



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
AD COLLIGENDA CAUSE NO. 11'A' OF 2011

IN THE MATTER OF THE ESTATE OF GRACE WAIRIMU KAMAU (DECEASED)

BETWEEN

MARY WAITHERA PETITIONER

VERSUS

ANN NDEGWA 1ST BENEFICIARY/INTERESTED PARTY

FRANCIS THIONGO 2ND BENEFICIARY/INTERESTED PARTY

RULING

The Petitioner Mary Waithera is a daughter and one of the children of Grace Wairimu Kamau (deceased). On 19th December, 2011, she filed an application for Grant of Letters of Administration Ad Colligenda Bona under Section 67 of the Law of Succession Act, Cap 16, Laws of Kenya (hereafter the Act). She advanced the reason for seeking the limited grant as "***limited for the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the same and until further representation be granted.***"

She swore a Supporting Affidavit on 16th December, 2011. Under paragraph 5 of the affidavit she specifies the various reasons for which she urges the court to make the grant of representation.

I duplicate them as follows:-

(a) ***Since the deceased passed away the estate has had no administrator.***

(b) ***The deceased since the year 2005 was diagnosed to be suffering from SENILE DEMENTIA (serious brain degeneration disorder) (annexed herewith and marked "MW.2" is a copy of the Medical Treatment Summary from Moi Teaching & Referral Hospital Eldoret).***

(c) ***The condition persisted until her untimely death on 11th day of June, 2011.***

(d) ***During the period of her illness some of my siblings managed to have some of her properties transferred to their names under questionable circumstances namely: ELDORET MUNICIPALITY/BLOCK 21 (KINGONGO) 3304; KAPSARET/KAPSARET/BLOCK 1 (YAMUMBI)289; ELDORET MUNICIPALITY/BLOCK 12/36; UASIN GISHU/KIMUMU/162; UASIN NGISHU/KIMUMU/163 (annexed and marked "MW.3", "MW.4", "MW.5", "MW.6" and "MW.7" are copies of the green cards respectively).***

(e) The remainder of the estate is at risk of being fraudulently alienated in the absence of an administrator.

(f) The Lands Registrar Uasin Gishu County has very kindly imposed restrictions in the absence of an administrator is not enough.

(g) It is therefore clear that the Estate is in great danger of being wasted before it is properly administered and distributed to the rightful beneficiaries.

Under paragraph 6 of said Supporting Affidavit, the Petitioner has further listed the unalienated properties belonging to the deceased which she seeks to protect as follows:-

- (a) WESTERN FARMERS 15/1654**
- (b) HURUMA PLOT NO. 152**
- (c) SOY/SOY BLOCK 10/NAVILLUS/1047**
- (d) MUIGAI-INI PLOT NO. 1029**
- (e) PEUGEOT P/UP 404 REG. KWA 357**
- (f) ELDORET MUNICIPALITY/BLOCK 14/1396**
- (g) SOLAI/NDUNGIRI/BLOCK 3/1529 WANYORORO 'B'**
- (h) BARCLAYS ELDORET A/C NO. 030036000171**
- (g) 1 POSHO MILL**

She has further listed the children of the deceased as follows:-

- (a) Joseph Kamau - Son - Deceased**
- (b) Mary Waithera - Daughter - 1956**
- (c) Francis Thiongo - Son**
- (d) Naomi Wambui - Daughter - Deceased**
 - (i) James Wanjohi - Grandson - 3.07.1982**
 - (ii) Samuel Ndegwa - Grandson - 22.02.1984**
 - (iii) Robert Mwangi - Grandson - 5.07.1986**
- (e) John Mwangi - Son**
- (f) Ann Waruguru - Daughter**
- (g) Paul Ndegwa - Son - Deceased**
- (h) Daniel Ndegwa - Son**

The hearing of the petition initially came up before honourable Justice Karanja who directed that all beneficiaries be served. I note that only two other beneficiaries filed Replying Affidavits,

namely Francis Thiong'o Ndegwa and Anne Ndegwa. Francis Thiong'o Ndegwa swore two Replying Affidavits on 30th January, 2012 and 2nd March, 2012 while that of Anne Ndegwa was sworn on 30th January, 2012.

The gist of the Replying Affidavits is that the late Grace Wairimu Kamau distributed her estate before her demise. That further, even if some of her property may still be in her name, the entire family sat, deliberated and decided on who shall inherit which property. According to Francis Thiong'o Ndegwa, all the deceased properties initially belonged to her late husband Samuel Ndegwa Kamau. That after the death of the latter, the deceased took out Grant of Letters of Administration and had all the properties registered in her name save for **ELDORET MUNICIPALITY/BLOCK 21 (KINGO'NG'O) 3304** which she bought and later transferred to Anne Ndegwa.

Ann Ndegwa further adds that her late mother never suffered from a mental disease. That she was only ailing from hypertension and diabetes and was seen by a psychiatrist once on 7th January, 2009 due to complications of diabetes. She stated that **L.R. ELDORET MUNICIPALITY/BLOCK 21 (KING'ONG'O) 3304** was bought by her late mother who later gave it to her as a gift. That in the instance, the same should not be listed among the assets of the deceased.

In rejoinder, the Petitioner has sworn a Supplementary Affidavit on 20th January, 2012. She depones that most of her late mother's properties were transferred to her siblings through fraudulent means as at the time of their transfer her mother was not mentally stable to make a sound decision. She has cited **ELDORET MUNICIPALITY/BLOCK (KING'ONG'O) 3304** which she claims the deceased bought in the late 1990s and built on it two houses for Anne Ndegwa and the late Naomi Wambui. That the children of Naomi Wambui continued to occupy the house of their late mother until the 2007 - 2008 post election violence when people fled their homes. That although the said plot is currently registered in the name of Anne Ndegwa, it was meant for both herself and the late Naomi Wambui and that the transfer into Anne Ndegwa's name is ultimately fraudulent.

The Petitioner denies that any family meeting was called with a view to distributing her late mother's property. That the only property that was distributed before the deceased became sick was **ELDORET MUNICIPALITY BLOCK 14/1395** which was transferred to her by the deceased on 19th August, 1999.

Another Supplementary Affidavit is sworn by one Joseph Kiongo on 2nd March, 2012 in his capacity as a village elder who witnessed the deceased distributing her properties on 2nd September, 2007. According to Joseph Kiongo he took the minutes of this meeting and all the persons present consented to the distribution. That the only persons who were not given any property were Mary Waithera (Petitioner) and Anne Ndegwa. That the petitioner was not given any property because she was married. That to appease the two, the deceased gave each one of them Kshs. 100,000/=. Joseph states that on 3rd September, 2007, he accompanied the deceased to Barclays Bank, Eldoret Branch in the presence of John Mwangi Ndegwa, their uncle David Mwangi Njehia and Ephraim Mwaura Mwangi whereby both the Petitioner and Anne Ndegwa were each given Kshs. 100,000/=. He depones that during all those transactions, he did not notice anything abnormal with the deceased.

On 30th January, 2012 the Interested Parties filed a Preliminary Objection to the Petition based on the following grounds:-

- 1. That no special circumstances have been shown to necessitate the grant of Administration ad Colligenda bona defuncti.***
- 2. That the petition introduces issues of argumentative, substantive and contentious nature by involving property which does not belong to the deceased's estate as indicated in the Replying Affidavits.***

3. *That the Petition seeks to involve assets which do not belong to the deceased's Estate and whose title documents are in the names of other persons.*

4. *That the grant of administration ad Colligenda Bona defuncti is limited for the purposes of collecting, getting in, receiving and preservation of the estate and not what the Petitioner seeks as disclosed in her Supporting Affidavit.*

I directed that this Preliminary Objection be heard alongside the Petition. I further directed that the parties file their written submissions. I have summarized each of the parties case which is borne in the respective affidavits. I would not therefore wish to duplicate the submissions made by the parties in this ruling save to say I will make reference to them when and if necessary. Nevertheless, it is important to note that the Petitioner has opposed the Preliminary Objection. She argues that she has demonstrated the need why court should issue the Limited Grant of Letters of Administration **Ad Colligenda Bona defuncti**. She stated that the Preliminary Objection requires that evidence be adduced to demonstrate how properties were acquired by the beneficiaries and other title holders and that the grant would be limited for the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the estate and until a further grant is made.

It is also important to note in this ruling that, as the ruling was pending for delivery, the Petitioner filed Summons dated 22nd July, 2013 under Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules seeking an order of prohibition inhibiting the registration of any dealings of the following parcels of land pending the delivering of this ruling:-

(a) **UASIN GISHU/KIMUMU/4720 to 4743 (24 plots total)** which are all subdivisions of **UASIN GISHU/KIMUMU/162** which was originally property of the late **GRACE WAIRIMU KAMAU**.

(b) **UASIN GISHU/KIMUMU/5060 to 5082 (23 plots total)** which are all subdivisions of **UASIN GISHU/KIMUMU/163** which was originally the property of the late **GRACE WAIRIMU KAMAU**.

(c) **ELDORET MUNICIPALITY/BLOCK 12 (KINGONGO) 3304** which was originally the property of the late **GRACE WAIRIMU KAMAU**.

(d) **KAPSARET/KAPSARET BLOCK 1 (YAMUMBI) 289** which was originally the property of the late **GRACE WAIRIMU KAMAU**.

(e) **ELDORET MUNICIPALITY/BLOCK 12/36** which was originally the property of the late **GRACE WAIRIMU KAMAU**.

(f) - **SOY/SOY BLOCK 10/NAVILLUS/1047**

- **ELDORET MUNICIPALITY/BLOCK 14/1396**

- **SOLAI/NDUNGIRI/BLOCK 3 (WANYORORO "B")/1529**

- **MUIGAI INN PLOT Nos. W 29 & W 30**

- **MUIGAI INN PLOT NO. 1029**

- **HURUMA PLOT NO. 152**

- **WESTERN FARMERS 15/1654**

all properties of the late **GRACE WAIRIMU KAMAU**.

At the time of filing the Summons the file was in the registry awaiting the filing of submissions. I declined to hear the summons on noting that the Petition was already disposed of and all that was pending was delivery of the ruling and doing so would be to reopen the case.

I have accordingly considered the petition, the opposition to it, the Preliminary Objection and the respective submissions.

Section 67 of the Law of Succession Act provides for the administration of the estate limited for purposes only of collecting and preserving the assets. Under Rule 36 (1) of the Probate and Administration Rules such letters can only issue "***where, owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of the representation to the person who by law be entitled thereto in sufficient time to meet the necessities of the case***"

The Petitioner enunciates the urgency under paragraph 5 of the Affidavit in Support of the Petition as; that her siblings have transferred some of the deceased's properties under questionable circumstances and that the remainder of the estate is in danger of being wasted before it is properly distributed to its beneficiaries. In support of her quest for justice, she stated that her siblings manipulated her mother who at the time of the various transfers, was suffering from senile dementia, which is a serious brain degeneration disorder.

Doctor Joseph Imbenzi of Moi Teaching & Referral Hospital testified at the behest of the Petitioner. The latter intended to demonstrate that while a patient is suffering from Senile Dementia he/she loses the control of his/her brain and cannot make an independent decision. As such, the Petitioner's case is that all the transfers effected in favour of her siblings were through manipulation.

In his summarized medical report dated 31st October, 2011, marked as exhibit 5, Dr. Imbenzi stated that since early 2005 the deceased was a patient of Moi Teaching & Referral Hospital attending follow-up at the specialized physician out-patient clinic upon being diagnosed to suffer from:-

1. Diabetes Mellitus
2. Hypertension
3. Osteoarthritis
4. Senile Dementia (Serious brain degeneration disorder)

The report indicates that review carried out by a specialist which form treatment record dated 7th June, 2005 indicate that the deceased:-

- Had serious memory loss
- Was pre-occupied with the past
- Had tremors and rigidity
- Had urinary incontinence

It also shows that a review as late as 21st April, 2011 indicated that the deceased had not gained complete control of her mental faculties.

Dr. Imbenzi also produced other medical treatment records in respect of the deceased as Exhibits 1 - 4.

The Interested Parties on the other hand advance the case that the deceased only suffered from diabetes and hypertension and that senile dementia hit her during her last few months. That the deceased transferred the properties while she was of sound mind and in any event, senile dementia does not make a person insane. It is also the Interested Parties' case that the property that is not currently in the name of the deceased cannot be considered to belong to the estate of the deceased.

Taking into account the observations, it is vivid that issues thrashed out by both sides are quite weighty and cannot be decided in an application for Grant of Letters Ad Colligenda Bona Defuncti. It must be noted that a large chunk of the estate was distributed before the deceased's death and another chunk is also yet to be distributed. I note further that out of the properties the Petitioner cites as undistributed, a number of them are contested by the Interested Parties as not being the deceased's property. And so, it is a contest whether such property can, on interim, be given to the Petitioner to administer. The law is precise that an administrator appointed under the Law of Succession Act administers the estate belonging to a deceased and not to other living persons claiming the same property. Where the latter case may apply, such persons claiming ownership would be at liberty to object to its administration or distribution. That is why, I think, it is only in a full succession cause that the court shall decide what property should be distributed to which party taking into account what each beneficiary has so far benefited from in the entire estate or as the case may be. For this reason, I am of the strong view that this is not a matter which can be determined in a Petition of this nature.

In the end, I decline to issue the Limited Grant of Letters of Administration sought. The parties should agree among themselves who should file for the full grant and if they cannot agree, their respective advocates should advise them on other available legal options.

I accordingly dismiss the Petition with each party to bear its own costs.

DATED and DELIVERED at ELDORET this 11th day of March, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Mr. Otieno for the Petitioner

Mr. Mwaniki for the Beneficiaries/Interested Parties