



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

PROBATE AND ADMINISTRATION CAUSE NO. 26 OF 2014

IN THE MATTER OF THE ESTATE OF PAUL NJUGUNA MWIGAI (DECEASED)

AND

DORCAS WAIRIMU NJUGUNA.....PETITIONER/RESPONDENT

VERSUS

LEAH THIRIMU NJUGUNA.....APPLICANT

(A ruling in respect of the summons for revocation of grant dated 5th February, 2016)

RULING

1. Through a Petition presented to the Court on 5th February, 2014, Dorcas Wairimu Njuguna the Petitioner herein applied for grant of letters of administration intestate to the estate of the late Paul Njuguna Mwigai (hereinafter simply referred to as the deceased).
2. In the Petition she described herself as the wife to the deceased. In the affidavit she swore in support of the Petition, she names Leah Thirimu Muigai, the Applicant in the instant application, as the 1st wife of the deceased. Each house is blessed with four children. They all survived the deceased.
3. On 28th March, 2014, the Court made a grant of letters of administration to the Petitioner. Confirmation of the same was done 8th May, 2014. Upon confirmation, the Petitioner was to faithfully administer the estate according to law and render a true and just account thereof whenever required to do so.
4. The grant however faces challenge by way of summons for revocation of grant and cross-petition for grant of letters of administration intestate filed on 5th February, 2016 by Leah Thirimu Njuguna. In the application she prays for orders as follows:

“1. THAT the Grant of Letters of Administration intestate to the estate of Paul Njuguna Mwigai issued to Dorcas Wairimu Njuguna of P. O. Box 224 Busia by the Honourable Court and dated 8th May 2014 be revoked and or annulled altogether.

2. THAT a fresh Grant of letters of Administration intestate to the estate of the late Paul Njuguna Mwigai be issued in the joint names of the Applicant herein and the Petitioner/Respondent.

3. THAT the Petitioner/Respondent to deposit in court all the proceeds and rent collected on

Land Parcel No. Bukhayo/Mundika/1915.

4. THAT costs of this application be in the cause.”

5. In the affidavit in support of the summons, the Applicant deposes that the deceased's inventory of assets as listed in the Petition is false.

6. According to the Petitioner the deceased owned several parcels of land which had been shared out during his lifetime. She listed those properties as Bukhayo/Nasewa/1647; Bukhayo/Mundika/1981; Bukhayo/Mundika/4434; Bukhayo/Mundika/9400; Bukhayo/Mundika/1915; Bukhayo/Mundika/2590; Bukhayo/Mundika/3206; and Bukhayo/Mundika/3207.

7. On the Applicant's part, the correct inventory of the undistributed assets of the deceased made up of L. R. No. Bukhayo/Nasewa/1647; L. R. No. Bukhayo/Mundika/4434; and L. R. No. Lari/Kijabe/352.

8. The Applicant's contention is that the property listed by the Petitioner had been shared out by the deceased prior to his death and thus was not available for distribution under succession proceedings. She lists those properties as Bukhayo/Mundika/1981 and Bukhayo/Bugeng'i/9400 gifted to James Gitonga Njuguna; Bukhayo/Mundika/3206 gifted to Harrison Muigai Njuguna; SouthTeso/Angoromo/5656 and Bukhayo/Mundika/3207 gifted to Robert Kiarie; Bukhayo/Mundika/2472 gifted to Joseph Kuria Njuguna; and Kimilili/Kimilili/2590 gifted to Harrison Muigai Njuguna.

9. It is noted that L. R. No. Bukhayo/Mundika/1915 which had initially been bequeathed to Joseph Kuria Njuguna reverted back to the estate of the deceased through a court order issued in Busia ELC Case No. 115 of 2014 Dorcas Wairimu Njuguna v Joseph Muigi Njuguna. It would be proper to observe that in the said judgment, the Court found that there was an irregularity in the transfer of the property from the deceased to his son. This raises a red flag and somewhat supports the allegations by the Petitioner that some of the dispositions made by the deceased were questionable. This will be determined during distribution of the estate at the appropriate time.

10. The Applicant avers that there have been numerous court battles between the deceased and the Petitioner and after the demise of the deceased, the Petitioner has taken exclusive administration of the estate to the exclusion of her household.

11. The Applicant is therefore apprehensive that unless she is enjoined in the cause as a co-administrator, the estate of the deceased will be mismanaged. It is alleged that the Petitioner has failed to render an account of the income she has collected through rent from some of the properties. It is also the Applicant's case that the estate of the deceased also faces the risk of being re-possessed by the County Government for failure to settle in time the required rates.

12. The Applicant's counsel in addition to the above reiterated the contents of the affidavit and that there was lack of trust in the Petitioner managing the deceased's estate.

13. It is the Applicant's position that pursuant to Section 66 of the Law of Succession Act, Cap 160 she ranks equal in priority with the Petitioner when it comes to the administration of the deceased's estate. The Applicant's case is that her reason for declining to be enjoined as a co-petitioner was due to the fact that she was willing to concede to the undivided two properties and saw no need to be enjoined as all the other properties had been shared out by the deceased prior to his death.

14. In response to the summons, the Petitioner swore an affidavit dated 17th May, 2016. She explains that the Applicant declined to be enjoined as co-administrator of the estate of the deceased. She avers that by a letter addressed to Applicant's lawyers, the Petitioner invited the Applicant to be a co-administrator to the deceased's estate and forwarded a petition for her execution. A reminder was sent and later on 15th October, 2013 the Applicant's then advocates on record gave a go-ahead to the Petitioner to petition for grant of letters of administration. As per the letter only two properties namely Bukhayo/Nasewa/1647 and Bukhayo/Mundika/4434 were available for succession.

15. The Petitioner in Paragraph 9 of her affidavit in essence agrees with the fact as put by the Applicant that only two plots were available for distribution. She filed suit at the Environment and Land Court to have Bukhayo/Mundika/1915 returned to the estate of the deceased as she claimed it was her matrimonial property. According to the Applicant, this particular property had already been awarded her son Joseph Kuria Njuguna by the deceased.

16. The Petitioner also avers in Paragraph 16 that she is willing to accept her share of the two undeveloped plots subject to plot number Bukhayo/Mundika/1915 being given to her as it is her matrimonial home. She deposes that in the event that her proposal is not acceptable, the entire estate belonging to the deceased be shared out equally.

17. It is the Petitioner's conclusion that she contested the transfers made by the deceased during his lifetime as the circumstances of the transfers were marred with duress and fraud. The deceased, according to the Petitioner, was ill and of frail health when the transfers were done.

18. The Petitioner contends that the summons by the Applicant is an attempt to delay the confirmation of the grant made to her.

19. The Petitioner's counsel in addition to the contents of the affidavit states that prior to the judgment of the E & L Court both houses were benefiting from the rent collected from L. R. No. Bukhayo/Mundika/1915 with the Petitioner collecting rent from the residential houses at the back and the son of the Applicant from the shops at the front. It is the Petitioner's observation that the Applicant's son has also not rendered an account of the money so obtained so as to have the moral authority of pointing an accusing finger at the Petitioner. Further, that no request was made beforehand to account for the rent collected. The Petitioner wraps up her case by opining that the instant application is another form of harassment on her and her children.

20. On the issue of the administration of the estate of the deceased, the Applicant seeks two distinct prayers from this Court; annulment of the grant of letters of administration issued to Dorcas Wairimu Njuguna and fresh grant of letters of administration to the estate of the deceased be issued in the names of both wives.

21. Before dealing with the above prayers, there is the accusation and counter-accusation that the Petitioner and the son of the Applicant were collecting rent from the premises Bukhayo/Mundika/1915. This matter has not been addressed in the pleadings by both parties maybe in an attempt to cover-up that they both cannot account for the amounts so collected. The issue will however be addressed in due course.

22. Let me first address the core subject of the application. Section 76 of the Law of Succession Act provides for instances when a grant can be revoked. It states:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an 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 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 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 unreasonable 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.”

23. The Applicant has argued that the fact that the inventory provided by the Petitioner is false necessitates the revocation of the grant initially issued to her. On face value it would seem as if his argument falls squarely within paragraphs (b) and (c) of Section 76.

24. The Petitioner on the other hand is of the view that since all the other properties of the deceased had been shared out, she would be willing to accept Bukhayo/Mundika/1915 together with the other two undeveloped plots as the former is where her matrimonial home lies. Does this imply that the Petitioner was indeed aware that part of the properties had already been shared out by the deceased? Was she then therefore misrepresenting to the Court as to the true inventory of the assets? Both questions on face value might be answered in the affirmative.

25. Was she then wrong to include all the other assets that belonged to her deceased husband?

26. The issue of dispositions made by the deceased prior to his death ought to be dealt with later in these proceedings during distribution.

27. It is conceded that the Applicant through her advocates agreed to have only two assets available for distribution. The question is whether consent can be inferred from her advocates' communication.

28. A keen look at Rule 26 (1) and (2) of the Probate and Administration Rules is vital. They provide:

“26 (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.”

29. In my view, the Petitioner in compliance with the above provisions ought to have at the time of presenting the Petition, provided evidence to Court that she had given notice of her intention to apply for grant to all persons entitled to the grant. Looking at the documents filed alongside the Petition there is no such evidence by the Petitioner. The consent available bears the names of her children. Nothing in the file shows that the first wife and her family consented to her applying for the letters of administration.

30. Indeed the Petitioner could have sworn an affidavit indicating that she had notified her co-wife and sought her consent but that she and her children and their counsel had given her a go-ahead to file the petition.

31. This is the only reason that the grant was defective right from the onset. It is the only reason for this Court to revoke the grant made to the Petitioner and order that a grant be made to both the Petitioner and the Applicant.

32. The evidence available at this stage shows that the two houses had been collecting rent in respect of

the buildings on L. R. No. Bukhayo/Mundika/1915. This property was reverted to the estate of the deceased after a court battle. Making an order for the depositing of rent at this stage would necessitate ordering the son of the Applicant to account for the rent received prior to the decision returning the property to the estate of the deceased. That will unnecessarily open a fresh battle front. I therefore decline the application to have the Petitioner deposit the rent proceeds in court. The best order is to direct the maintenance of the *status quo*, which I hereby do.

33. In light of what I have stated above the orders shall be as follows:

- a) The grant issued to Dorcas Wairimu Njuguna on 8th May, 2014 is hereby revoked;
- b) Dorcas Wairimu Njuguna and Leah Thirimu Njuguna are hereby appointed as joint administrators to the estate of the deceased Paul Njuguna Mwigai with effect from the date of this ruling;
- c) The status quo to be maintained in respect of the collection of rent for the buildings on L. R. No. Bukhayo/Mundika/1915; and
- c) Costs shall be in the cause.

Delivered, dated and signed at Busia this 1st day of Sept., 2016

W. KORIR,

JUDGE OF THE HIGH COURT