



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
SUCCESSION CAUSE NO. 1059 OF 2011
IN THE MATTER OF THE ESTATE OF RAPHAEL MAUNDU MUOKA (DECEASED)

VERONICAH SYOKAU KIMEU

MARY MUTAVE KILONZO.....OBJECTORS

VERSUS

PASCAL MUOKI MAUNDU.....PETITIONER

RULING

The Summons

The Petitioner herein was issued with a grant of letters of administration intestate with respect to the estate of the deceased Raphael Maundu Nzioka (hereinafter referred to as “the deceased”) on 3rd May 2012. The said grant was confirmed by this Court and a Certificate of Confirmation issued to the Petitioner on 15th March 2013.

The Objectors herein who claim to be daughters to the 1st wife to the deceased. have filed two applications, the first application being by way of summons for revocation of grant dated 15th July 2013, wherein they are seeking the following orders:-

1. That the grant issue to Pascal Nzioki Maundu be annulled/revoked.
2. That, pending the hearing and disposal of this application an order do issue prohibiting any transaction that may be commenced by use of the grant herein and/or disposal of any of the property to the estate.

The grounds for the said application were that the grant was obtained by the concealment from court of material facts and reliance on false statements. Further, that the Petitioners failed to include all the beneficiaries of the deceased in the petition and the interest of the Objectors have not been taken care of.

The 2nd Objector in her supporting affidavit sworn on 15th July 2013 attached a letter from the chief of Nguluni Location dated 19th June 2013, showing that the deceased had three wives and the children of each of the wives. She averred that the Petitioner omitted the children of the 1st wife namely Annastacia Ngundu Maundu (Deceased), who she names as follows:

- i. Rosemary Wavinya – Daughter (Married)
- ii. Mary Mutave – Daughter (Married)
- iii. Margret Wanza – Daughter (Not Married) who is Deceased and was survived by two children Frida Ngundu and Stephen Mbithi
- iv. Benedetta Mutio – Daughter (Married)
- v. Veronicah Syokau – Daughter (Married)
- vi. Cecilia Kalekye – Daughter (Married)
- vii. Causalies Ngui – Daughter (Married)

The second application by the Objectors is a Notice of Motion dated 30th April 2014, wherein they are seeking orders that the Petitioner's suit be struck out on account of incompetence of his advocate. The grounds for the said application as stated in the application and supporting affidavit sworn on 30th April 2014 by Gladys Gichuki, the Objectors' Advocate, are that the firm of P. N. Musila has been acting on behalf of the Petitioner from 16/10/2012 to date in Succession Cause Number 1059 of 2011, and that P. N. Musila who is an advocate of the High Court at the time of receiving instructions did not have a valid practicing certificate. The Objectors attached a letter from Law Society of Kenya dated 11/3/2014 confirming this position.

This Court directed that the said applications be heard and determined together. The Petitioner did not file any responses to the two applications by the Objectors, and the learned counsel for the Objectors relied on the pleadings filed.

The Issues and Determination

I have read and carefully considered the pleadings filed by the Objectors. The issue to be decided are firstly, whether the Objectors are beneficiaries of, and entitled to benefit from the deceased's estate; secondly if so, whether the Petitioner is culpable of non-disclosure of this material fact; thirdly, whether the Petitioner's confirmed grant of letters of administration should be revoked; and lastly, whether this succession cause should be struck out.

On the first issue as to the Objectors' entitlement to the deceased's estate, section 40 of the Law of Succession Act provides for the distribution of the property of an intestate who was polygamous as follows:

“(1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.

(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38...”

In the present application the Objectors provided a letter from the chief stating that the intestate was polygamous and had three wives, including the Objector's mother who is deceased. Section 38 of the Law Succession Act provides in this regard that where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

The Petitioner has not contested the averments by the Objectors, and a perusal of the Petition for Letters

of Administration Intestate filed by the Petitioner on 7th December 2011, and of the chamber summons for confirmation of grant dated 2nd October 2012, shows that the objectors and their siblings were not included as beneficiaries of the deceased's estate, neither was their consent given.

It is thus my finding that the Objectors are legally entitled to inherit the deceased estate, and that there was material disclosure on the part of the Petitioner in failing to disclose the existence of the first wife of the deceased and her children. The confirmed grant issued to the Petitioner is thus liable to revocation.

On the last issue, section 34 of the Advocates Act provides as follows:

“ (1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument—

(a) relating to the conveyancing of property; or

(b) for, or in relation to, the formation of any limited liability company, whether private or public; or

(c) for, or in relation to, an agreement of partnership or the dissolution thereof; or

(d) for the purpose of filing or opposing a grant of probate or letters of administration; or

(e) for which a fee is prescribed by any order made by the Chief Justice under section 44; or

(f) relating to any other legal proceedings;

nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument:

Provided that this subsection shall not apply to—

(i) any public officer drawing or preparing documents or instruments in the course of his duty; or

(ii) any person employed by an advocate and acting within the scope of that employment; or

(iii) any person employed merely to engross any document or instrument.”

The Supreme Court of Kenya in National Bank of Kenya Limited vs Anaj Warehousing Limited, (2015) e KLR after looking at various judicial precedents that upheld the invalidity of documents drafted by an advocate not holding a practicing certificate, including National Bank of Kenya Ltd vs Wilson Ndolo Ayah (2009) e KLR, Kajwang' vs Law Society of Kenya (2002) 1 KLR 846 and Obura vs Koome (2001) KLR 109, held in that the proper direction in law is as follows:

“no instrument or document of conveyance becomes invalid under section 34(1)(a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practicing certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates shall be void for all purposes.”

This decision binds this Court, and also equally applies to any document or instrument prepared by an Advocate who does not have a practicing certificate for purposes of filing or opposing a grant of probate or letters of administration. The finding of this Court on the last issue as to whether the succession cause herein should be struck out is thus in the negative for these reasons.

The prayers in the Objectors Summons for Revocation of Grant dated 15th July 2013 are accordingly allowed, and it is accordingly ordered as follows:

1. The grant of letters of administration intestate issued to Pascal Nzioki Maundu on 30th April 2012 with respect to the estate of Raphael Maundu Nzioka (Deceased) be and is hereby revoked.
2. The Certificate of Confirmation of a grant issued to Pascal Nzioki Maundu on 15th March 2013 with respect to the estate of Raphael Maundu Nzioka (Deceased) be and is hereby revoked.
3. The Objectors and Petitioner are at liberty to commence fresh administration proceedings with regards to the estate of Raphael Maundu Nzioka (Deceased)
4. There shall be no order as to costs.

The prayer in the Objectors' Notice of Motion dated 30th April 2014 is declined.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 18th day of July 2016.

P. NYAMWEYA

JUDGE