



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
SUCCESSION CAUSE NO. 679 OF 2002

IN THE MATTER OF ESTATE OF SAMWEL KANYOTIDECEASED

AND

RICHARD NYAGA PETITIONER

VERSUS

LUCIA IRUKI SAMWELOBJECTOR/RESPONDENT

SICILIA MUTITUADMINISTRATOR/APPLICANT

R U L I N G

The Objector has filed this application dated 11th October 2010 for amendment brought under the Provisions of the Law of Succession Act. The Applicant requests that her application for review dated 11/12/2006 be amended. She wants the Review application to be amended to become an application for revocation of grant.

The main ground is that this Court made illegal orders herein on 23/11/2006 and 26/11/2006 by issuing a grant to the Protestor on 23/11/2006 and confirming it on 26/11/2006. Further she states that the Protestor has refused and/or failed to have a 2nd administrator appointed yet there is a continuing trust. The application is supported by an affidavit of Jennifer Wangui an employee in the firm of P.N. Mugo and Co. Advocates. She repeats the grounds on the face of the application in her grounds. The Respondent (Administratrix) filed a replying affidavit dated 2/9/2011. She clarified that the grant was issued to her on **17/11/2004** and confirmed on **26/11/2006**. She opposed the application saying the amendment was introducing another cause of action.

Both Counsels agreed to file written submissions which they confirmed they had filed. However as I write this Ruling I do not see the submissions by Counsel for the Applicant. He however did highlight them on 20/12/2012 where he explained that the deceased who had two wives had two parcels of land which he shared out between his two houses. And that the Respondent (Widow) got the grant alone and wishes to subdivide the land unfairly. He also raises issues with the grant that was issued herein as it was contrary to the Provisions of the Law of Succession Act. He asked the Court to overlook technicalities, and allow the application. He asked the Court to ignore the issues raised by the Respondent as they were mere technicalities. M/s Njeru relied on her written submissions. She has pointed out that though Mr. P.N. Mugo appears for the Petitioner and Applicant none have sworn an affidavit in support of the current application. Instead an employee of Mr. P.N. Mugo had sworn the affidavit. She opposed the application saying it was intended to change the cause of action. She gives the history on how the grant herein came to be issued. A perusal of the record herein gives me a picture of the following;

That on 29/11/1995 the Magistrate's Court issued letters of grant of administration to the Petitioner and Objector (deceased's 2nd wife).

- These two administrators did not apply for confirmation of the grant issued on 29/11/1995.
- Vide an application dated 17/3/2004 the Protestor (Siciria Mutitu Samwel) filed an application asking the Court to Order the two administrators to apply for confirmation.
- Following this application the Court on 8/11/2004 issued a Notice to show cause for the two administrators to appear before it and show cause why the grant of letters of administration issued to them jointly on 29/11/1995 should not be confirmed OR why the said grant should not be recalled and SICIRIA MUTITU SAMUEL appointed as the administrator of the deceased's estate.
- The administrators were duly served but they never appeared and the Court granted the alternative prayer on 17/11/2004.
- The grant to the Protestor was confirmed on 23/11/2006. And the distribution in the confirmed grant is to the effect that the deceased's two parcels of land be each shared into two equal parts for each of the two families.
- It is this distribution that the parties are contending over.

Mr. P.N.Mugo has submitted that vide a Civil Case Embu RMCC NO.15/1984 the Protestor was given land NGANDORI/KIRIGI/1048 which did not therefore form part of the deceased's estate. I have perused this file and have not seen any Judgment and/or decree to confirm that kind of submission. All that has been filed are copies of the Plaintiff and Defence in the said Civil Case. The Protestor/Respondent has been accused of committing some offences by not appointing a co-administrator when there is a continuing trust. This Court has also not been told which this continuing trust is. The Protestor did not apply for letters of grant of administration. But rather when the Petitioner and the Objector refused to have the grant confirmed within 6 months the Protestor did apply after nine (9) years (1995-2004) that they be compelled to apply for confirmation. The Court did so by issuing a Notice to show cause which they failed to honour after being served. The grant issued to them was revoked and a new one issued in the names of the Protestor. What was illegal about that? Who were the minors in the family then? When the grant was initially issued to the Petitioner and the Objector they cited the Land number Ngandori/Kirigi/1048 as one of the properties due for distribution. Why are they now saying that the land had already been given to the Protestor?

The application before me is for amendment of a REVIEW application dated 11/12/2006. The application for amendment is dated 11/10/2010. The amendment is to allow the Objector/Applicant to file for Revocation of grant. The application for Review and the one for Revocation are so widely distinct and unrelated.

The causes of action are so different. Moreover the affidavit supporting it has been sworn by one who is a total stranger, to these proceedings. Neither the Petitioner nor Objector has filed any affidavit in support of this application. A clerk, from Mr. P.N. Mugo's firm cannot come here to swear and tell this Court how it made illegal orders which are null and void as far as the grant is concerned. And if the Applicant is dissatisfied with the orders that the Court made, she should appeal against them and not refer to them as illegal orders. From the material that has been presented before me it is clear that the problem between these two families is the distribution of the two parcels of land. It's not really about the administrator. It's an old matter which should be finalized instead of filing unnecessary applications like the present one. Even if Article 159 (1) (d) of the Constitution implores on the Courts not to dwell on technicalities, advocates cannot hide behind that provision to breach known rules and expect to be excused. This application besides having been supported by an affidavit sworn by a total stranger it brings into the Review application a totally different cause of action. Infact if Counsel was keen on pursuing that cause of action the best option would have been to withdraw the Review application and file what he wanted. My finding is that the present application lacks in merit and it is dismissed. Each party to bear his or her own costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 13TH DAY OF MARCH 2014.

H.I. ONG'UDI

J U D G E

In the presence of;

Mr. P.N. Mugo for Applicants

M/s Fatuma for M/s Njeru for Petitioner/Respondent

Parties

Njue – C/c