



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**SUCCESSION CAUSE NO 426 OF 2014**

**IN THE MATTER OF THE ESTATE OF EDITH WANGUI KAHINDO (DECEASED)**

**NERRY WANJIKU WAMBUGU .....APPLICANT**

**VERSUS**

**JOHN NJUNGE WAMBUGU .....RESPONDENT**

**RULING**

**PLEADINGS**

Before this Court is an application by Nerry Wanjiku Wambugu, hereafter “the Applicant”, filed on 10<sup>th</sup> December 2014 seeking, among others, orders from this Court that the limited grant of letters of administration made to John Njunge Wambugu, hereafter “the Respondent”, be revoked or annulled. This application has been made under the provisions of **Section 76(a), (b) & (c)** of the **Law of Succession Act** and **Rules 44 & 73** of the **Probate and Administration Rules**. The limited grant made to the Respondent is in respect of the estate of Edith Wangui Kahindo, hereafter “the deceased”, who died intestate on 4<sup>th</sup> January 1979. The sole asset consisting the deceased’s estate is Plot No. K-73 in Mathare Valley, hereafter “the suit property”. The Respondent applied for and obtained a limited grant of letters of administration ad litem limited for the purpose of filing a suit to recover rent owed to the deceased’s estate on the basis that he was the only surviving relative of the deceased who was his aunt and therefore the rightful heir to her estate.

This limited grant is opposed by the Applicant who is a sister to the deceased and the mother of Applicant. As a result, the Applicant filed, on 10<sup>th</sup> December 2014, a summons for revocation or annulment of the limited grant premised on, among others, the following grounds:

- i) That the grant was obtained fraudulently by making of false statements that the Respondent was the only eligible personal representative of the deceased.
- ii) That the Respondent falsely stated which claim is untrue that the deceased was not survived by any other dependant beside himself.
- iii) That the Respondent falsely stated which claim is untrue, that he had lived with the deceased on the said property since his childhood and continued with development therein.
- iv) That the grant was obtained by means of attaching the chief’s letter which does not confirm the

Respondent as the rightful beneficiary and which was later retracted by its maker.

v) That the Respondent failed to disclose that the Applicant being his mother was the rightful beneficiary of the estate having been issued with an assignment and confirmed by the public trustee in the Attorney General's office.

## **FACTS**

It is important and helpful to set out the factual background of the present case before moving to determine the matter as this will provide a contextual basis for the resulting decision. In what follows the facts of the case are set forth in brief. On 25<sup>th</sup> February 2014, the Respondent petitioned this Court for a limited grant of letters of administration in respect of the deceased's estate for the purpose of instituting a suit to recover rent owed to the estate. In his petition, he deposed that he was the only surviving relation of the deceased who was able to represent the estate in the capacity of a personal representative. He also deposed that he had lived with the deceased on the suit property since his childhood and that he continued developing on that property even after the demise of the deceased, and obtained as proof of this a letter from the area chief dated 26<sup>th</sup> September, 2013. On the basis of his presentations, this Court made a limited grant of letters of administration ad litem limited to the Respondent limited only for the purpose of filing suit on behalf of the deceased's estate.

Prior to her demise the deceased had joined Mathare Investments and Properties Ltd for the purpose of buying the suit property, which she subsequently bought. Due to her failing health the deceased assigned the suit property to the Applicant by way of an agreement dated 15<sup>th</sup> August 1978 attached to the application pursuant to which the then City Council of Nairobi sold the suit property to the deceased who then assigned it to the Applicant. The Public Trustee filed **Administration Cause No. 155 of 1979** on 11<sup>th</sup> April, 2000 to administer the deceased's estate on the basis that the gross value of the assets did not exceed Kshs. 10,000, and the same is evidence by the certified copy of certificate signed by the Assistant Public Trustee dated 20<sup>th</sup> June 1980.

The Public Trustee went on to administer the deceased's estate and sought to identify the beneficiaries with a valid claim to the estate. This is confirmed by a letter dated 25<sup>th</sup> August 1987 from the office of the Public Trustee requesting that share certificate 0090 relating to Plot K-73 be forwarded to the beneficiaries of the estate of the deceased. On 12<sup>th</sup> April 2000, the Public Trustee wrote to the Secretary of Mathare Investments and Properties Ltd, in which the deceased was a shareholder, requesting that the deceased's shares in the company be transferred to the Applicant.

While it is in dispute when the Respondent began living on the suit properties and whether he lived with the deceased on that property, it is common ground that he has lived there for some period. It is also common ground that he has been collecting rent from tenants and also paying rates and rents in respect of the suit property. A dispute arose concerning the ownership of the suit properties and in particular to whom the rent should be paid to.

The Applicant stated that she had authorized the Respondent, her son, to collect rent from the tenants on behalf of the deceased prior to her death and on behalf of the Respondent after the demise of the deceased. She deposed that the Respondent refused and/or failed to give her the proceeds from the rent collected and frustrated her attempts to transfer and register the suit property in her name. This led her to the decision to sell the suit property on 28<sup>th</sup> January 2014 to one Adan Aila Wote for a consideration of Kshs. 2,400,000 and to hand over the ownership documents to him. The Applicant subsequently gave notice to the tenants of the suit property of the change in ownership and that rent should henceforth be paid to the new landlord and not to the Respondent. This was complied with by the tenants who immediately paid rent to Adan Aila Wote who had commenced registration of the property in his name.

The Respondent was aggrieved by this development which caused him to petition for a limited grant of representation on 25<sup>th</sup> February 2014 by way of certificate of urgency. He also filed **Civil Suit No. 1639 of 2014** in the Chief Magistrate's Court at Nairobi in which he claimed unpaid rent from the tenants of the

suit property. In that suit, he obtained judgment in his favour resulting in the attempt by his agents, Muhatia Pala Auctioneers, to attach the movable property of the tenants of the suit property. However, by its order of 3<sup>rd</sup> September 2014, the Chief Magistrate's Court directed that the status quo be maintained until the hearing.

## ISSUES

From the pleadings the parties in this case, this Court finds that the following are the issues for determination to which the Court will focus its legal analysis:

- i) Whether the Applicant is a dependant or beneficiary or otherwise has some beneficial interest in the deceased's estate;
- ii) Whether the Respondent is the rightful heir to the deceased's estate;
- iii) If the answer to i) is in the affirmative, whether the limited grant obtained by the Respondent should be revoked or annulled on the basis that it was procured by fraudulent means;
- iv) Whether the limited grant should be revoked or annulled on the basis that the proceedings to obtain it were defective in substance;
- v) If the answers to iii) and iv) are in the affirmative, whether the Respondent should bear the costs of the present proceedings.

## ANALYSIS

The first and second issues are interrelated to the extent that they concern the beneficial status or otherwise of the Applicant and Respondent as regards the deceased's estate. It is common ground that the deceased was the Applicant's sister and the Respondent's aunt, and that the Respondent stayed on the suit property for a while in order to collect rent. It is also common ground that the deceased did not have any children of her own. It is however not clear what the status of the parties is in relation to the succession of the deceased's estate. The critical question is the place of a sister and a nephew in the framework of a succession cause. **Section 29** of the **Law of Succession Act Cap 160** provides:

*For the purposes of this Part, "dependant" means?*

*(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;*

*(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death;*

Thus the Applicant who was a sister of the deceased can qualify as a dependant within the meaning of **Section 29** of the **Law of Succession Act Cap 160** if it can be shown that she was being maintained by the deceased immediately prior to her death. In contrast, the Respondent does not qualify as a dependant because the only possibility of that is if it can be demonstrated that the deceased had taken him into her own family as her own child. This is not borne out by the evidence before this Court. While the Applicant was not being maintained by the deceased immediately before her death, there is evidence that the deceased had assigned the suit property to the Applicant. In her capacity as the assignee the Applicant has valid beneficial interest in the suit property.

**Section 39(c) Law of Succession Act Cap 160** provides that;

*(1) Where an intestate has left a surviving spouse or children, the net intestate estate shall devolve*

*upon the kindred of the intestate in the following order of priority;*

*(a) Father; or if dead*

*(b) Mother; or if dead*

*(c) Brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none.*

*(d) Half-brothers and half-sisters, and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none.*

*(e) The relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.*

*(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the state, and be paid into the Consolidated Fund.*

Even if the Respondent was to insist that he is a beneficiary of the estate and thus he should be allowed to administer the same, the law of succession sets out an order of preference to given to persons to administer an intestate estate. **Section 66** of the **Law of Succession Act Cap 160** provides:

*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 the 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.*

**Section 66(b)** of the **Law of Succession Act Cap 160** is particularly relevant in the present case; by virtue of the Applicant's beneficial interest arising from the fact that the deceased assigned the property to her, she has a better claim than that of the Respondent to the administration of the estate as she is the sister of the deceased and the deceased assigned her the property. This Court therefore finds that the Respondent cannot be the rightful heir to the deceased's estate, and also that the Applicant is a beneficiary of the estate.

The third and fourth issues are interrelated and they concern whether the limited grant made to the Respondent on the basis that the deceased with whom he had lived since he was a child was not survived by any other dependent except the Respondent should be revoked or annulled. Another ground for revocation and annulment raised by the Applicant is that the proceedings to obtain the grant were defective in substance. The applicable law in the above regard is **Section 76** of the **Law of Succession Act Cap 160** which provides:

*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;***

In her summons of for revocation or annulled grant of 10<sup>th</sup> December 2014, the Applicant made the case that the limited grant made to the Respondent should be revoked or annulled on the bases of paragraphs (a), (b) and (c) in the above provision. This Court has carefully examined the pleadings of the parties and the affidavits deposed in support thereof, and it has found that the Respondent did employ fraudulent means and material non-disclosure to obtain the limited grant. In his affidavit of 25<sup>th</sup> February 2014, the Respondent stated the following under oath:

***“The deceased was not survived by any other dependant besides me. ... That having lived with my deceased aunt since I was a child, upon my aunt acquiring the said plot, I moved into the property and commenced development ....***

By claiming to be the only surviving dependent of the deceased while his mother who is a sister of the deceased is still alive and well, the Respondent made a patently false statement and concealed something material to the case. What was deposed by the Respondent was untrue and a false misrepresentation of facts. Also, his statement constituted an untrue allegation of fact essential in point of law to justify the limited grant. Had he disclosed that his mother and siblings are alive and well the Court would have required their consents before making the limited grant of letters of administration ad litem to him. This shows that the proceedings to obtain the grant, which were premised on a falsehood, were defective in substance because the Respondent was not a beneficiary. These facts and the evidence before this Court would justify revocation or annulment of the grant.

Taking into account all the circumstances of this case, the law and the evidence on record, it is the Applicant who ranks prior in the order dependency and of preference administer the estate of the deceased. She is therefore the rightful heir of the deceased's estate. In the premises therefore this Court finds and holds that the petition for a limited grant was defective in substance because the Respondent lacked the legal capacity to file the petition and therefore ought to be revoked. This Court also finds that the Respondent intended to disinherit both the Applicant and his siblings through deliberate concealment and misstatement of material facts. On this basis the limited grant of letters of administration of the estate of the deceased made to the Respondent is only fit for revocation in terms of **Section 76 (a), (b) & (c) of the Law of Succession Act Cap 160**. Hence this Court partially allows prayer c) in the Applicant's summons for revocation or annulment of the limited grant that was filed on 10<sup>th</sup> December 2014.

This Court is however cognizant of the fact that **Civil Suit No. 1639 of 2014** in the Chief Magistrate's Court at Nairobi was instituted by the Respondent in order to recover rent and to prevent intermeddling with the deceased's property. It is not clear whether that suit has been concluded. It is therefore important to ensure that a decision of this Court does not adversely affect the interests of the parties to that case. In order to safeguard the interests of the parties, to ensure that the ends of justice are met and to prevent abuse of the court process this Court will exercise its inherent power provided in the **Law of Succession Act Cap 160**. In particular, **Rule 73 of the Probate and Administration Rules** provides:

***Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.***

This Court finds it necessary to substitute the name of the Applicant for that of the Respondent in the limited grant. This will enable the Applicant to continue the civil suit with a view to bringing it to conclusion. After considering all the evidence on record, this Court orders as follows:

**FINAL ORDERS**

- i) The grant of limited grant of letters of administration ad litem of the estate of the deceased was obtained by the Respondent in a manner contrary to **Section 76** of the **Law of Succession Act Cap 160** and **Rule 44** of the **Probate and Administration Rules**.
- ii) The name of the Applicant be and is hereby substituted for that of the Respondent in the limited grant.
- iii) The Applicant is at liberty to apply for further representation to facilitate the transfer of the suit property to the purchaser, Adan Aila Wote.
- iv) Although this is a family matter where there should be no orders as to costs, the present proceedings were caused by the fraudulent conduct of the Respondent. Therefore the Respondent is hereby ordered to bear the costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF MAY, 2015**

**M. MUIGAI**

**JUDGE**

*In the presence of:*

*Counsel* ..... *for* ..... *the*  
*Applicant*.....

*Counsel for the Respondent*.....