



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 2752 OF 2007

IN THE MATTER OF THE ESTATE OF SOSPETER MBUGUA MUNYUI (DECEASED)

CHRISTINE NYAMBURA MBUGUA.....1ST APPLICANT

JANE WAMBUI MBUGUA2ND APPLICANT

MARY MUTHONI MBUGUA.....3RD APPLICANT

MARGARET DAVID KANGETHE.....4TH APPLICANT

VERSUS

JAMES NJOROGI MBUGUA.....1ST RESPONDENT

PETER MUCHIRI MBUGUA.....2ND RESPONDENT

SARAH MUTHAKA WANYORO.....3RD RESPONDENT

RULING

1. The deceased SOSPETER MBUGUA MUNYUI died on 3rd September 1998. He was married to two wives:- WAIRIMU MBUGUA (who predeceased him) and BEATRICE WANJIKU MBUGUA. On 17th October 2007 DAVID WANYORO MBUGUA, JAMES NJOROGI MBUGUA AND PETER MUCHIRI MBUGUA petitioned the court for grant of letters of administration intestate, in their capacity as sons of the deceased. The same was granted to them on 4th April 2008. Following the passing on of one of the administrators, DAVID WANYORO MBUGUA, his wife SARAH MUTHAKA WANYORO applied to be substituted in his place as administrator. The court on 9th May 2011 issued a new grant of letters of administration intestate to JAMES NJOROGI MBUGUA, PETER MUCHIRI MBUGUA and SARAH MUTHAKA WANYORO. The administrators herein have applied for confirmation of the grant which is pending before this court. Also pending are various protests to the suggested mode of distribution.
2. In the affidavit in support of petition for grant, the following were listed as surviving the deceased:

- i. BEATRICE WANJIRU MBUGUA - wife
- ii. DAVID WANYORO MBUGUA -son
- iii. WILSON KAGARI MBUGUA -son
- iv. STEPHEN WANYORO MBUGUA-son
- v. JAMES NJOROGE MBUGUA-son
- vi. PETER MUCHIRI MBUGUA-son
- vii. PAULINE NYAMBURA MUCHUGI-grand daughter
- viii. HANNAH NJOKI MUCHUGI-grand daughter

The following assets were listed as comprising the estate of the deceased:-

- a. L.R NO.209/4372 - NGARA
- b. L.R NO.209/2389/37 -PANGANI
- c. L.R NO.209/8355-INDUSTRIAL AREA
- d. KIAMBAA/RUAKA/T.360/3
- e. KIAMBAA/RUAKA/T.214
- f. MUGUGA/7842/7
- g. KIAMBAA/RUAKA/107
- h. KIAMBAA/THIMBIGUA/3247
- i. SHARE A/C NO. 8202 with STANDARD BANK
- j. SHARES NO.4939 with KCB LTD.

3. The applicants, who are daughters of the deceased, have filed these summons dated 23rd November 2014 seeking the revocation or annulment of the grant made to the respondents on 9th May 2011 on the grounds that the proceedings to obtain the grant were defective in substance; the grant was obtained fraudulently by making false statement or by concealing material facts to the court; and that one of the persons to whom the grant was issued was not a proper person to administer the estate. The application was supported by the affidavits of the applicants in which they averred that they were not informed of the respondents' petition for the grant as should have been done as they are daughters of the deceased and therefore beneficiaries to his estate. Further, that they did not consent to grant being made to the respondents being persons of equal priority. Further, that the 3rd respondent, being the wife to their deceased brother DAVID WANYORO MBUGUA, who replaced the said deceased administrator, does not fall within the degree of consanguinity provided for under Cap 160 and thus not qualified to be an administrator in the estate of the deceased.
4. In a replying affidavit sworn by WILSON KAGARI MBUGUA, who is one of the sons and beneficiaries of the estate of the deceased, it was averred that it was not true that some of the beneficiaries, including the applicants herein, were not informed of the petition for letters of administration or that they were indicated as beneficiaries of the estate therein.
5. The application was agreed to be disposed off by way of written submissions, which have been duly considered by this court. The respondents in their submissions admitted that they omitted to indicate the applicants who are daughters of the deceased as beneficiaries for reason that the deceased had bequeathed them the Njiru estate thus they saw no need to cite them in the cause. They admitted that it was a failure on their part not to include the applicants herein as beneficiaries in the Petition, but that the applicants were, however, aware of the going-ons in the petition for grant having attended all family meetings where the same was discussed. Further, it was submitted that although the respondents applied for grant of letters of administration intestate, the deceased left behind a will which was read to the whole family immediately after the burial of the deceased. Concerning the suitability of the 3rd respondent as administrator, it was submitted that the dispute involved the distribution of the estate as amongst WAIRIMU'S household. It was submitted that members of this household want the distribution to be done equally amongst them, but the same is objected to by the 3rd respondent who contends that her late husband being the eldest son in the said household should get a bigger portion. Further, that the 3rd respondent having stepped into the shoe of her husband, the eldest of the deceased's children, she stands in priority like all the

other children of the deceased.

6. **Section 52 of Cap 160** as read with **Rule 7(1)(e)** of the Probate and Administration Rules provides for information which should be contained in an application for a grant, which includes, *inter alia*, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased. I do note that in the affidavit in support of the petition for grant, there was no mention of the applicants herein together with the other daughters of the deceased, as being beneficiaries to the estate, a fact that has been admitted by the respondents in their submissions. This amounted to concealment from the court of material fact which warrants revocation of the grant. Further, under **rule 26(1)** letters of administration ought not to be granted to any applicant without notice to every other person entitled in the same degree as, or in priority, to the applicant. The applicants are sisters of the respondents and were thus entitled to know that a petition had been lodged for grant of letters of administration intestate in respect to their deceased father. Under **section 66** of the Act, the applicants are ranked in same degree to the 1st and 2nd respondents. This court has previously held that a grant will be revoked where a person who is entitled to apply is not notified by the petitioner of his intention to apply and that person's consent to the petition is not sought. Since there was no renunciation or written consents of the applicants herein, in form 38 or 39 as provided for in **rule 26(2)**, the grant has to be revoked. **(IN THE MATTER OF THE ESTATE OF DANIEL KAMAU MWANGI (DECEASED) (NRB. SUCC. CAUSE NO.2761 OF 2007 and IN THE MATTER OF THE ESTATE OF EUTYCHUS WANYOIKE NJAU (DECEASED) NRB. SUCC. CAUSE NO 1633 OF 2009)**
7. On the respondent's contention that the reason as to why the applicants were omitted as beneficiaries in the petition for the grant was because they had been bequeathed the Njiru property by the deceased prior to his death, this is a matter to be taken into account by the court at the point of distribution of the estate among the beneficiaries, as envisaged by **section 28(d)** of the Act. **(IN RE ESTATE OF KITTANY (2002) 2KLR AT PG.746)**
8. On the issue of the 3rd respondent's suitability to administer the estate, **Section 66** gives the court discretion in the appointment of the person or persons who will administer the estate. Without prejudice to this discretion, however, there is a general guide on the order of preference to be given to certain persons in the administration of an intestate's estate. In that order, spouses rank first, followed by other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by **Part V**, in particular **sections 32,36,37,38 and 40** of the Act. This order of preference was reinforced in the case **IN RE THE MATTER OF THE ESTATE OF AGGREY MAKANGA WAMIRA (DECEASED) [2000] ECLR**, where it was stated that priority in taking a grant of letters of administration intestate should be given to the surviving spouse followed by the children. The deceased herein is survived by a spouse and children. The initial grant issued on 4th April 2008 was granted to his three sons, DAVID WANYORO MBUGUA, JAMES NJOROGI MBUGUA AND PETER MUCHIRI MBUGUA. It is noted that although the surviving spouse ranked in priority to the children, she gave her consent in Form 38 to the grant being made to a person of equal or lesser priority as envisaged under **Rule 7(7) of the Probate and Administration Rules**. Thus this grant was in order.
9. However, regarding the point of substituting the deceased administrator DAVID WANYORO MBUGUA, with the wife SARAH MUTHAKA WANYORO, it is noted that she did not rank in priority to the surviving children of the deceased. It is also noted that none of the children of the deceased herein consented to her being substituted as an administrator. Being a person of lesser priority than the children of the deceased, she ought to have obtained their consent in Form 38 to her application to substitute her deceased husband as an administrator. **Rule 7(7)** states that;

" where a person who is not a person in the order of preference set out in Section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it exercise its discretion under that section and shall also satisfy the court that every

person having a prior preference to a grant by virtue of that Section has-

- a. renounced his right generally to apply for a grant; or**
- b. consented in writing to the making of the grant to the applicant; or**
- c. been issued with a citation calling upon him either to renounce such right or to apply for a grant...."**

10. This therefore means that before the 3rd respondent, a daughter-in-law to the deceased, could be appointed administrator, the children who ranked in priority to her should have renounced their right to administer, or consented to the same. As this was not done, I find that the procedure to appoint the 3rd respondent as administrator was defective and that she is not the proper person to administer the estate.

11. In conclusion, the application succeeds. The grant of letters of administration issued to JAMES NJOROGI MBUGUA, PETER MUCHIRI MBUGUA AND SARAH MUTHAKA WANYORO on 9th May 2011 is hereby revoked. I direct that the parties do within 30 days agree on who will be granted letters to administer the estate following which the matter be listed to record that agreement.

DATED at NAIROBI this 7th day of April 2015

A.O. MUCHELULE

JUDGE

DELIVERED at NAIROBI this 7th day of April; 2015

W. MUSYOKA

JUDGE