutune secretly filed this succession cause without their knowledge. Again, their brothers John Mugambi, Erastus Gikundi and Joseph Mwangi were the only persons who signed the letter of consent to file this succession cause.***
6. ***They further contended that their brothers wanted to disinherit them from getting a fair share of their father's estate.***

[5] John Mugambi M'Mboroki opposed the application dated 23rd October 2012 through his replying affidavit filed in court on 16th April 2013. He deposed inter alia; that when filing the Succession Cause the Petitioner took into account customs that were in operation on inheritance at the time; and that the 1st and 2nd interested parties were informed of the filling of this succession cause except they were not interested in getting any share since they were married and had their own property.

[6] On 25th September 2013 Makau J, upon agreement of the parties directed that the two applications be canvassed by way of written submissions. The submissions were filed and are part of record. The court will also consider them.

DETERMINATION

Issues

[7] Upon careful consideration of the two applications, the rival submissions by the parties and the authorities relied upon by the Interested Parties, one major and composite issue emerges, namely:-

> ***(a) Whether I should revoke the grant issued to Julia Mutune M'Mboroki, now deceased and appoint one or more person or persons as administrators of the estate. Under this issue, I will render myself on the persons and the manner to be appointed. Matters to do with completing the process of administration will also not be avoided; are invariable discussion in the ruling.***

Death of administrator

[8] Out of this entire judicial discourse, one fundamental issue of law has arisen; effect of death of a sole administrator on the grant. In my experience as a judge, one grave mistake I have seen being committed is to apply for substitution of the deceased administrator. In my understanding, substitution of a deceased administrator is not possible as the particular proceedings in which he had been appointed administrator do not relate to his estate. This explanation shows the folly of trying to substitute a deceased administrator. Courts have said time

and again that, except where a grant is made to the Public Trustee or a Trust Corporation, a grant of letters of administration is issued *in personam* and is not transferable. See section 56 and 57 of the Law of Succession Act. I also think it is worth mentioning that the Law of Succession Act does not talk of substitution of administrator; it provides for making of a grant to another person or persons after revocation of grant or on the death of the administrator or on renunciation of right to apply or executorship etc. A classic example is section 81 of the Law of Succession Act; that, where there is a continuing trust, *a further grant to one or more persons has to be made by the court*. There is absolutely no room of substitution of the deceased administrator under the Law of Succession Act. In my view, therefore, where the sole administrator is a natural person, and he or she dies, the grant becomes useless or inoperative by reason of subsequent event of his demise. I am aware that the Law of Succession Act does not define or say what constitutes *''the grant has become useless and inoperative through subsequent circumstances''*. But, in my opinion, death of an Administrator would be a sufficient reason to revoke a Grant for having become useless and inoperative due to subsequent demise of its holder. Accordingly, in such case, the proper procedure is to apply for revocation of grant of letters of administration under section 76(e) of the Law of Succession Act on the reason *that the grant has become useless and inoperative through subsequent circumstances* and a grant to be made to another person named in the application. I am content to cite the case of ***In the Matter of the Estate of Mwangi Mugwe alias Eliza Ngware (Deceased) Nairobi High Court Succession Cause No. 2018 of 2001*** where Khamoni J (as he then was) held that an application for substitution was improper and could only be brought under Section 76 of the Law of Succession Act for Revocation of Grant on the grounds that it had become useless and inoperative following the demise of the holder. In fact, I should suggest that, such a grant is to be revoked as a matter of course once the death of the sole administrator is established. This is, however, different where one or more of the several administrators die: Here section 81 of the Law of Succession Act is the guide; the power and duties of the administrators vest in the survivors or survivor of them.

Grant is revoked for being inoperative

[9] Applying the above test on the facts of this case, it is not in dispute that the original Administrator in this Cause namely Julia Mutune passed on 8th February 2000. She was the sole administrator of the estate. Accordingly, I revoke the grant of Letters of Administration that was made to Julia Mutune on 25th July 1986 for it has become useless and inoperative due to subsequent circumstances, namely her demise. I have also had the advantage of perusing the initial pleadings filed and none of the interested parties were mentioned in the petition as by law required. Their consent as persons having equal rights of representation was also not obtained by the deceased administrator. That is not all: the fact that the deceased had two houses was not disclosed in the petition. These matters; ***(1) constitute concealment from court of something material to the case; (2) makes the proceedings to obtain the Grant defective in substance; and (3) so, the Grant was obtained by fraudulent means.*** All these render all consequential orders made upon the grant issued to the late administrator a candidate for setting aside. I set aside all consequential orders thereto. The application dated 23rd October 2012 is therefore allowed. I now move on to the other issues; who shall be appointed the administrator of the estate in view of these events?

Appointment of administrator

[10] All the parties in this cause are beneficiaries of the deceased estate and stand in equal priority for purposes of appointment of administrators; their consent to one or more of them to apply for letters of administration must be sought. The applicant in his affidavit in support of the application for *''substitution''* deposed that the beneficiaries namely Gikundi M' Mboroki and John Mwangi M' Mboroki had consented to him being appointed as the Administrator of the estate. The said consent was not annexed to the application and I have seen none. There was also no mention of the other beneficiaries and specifically the Interested Parties in his quest for appointment as administrator of the estate. These seem to confirm the Interested Parties' submissions that they have not agreed on the applicant being appointed as the Administrator of the

estate and that he is imposing himself as an Administrator. They just fell short of accusing him of patriarchal dominance and arrogance.

[11] Connected to the foregoing, I note one important issue coming out of the Applicant's replying affidavit filed in court on 16th April 2013 especially the argument by the Applicant that, when filing the Succession Cause, he took into account customs that were in operation at the time on inheritance. The Interested Parties on the other hand asserted that applying Meru customary laws would discriminate against the daughters of the deceased and also violate the Constitution. It is amazing that the deceased Administrator had at one time filed an application in court seeking to have the Grant of representation revoked on the grounds, *inter alia*, that the applicant was planning to disinherit her and her unmarried daughters. Stiff resistance to his appointment has been put forth by the interested parties who submitted that none of the beneficiaries have agreed that the Applicant be the administrator because they do not trust him with matters of administration of this estate which involves two houses.

[12] Despite the averment by the applicant in his application dated 4th September 2012, I do not see the alleged consent by all the beneficiaries and specifically the Interested Parties for his appointment as the Administrator. I also note that grave matters of discrimination of the Interested Parties on account of their gender have been brought to bear. In fact the Applicant has confirmed that he relied on the Meru customary laws and practices in his distribution method. Customary law must be measured on the constitutional yardstick. Therefore, I think these are substantial constitutional issues which deserve an in-depth evaluation by this Court. These issues are not diminished by claims that the Interested Parties did not lay claim to the estate in good time or that these issues are afterthoughts. In light of these issues, matters impinging on the conduct of the Applicant and the fact that the application by John Mugambi M'Mboroki is mis-guided, I dismiss it his application dated 3rd September 2012. I will not appoint ***John Mugambi M' Mboroki*** as requested in his application.

[13] Nonetheless, the estate will not remain without an administrator for long. It has come to light now that there are two houses involved in this succession which is quite a substantial consideration in the Law of Succession Act. After taking into account the totality of the circumstances of this case, I am convinced I should appoint two administrators in this matter. I will not, however, exercise my final discretion under section 66 of the Law of Succession Act to appoint the two administrators before I give the parties the last chance to agree on the two administrators. Accordingly, I direct parties, within 21 days to file separate lists of two names of persons they wish to be appointed administrators of the estate. In the event of default by one or more or all the parties to so file the lists ordered by the court within the time allowed, the court will give its decision within 7 days thereafter. These time lines are tight but necessary in view of the age of this cause and the fact that distribution is still outstanding. This whole scheme of things is informed by the overriding objective of the law.

Costs

[14] Since this is a succession cause involving family members, I will not make an order for costs. It is so ordered.

Dated, signed and delivered in open court at Meru this 3rd day of February 2016

F. GIKONYO

JUDGE

In the presence of:

Mr. Abuor Advocate for Mr. Rimita Advocate for interested party

Mrs.Ntarangwi for applicant

F. GIKONYO

JUDGE