



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO. 497 OF 2014

In the Matter of the Estate of M' Mwaa M' Kiurubua- Deceased

JULIUS KABERIA MWIRABUA.....APPLICANT

Versus

GEORGE KITHELA MAORE.....RESPONDENT

RULING

Absence of consent from person with priority

[1] The significant orders that have been sought in the Summons for Revocation of Grant dated 24th April, 2015 are:-

(a) Annulment and or revocation of the grant issued to the petitioner on 15th December 2014; and

(b) Costs of the application.

The said application is expressed to be brought pursuant to section 76 of the Law of Succession Act and Rule 44 (1) of the Probate and Administration Rules, and it is premised on the following grounds:

1. That the Petitioner filed this cause secretly and without the consent of the other beneficiaries.
2. That the Petitioner has omitted some of the deceased's dependants; and
3. That the Petitioner ranks last in the hierarchy of the deceased dependants.

[2] The Applicant's case is that he is a son of the deceased and the Petitioner is his nephew. According to him, as a grandson of the deceased the Petitioner ranks last in order of priority for applying for administration of the estate of the deceased. He stated further that the Petitioner filed this cause without consulting any of the surviving dependants of the deceased. In addition, the Applicant urged that the signatures purportedly appended in the consent to apply for letters of administration were forgeries.

Petitioner returned fire

[3] The Petitioner opposed the application through a replying affidavit sworn by him on 16th June 2015. He deposed *inter alia* that, in a family meeting convened for purposes of filing a succession cause, it was agreed and consented by all dependants that a cause shall be filed with him as the administrator. He stated

that, pursuant to that agreement he filed this petition in his capacity as grandson of the deceased. He emphasized that all the other dependants of the deceased appointed him to do this.

Submissions

[4] Parties also filed submissions pursuant to the directions by this court given on 21st March 2016, after parties agreed that this application be disposed of by way of written submissions. In his submissions, the Applicant emphasized that the Petitioner ranks junior to the Applicant in the hierarchy of succeeding the deceased. He also urged that the Petitioner had omitted several beneficiaries from the list of dependants meaning that he cannot be a good administrator of the deceased's estate.

[5] The Petitioner on the other hand insisted that this succession cause was filed in consultations with family members who nominated him to file it. He also stated that the other beneficiaries gave him authority to appear, plead and act for them vide the authority dated 24th November 2015. It was further contended the allegation that this succession cause was filed secretly and without any consultation of the family had not been proved.

DETERMINATION

Issues

[6] It is clear from the pleadings filed and arguments presented by the parties that the following constitute the issues in controversy;

(a) Whether the Petitioner omitted some dependants in the petition;

(b) Whether the Applicant ranks in priority over the Petitioner in applying for grant of representation herein;

(c) Whether the Petitioner sought the consent of persons in priority or equality to him in a applying for the grant of representation herein; and

(d) Ultimately, whether I should annul or revoke the grant issued to the Petitioner herein.

Omitting dependants

[7] Let me begin with this matter which is fairly straight forward. The Applicant contended that the Petitioner had omitted some of the deceased's dependants and singled out one Mungathia M' Mwaa. But the Petitioner responded to this allegation and stated that the said Mungathia M' Mwaa opted to be left out of the petition. I see an affidavit sworn by the said Mungathia M' Mwaa on 24th November 2015 to the effect that he voluntarily requested to be left out of the petition and that he had full confidence in his nephew (the petitioner) as the administrator of the deceased estate. Therefore, the averment by the Applicant on omission of Mungathia does not hold sway. I dismiss it. I move to the next issue.

Order of priority to apply for administration

[8] I have carefully considered this application and the rival submissions by the parties. Doubtless, the Petitioner is a grandson of the deceased whereas the Applicant is a son of the deceased. In accordance with section 66 and Part V of the Law of Succession Act, the Applicant ranks in priority over the Petitioner for purposes of applying for letters of administration of intestate estate. With that rendition, Issue 2 has been resolved. But that alone is not sufficient to prevent a grant from being made to any other person to whom a grant may be made, or may be required to be made, under the Law of Succession Act. See Rule 27 of the Probate and Administration Rules. For completeness of this argument, I will, therefore, have to consider issue 3.

Consent to apply for administration

[9] In light of the foregoing, did the Petitioner seek and obtain consent of persons who rank in priority to him before filing this cause? The Applicant argued that this cause was filed secretly and without the consent of the other beneficiaries. He did not, however, disclose the other beneficiaries who he alleged did not give consent to the Petitioner to apply for administration of this estate. I am minded that I must weigh the Petitioner's averment that, before he filed this cause, a meeting of family members was convened in which he was given authority to file this cause as the administrator. Although, no minutes of the said meeting which were produced, nonetheless, those averments remained unchallenged and uncontroverted by the Applicant. In addition, those arguments find support in paragraph 3 of the affidavit sworn by one of the beneficiaries Mungathia M' Mwaa; that the Petitioner was nominated by the family to apply as the administrator of the estate. The Petitioner further produced authority dated 24th November 2015 to appear, plead and act signed by the beneficiaries authorizing him to make such pleadings as may be necessary in respect of this succession cause on their behalf. Again, nothing would bring conviction upon this court that the said document was a forgery. There was really no serious challenge by the Applicant of this document. This recapitulation of facts of the case brings me to the point where I should ask whether the Application herein meets the legal threshold for annulment and or revocation of a grant set out in section 76 of the Law of Succession Act which provides as follows:

76. Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any 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 the 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 that 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 reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; 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.

[10] From the circumstances of this case I am not satisfied that the Applicant has proved on a balance of probability that this cause was filed secretly or without the consent of other beneficiaries or that the Petitioner had omitted some of the deceased's dependants. As I stated earlier, the mere reason that the Applicant ranks higher in the order of the right to apply for administration or that consent or renunciation was not obtained from persons entitled in equality or priority does not *per se* prevent a grant being made to any person to whom a grant may be made, or may be required to be made, under the Law of Succession Act. I cite rule 26 and 27 of the Probate and Administration Rules. I think the law has taken this position in full recognition that persons with equality or priority to apply for administration may refuse to so apply or may refuse to give consent or be unable for lawful reason to give consent. This is the basis of citation on such insolent persons and a grant being made to such other person despite the absence of consent by

the people who had prior or equal right to apply for grant of administration. There are other instances where a grant may be made to persons not related to the deceased and even to a legal person such as Public Trustee or Trust Corporation. Therefore, for purposes of revocation of grant, much more is needed to show that there was no consent that was sought such that:

(a) the proceedings to obtain the grant were defective in substance;

(b) the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;

(c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

[10] In this case, there is nothing to show that the Petitioner forged any signatures as alleged. There is also nothing to show that the family and the other beneficiaries did not give their consent to the Petitioner to file this cause. There is also absolutely nothing to show that some dependants were left out as alleged. The person who was alleged to have been left out swore an affidavit deposing that he voluntarily made the decision to be left out of the petition. That is sufficient renunciation of the right in law and a grant will not be revoked on such venial omission. All the averments by the Petitioner that the family met and gave him authority to file these proceedings were not dislodged by the Applicant who only made generalized statements of denial. I have a feeling, and there is possibility that the Applicant may have changed his mind and intended to recant his consent; he has not shown sufficient evidence of lack of authority to the Petitioner to apply for administration of the estate. Accordingly, I find that the Petitioner had the authority of the persons in priority to him to apply for administration. I should also state that the Petitioner is also entitled to apply for administration of this estate except that he ranks lower than the Applicant and he needed only to seek for their consent or renunciation which he did. Again, he is not one of the persons to whom no grant of representation could be made under section 56 of the Law of Succession Act. For these reasons, I do not find any merit in the application dated 24th April, 2015 and I dismiss it. This being a succession matter involving close family members there will be no order as to costs.

Dated, signed and delivered in open court at Meru this 14th day of September, 2016

F. GIKONYO

JUDGE

In the presence of:

Mr. Kimaita advocate for petitioner

Mr. Kaimenyi advocate holding brief for Mr. Kimathi Kiara advocate for applicant

Petitioner present.

F. GIKONYO

JUDGE