



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**SUCCESSION CAUSE NO. 835 OF 2013**

**IN THE MATTER OF THE ESTATE OF JOHN MUIA KIOKO (DECEASED)**

**ANNA MUTINDI.....PETITIONER**

**VERSUS**

**BERNARD WAMBUA MUIA .....OBJECTOR**

**RULING**

**The Summonses**

The Petitioner herein is a daughter of the deceased John Muia Kioko (hereinafter referred to as “the deceased”), while the Objector is the first born son of the said deceased. The Petitioner petitioned for letters of administration intestate for the estate of the deceased on 21st November 2013, which grant was issued to her on 19<sup>th</sup> March 2014. She subsequently filed summons dated 24<sup>th</sup> April 2015 seeking a special citation to issue to the Objector herein, who being a beneficiary has failed and/or refused to consent to the estate of the deceased. Further, that in the alternative the petition of the said letters of administration be deemed as filed notwithstanding the said consent. The said summons has been filed pursuant to the section 70 of the Law of Succession Act and Rules 21,22 and 73 of the Probate and Administration Rules.

The main grounds for the Petitioner’s application as stated in the application and in her supporting affidavit sworn on 24<sup>th</sup> April 2015, are that the Objector refused to consent to the filing of the Petition and that the estate of the deceased requires to be administered. The Objector in a replying affidavit he swore on 25<sup>th</sup> June 2015 denied that he had refused to accept the petition to be filed as alleged, and that the Petitioner being the third born married daughter of the deceased, cannot assume priority over the sons of the deceased. The Objector also alleged that the Objector is not fit to administer the estate of the deceased as she has intermeddled with the estate by having two properties of the deceased namely Machakos/Nguluni/760 and Athi River/Athi River Block 5/514 transferred to her name in the absence of a confirmed grant. He attached abstracts of title to this effect.

The Objector then also filed an application by way of summons for revocation of grant dated 20<sup>th</sup> November 2014, pursuant to section 76 of the Law of Succession Act and Rules 44 and 73 of the Probate and Administration Rules, wherein he is seeking an order that the grant of letters of administration issued herein to the Petitioner be revoked. The grounds for the said application are that the proceedings to obtain the grant were defective in substance and that the Petitioner did not obtain his consent despite the Objector being a beneficiary of the deceased estate.

The Objector in his supporting affidavit sworn on 20<sup>th</sup> November 2015 reiterated the averments he had

previously made as stated in the foregoing, as to the Petitioner not ranking in priority and not being fit to administer the estate of the deceased. He also averred that if the Petitioner is allowed to administer the estate, her spouse who is a stranger to the estate may interfere with the administration.

The Petitioner filed a replying affidavit to the Objector's application which she swore on 21<sup>st</sup> January 2016. She stated therein that all children of a deceased person be they daughters or sons are all equal, and can take out letters of administration with respect to the estate of their deceased parent, and that she has not assumed any priority over her brothers. She reiterated that the Objector had refused to give his consent to the making of letters of administration to her, and denied being involved in the process of transferring the property of the deceased. She averred that the abstracts of title exhibited by the Objector were as a result of an adjudication process that began in the lifetime of the deceased.

P.M Mutuku & Company Advocates, the learned counsel for the Petitioner, filed written submissions dated 7<sup>th</sup> March 2016, wherein it was argued that section 66 of the Law of Succession Act applies in this matter, and that pursuant to the said provision both the Petitioner and Objector have an equal right to administration of their father's estate. Further, that under the law and Article 27 of the Constitution, sons have no superior claim over married daughters. It was submitted that consent to the petition for letters of administration was given by all the other beneficiaries of the deceased's estate as required under Rule 26(1) of the Probate and Administration Rules. The Petitioner further submitted that she was not opposed to the estate having more than one administrator as provided under section 56(1)(b) of the Law of Succession Act.

The Objectors' learned counsel, F.M Mulwa & Co Advocates, filed written submissions on the two applications dated 26<sup>th</sup> February 2016, in which it was argued that it is a mandatory requirement under Rule 26(1) of the Probate and Administration Rules that letters of administration shall not be granted without notice to every person entitled in the same degree as or in priority to the applicant, and reliance was placed on the decision in **Rusa Rufas Ntwiga vs Jane Gachunku, (2014) e KLR** in this regard. It was further submitted that sections 45, 55 and 82 of the Law of Succession Act prohibits selling of a deceased's property before a grant is confirmed. Reliance was placed on the case of **Nancy Njoki Ngugi & Anor vs George Mungai Thiga & 3 Others, (2015) e KLR** in this regard .

### **The Issues and Determination**

This Court directed that the two applications by the Petitioner and the Objector be heard and determined together by way of affidavit evidence and written submissions. I have read and carefully considered the pleadings and submissions made by the Petitioner and Objector. The issues to be decided are firstly, whether the special citation sought by the Petitioner can issue; and secondly, whether the Petitioner's grant of letters of administration should be revoked.

On the first issue as to the citation sought by the Petitioner, I note that under section 70 of the Law of Succession Act, the power of the Court to issue special citation to any person who appears to have an objection to the issue of a grant can only be exercised before the making of the grant. Section 70 provides as follows:

**“Whether or not there is a dispute as to the grant, every court shall have power, before making a grant of representation—**

**(a) examine any applicant on oath or affirmation; or**

**(b) call for further evidence as to the due execution or contents of the will or some other will, the making of an oral will, the rights of dependants and of persons claiming interests on intestacy, or any other matter which appears to require further investigation before a grant is made;**

**or**

**(c) issue a special, citation to any person appearing to have reason to object to the application.”**

The Petitioner’s application for the special citation to the Objector for having refused to consent to the petition for grant of letters of administration intestate or in the alternative to dispense with the Objector’s consent is therefore overtaken by events and an exercise in futility, and is incompetent to the extent that the grant herein was issued to the Petitioner on 19<sup>th</sup> March 2014, one year before her application was made.

On the second issue as to whether the Petitioner’s grant of letters of administration should be revoked, the Objector has argued in this respect that his consent to the said grant was not obtained despite him being a beneficiary of the deceased estate. Reliance was placed in this regard on Rule 26 of the Probate and Administration Rules which provides 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 Petitioner does not contest that the Objector’s consent was not obtained, and avers that it is the Objector who declined to give the said consent. A perusal of the affidavit in support for the Petition for letters of administration intestate filed herein on 21<sup>st</sup> November 2013 by the Petitioner however shows that not only was the consent of the Objector not given, the Objector was not named as one of the survivors of the deceased despite the attached letter from the Assistant Chief of Isinga Sub-Location Kangundo dated 28<sup>th</sup> January 2014 indicating that the Objector was one of the surviving sons of the deceased. To this extent there was material non-disclosure in the said petition, and the fact that the Objector had refused to consent to the petition cannot cure this non-disclosure.

This finding entitles the Objector to the order sought of revocation. However going forward I will need to address the issue raised by the Objector as to the Petitioner being of lesser priority to administer the estate of the deceased by virtue of being his married sister. Section 66 of the Law of Succession Act provides a general guide as to those who will be preferred to administer the estate of a deceased 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 by Part V;**

**(c) the Public Trustee; and**

**(d) creditors:**

**Provided that, where there is partial intestacy, letters of administration in respect of the**

**intestate estate shall be granted to any executor or executors who prove the will. “**

Under Part V of the Act, section 36 specifically provides that where an intestate has left a surviving child or children but no spouse as in this application, the net intestate estate shall be equally divided among the surviving children. Therefore, the Petitioner and Objector are of equal priority when it comes to administering the estate, as they are both children of the deceased and are entitled to his estate equally. It is notable that the aforesaid provisions of the Law of Succession Act do not in this regard distinguish between male or female, and/or married and unmarried children of an intestate.

The last issue for determination is whether the Petitioner has intermeddled with the deceased's estate. I note that the deceased died on 1<sup>st</sup> April 2009. The Petitioner was granted letters of administration on 19<sup>th</sup> March 2014 which are yet to be confirmed. I have perused the copies of the entries in the register of land parcels Machakos/ Nguluni /760 and Athi River/Athi River Block 5/514 which were annexed by the Objector as Annexures “BWM-2” and “BWM-3” to his affidavit in support of the summons for revocation.

The registration of Machakos/ Nguluni /760 in the Petitioner's name on 27<sup>th</sup> March 2014 could be explained as having vested the said property in the Petitioner in her capacity then as personal representative of the deceased. The legal position as regards the vesting of the property of a deceased person in administrators, is that it so vests in their capacity as the personal representatives of the deceased, and it is indeed the duty of administrators to collect and preserve a deceased's estate in this capacity pursuant to the provisions set out in sections 79 and 83 of the Law of Succession Act. Collection of the assets of a deceased person includes the vesting the deceased's property in the personal representative's name.

It is however not clear, and the Petitioner did not shed any light as to how the property known as Athi River/Athi River Block 5/514 was registered in the name of Athaliah Limited on 21<sup>st</sup> September 2010, before a grant of representation was issued to the Petitioner. The law of Succession Act at section 55 provides as follows with regard to disposition of capital assets of a deceased persons estate:

**“(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.**

**(2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.”**

This position is reinforced by section 82(b)(ii) of the Act which provides that no immovable property shall be sold before confirmation of the grant.

It is thus my finding that the parcel of land known as Athi River/Athi River Block 5/514 could not have been legally registered in the name of Athaliah Limited. In addition, since the grant issued to the Petitioner is subject to revocation, the said properties shall be restored to the deceased's estate to await fresh succession proceedings.

The orders of this Court are accordingly as follows arising from the findings in the foregoing:

1. The prayers in the Petitioner's summons dated 24<sup>th</sup> April 2015 are hereby denied with no order as to costs.
2. The Objector's Summons for Revocation of Grant dated 20<sup>th</sup> November 2014 is allowed to the extent of the following orders:

(a) The grant of letters of administration intestate issued to Annah Mutindi Mwanzia on 19<sup>th</sup> March 2014 with respect to the estate of John Muia Kioko (Deceased) be and is hereby revoked.

(b) Any distribution, transfers and dispositions of any kind to and/or by Annah Mutindi Mwanzia of the deceased's properties known as Machakos/ Nguluni /760 and AthiRiver/Athi River Block 5/514, and any other subsequent dealings with the said properties be and are hereby declared unlawful and null and void, and shall be cancelled forthwith.

(c) The registration of properties known as Machakos/ Nguluni /760 and Athi River/Athi River Block 5/514 shall forthwith be restored in the name of John Muia Kioko (Deceased)

(d) The Petitioner and Objector shall be at liberty to commence fresh administration proceedings with regards to the estate of John Muia Kioko (Deceased).

(e) There shall be no order as to costs.

Orders accordingly.

**Dated, signed and delivered in open court at Machakos this 11<sup>th</sup> day of July 2016.**

**P. NYAMWEYA**

**JUDGE**