



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO. 323 OF 1993

IN THE MATTER OF THE ESTATE OF KIROGO NJOROGE (DECEASED)

BETWEEN

NYARUA KIROGO.....APPLICANT

AND

DAVID NJUGUNA KIROGORESPONDENT

JUDGMENT

1. **Nyarua Kirogo** hereinafter referred to as “the Applicant” filed Summons for Revocation of Grant dated 8th July, 2004 seeking revocation of the grant of Letters of Administration issued to **David Njuguna Kirogo (deceased)** hereinafter referred to as “the Respondent” on 18th April, 1994 and confirmed vide Certificate of Confirmation of Grant dated 13th September, 1994.

2. The summons is supported by the Affidavit of the Applicant sworn on 9th July 2004 and on the grounds set out on the face of the summons as follows:

- i) **That the said grant was made on the basis of misrepresentation by the said David Njuguna Kirogo to the effect that he is a son to the deceased whereas that is not the case**
- ii) **That the said David Njuguna Kirogo in his application for letters of administration intestate left out other deceased’s lawful dependants.**
- iii) **That the proceedings subsequent to the granting and confirmation of the grant were marred with fraud, concealment and gross misrepresentation of material and relevant facts.**

3. Following the demise of the Respondent, the court issued an order that the wife of the Respondent, **Esther Wanjiru Maina**, be served with the Application to indicate her wish to be substituted as the Respondent. Further she was required to be present in court on 14th July, 2006 when the matter was set for further directions. Despite service of the said on 11th July, 2006 and subsequent hearing notices issued in relation to this matter the said Esther Wanjiru Maina failed to enter an appearance or to be in attendance at the hearing hereof.

4. By an Order issued on the 13th July, 2005 one Jim Munge Kinuthia was granted leave to be enjoined as a party to these proceedings so as to safeguard his interests in respect of parcel No. Kiambogo/Kiambogo Block 2/460 which he claimed did not form part of the Estate of the Deceased.

5. On 19th March, 2015, the matter came up for hearing where the applicant was represented by the learned counsel, **Mr. Kahiga**.

6. The Applicant testified that she was the wife of **Karago Njoroge (deceased)** who died on 11th July, 1993. The Respondent filed a Petition in respect of the estate of the deceased. In his application for the grant he stated that he was a son of the deceased. However the Applicant stated that the Respondent was a brother to the deceased. Further the Respondent left out three children of the deceased in his application namely; M W, M N and S N. She produced a letter (**Pexb.1**) from her local chief confirming she was the wife of the deceased and outlining the children of the deceased.

ISSUES FOR DETERMINATION

- i) Whether the Grant was obtained fraudulently by making of false statements that the respondent was a son of the deceased;
- ii) Whether there was misrepresentation of material facts;
- iii) Whether there was concealment of material facts relating to the other beneficiaries to the Estate;
- iv) Whether revocation of the Grant is merited;

ANALYSIS

The advocate for one Jim Munge Kinuthia (hereinafter referred to as “**Kinuthia**”) was duly served with the Hearing Notice dated the 9th December, 2014 and despite service both the advocate and Kinuthia were absent at the hearing, hereof.

Esther Wanjiru Maina the widow of the Respondent failed to enter an appearance and despite hearing notices being served upon her was also not in attendance at the hearing hereof.

Their absence notwithstanding the matter proceeded for hearing.

When Petitioning for the Letters of Administration the Respondent stated that he presented the Petition in his capacity as the son of the deceased. In his Affidavit in Support made on the 19th August, 1993 at paragraph (4) he further deposed that he was the son of the deceased. The Kenya Gazette Notice of 29th October, 1993 also reiterates the above position that the respondent petitioned for the Letters in his capacity as the son of the deceased.

In the Petition the Respondent names the survivors cum beneficiaries as;

- i) David Njuguna Kirogo – son
- ii) M W K –daughter (minor)
- iii) Z N – daughter (minor)
- iv) J W – daughter (minor)
- v) Nyarua Kirogo – widow

The evidence of the Applicant at the hearing hereof was that she is the widow of the deceased. This fact is not disputed and the Respondent has acknowledged this fact when he petitioned for the said Letters of Administration. She testified that she was not notified, nor informed or consulted before the respondent petitioned for the Letters nor did he obtain her consent.

By virtue of Section 66 of the Law of Succession the surviving spouse ranks higher in priority to the children of the deceased. It is therefore incumbent upon the Respondent to have sought her written consent to obtaining the grant or her renunciation of the right to petition for the Letters.

It is trite law that a person who is entitled to take out Letters of Administration must be notified and or their consent first had and obtained. In the absence of these requisite written consents in the form of Forms 38 and 39 as provided by the rules duly signed by the Applicant, this court is satisfied that the whole process was a nullity and the grant has to be revoked.

The Applicant goes further to state that she only had daughters and that the Respondent was not her son nor was he a son of the deceased but was in actual fact his brother. Her evidence is not challenged and remains uncontroverted.

Upon perusing the court record this court notes that the Respondent's Petition was not supported by any letter from an Area Chief; the Applicant/widow's evidence however is fortified by the letter from the Acting Chief tendered into court as (**PExb.1**), in which she is named as a wife of the deceased.

This court is satisfied that Respondent ranks lower in priority and in the absence of the consent and or renunciation from the applicant then the Respondent was not the proper person to administer the Deceased's Estate.

This court reiterates that in the Petition the respondent listed the following as being the persons who survived the deceased; namely;

- i) David Njuguna Kirogo – son
- ii) M W K –daughter (minor)
- iii) Z N – daughter (minor)
- iv) J W – daughter (minor)
- v) Nyarua Kirogo – widow

The Letter from the Chief lists the survivors as;

- i) Nyarua Kirogo - 1967 (wife)
- ii) M W K - 1985
- iii) Z N -1986
- iv) J W – 1990
- v) M W -1995
- vi) M N – 1997
- vii) S N -2003

The Applicant contends that the Respondent concealed material facts as he failed to include the

names of M W in the list of dependants in the Petition.

Indeed the name of the Applicant's above mentioned daughter was omitted in the Petition but I have also noted that the Ag. Chief has taken the trouble to indicate all the children's years of birth.

It is this court's considered view that when the respondent applied for the Letters in 1994 this said daughter was not yet born and this court is satisfied that the failure to include her name did not amount to concealment of a material fact.

I have also noted that the Chief's letter (**PExb.1**) does not include the name of the Respondent as being a son of the Deceased nor a beneficiary of the Estate and there being no evidence to controvert that of the Applicant's this court is satisfied that the statement in the Petition and in the Affidavit in Support where the Respondent deposes to be the son is a false statement and a misrepresentation of facts.

FINDINGS

For the reasons stated above this court finds that the applicant has made out a case deserving of the order for Revocation of the Grant as the proceedings were fraudulent as the Respondent falsely made statements in which he misrepresented himself as being a son of the deceased whereas in actual fact he was a brother to the deceased.

This court makes a further finding that the Respondent was not a direct beneficiary of the deceased and was not a proper person to administer the Deceased Estate.

This court finds that there was no concealment from the court of facts material as to the true persons entitled to be the beneficiaries to the Estate of the deceased.

DETERMINATION

The Grant of Letters of Administration issued on 13th September, 1994 and made to David Njuguna Kirogo be and are hereby revoked and the properties belonging to the Deceased and not distributed to the true beneficiaries do revert back to the Estate of the Deceased.

The applicant is at liberty to petition for a fresh Grant of Letters of Administration to the Estate of the late **KIROGO NJOROGE**.

There shall be no Order as to costs.

Orders Accordingly.

Dated, Signed and Delivered at Nakuru this 10th day of July, 2015.

A. MSHILA

JUDGE