



IN THE HIGH COURT OF KENYA AT KITALE.

SUCCESSION CAUSE NO. 85 OF 2004.

BARNGETUNY KENDUIYWA ::::::::::::::::::::::::::::::::::::::: DECEASED.

VERSUS

HELLEN CHEMELI KENDUIYWA ::::::::::::::::::::::::::::::::::::::: APPLICANT.

R U L I N G.

The deceased, **Barngetuny Kenduiywa**, passed away on the 19th October, 2000, after which the petitioner/respondent, **Hellen Kenduiywa**, obtained grant of letters of administration respecting his estate in her capacity as the only widow.

The grant was issued on the 14th September, 2004 and was ultimately confirmed on 12th July, 2012, after several emerging disputes between the family members of the deceased were resolved.

However, on the 5th October, 2012, the applicant/objector herein, **Ann Nanyama Wanjala**, filed this application for revocation and/or annulment of the grant on grounds that it was obtained fraudulently and by concealment of material facts and by means of untrue allegations of fact essential in point of law to justify the grant.

The application is supported by the averments contained in a supporting affidavit by the applicant dated 4th October, 2012.

Under section 76 of the Law of Succession Act, a grant may indeed be revoked or annulled if it was obtained fraudulently or by concealment of material facts or by making of a false statement.

Consequently, the burden to establish that the grant subject of this matter was obtained unlawfully in the manner prescribed herein above lay with the applicant/objector. It is averred in the supporting affidavit that the applicant was also a widow of the deceased, the two having contracted a marriage in the year 1989 under customary law but when the grant was obtained by the respondent, the applicant's consent was not sought neither was any notice given to her yet being one of the widows she was also entitled to apply for the grant. That, the respondent failed to disclose the full list of the deceased's children as the applicant's son with the deceased was left out neither did she disclose that the applicant was one of the widows.

The applicant therefore contended that the grant was fraudulently obtained by the respondent.

In response, the respondent stated that the applicant is a busy body and at no time was she ever a wife to the deceased and neither did she sire any children with him. That, the applicant stayed at the respondent's house as a maid and that her alleged son is not son to the deceased.

The respondent contended that she did not leave out any of the dependants of the deceased and if indeed the applicant was wife to the deceased she ought to have known that the application for grant was filed in court as there was due advertisement vide the Kenya Gazette. Further, that the applicant's annexure marked "ANW 1" is not authentic and that there is nothing to be shared since the estate has already been shared out.

The respondent also contended that the applicant is being used by some people who were not happy with the way the property was distributed.

The applicant in her further affidavit dated 16th January, 2013, annexed photographs (Exhibit marked "ANW 2") taken with the deceased and contended that the two set up a matrimonial home at Taito Farm where the deceased died under her care. She also annexed some receipts (Exhibit marked "ANW 3") and contended that the deceased provided maintenance and paid school fees for their son.

The applicant stated that she was chased away from the matrimonial home by the respondent's sons and that she brought this application as a beneficiary of the estate of the deceased and not as a hired gun for anyone.

From all the foregoing, the fact that the applicant is a widow of the deceased and that they sired one son together had to be proved before it could be held by this court that she and her son were also entitled to benefit from the estate of the deceased and so that the grant issued to the respondent may be revoked for having been obtained mostly by concealment of material facts in relation to the applicant's relationship with the deceased.

Basically, the letter from the chief Sitatunga location to the panel of elders Kaplamai Division (Annexure marked "ANW 1") is a photocopy which has not ever been certified as a true copy of the original.

It's authenticity is doubtful particularly in the absence of a supporting affidavit from the chief who wrote it.

Besides, the letter is not proof or sufficient proof that the deceased and the applicant had contracted a customary marriage prior to his death. No independent person deponed any affidavit to at least show that there was a marital relationship between the applicant and the deceased or that the applicant and her son were dependants of the deceased.

With regard to the applicant's son, nothing was exhibited to establish that the child was a product of her alleged relationship with the deceased or that the child was maintained in any way by the deceased and treated by him as his own son.

The photographs and the receipts exhibited by the applicant are not sufficient and credible to prove the existence of a marriage relationship between the applicant and the deceased and also to show that the deceased was responsible for the payment of school fees for the applicant's son.

It is instructive to note that the receipts bear the name of a person called Noah Kenduiywa yet the applicant's son is referred to as Herbert Kipkemboi.

The paternity of the applicant's son ought to have been established by a DNA examination if not by any other credible evidence.

No evidence was led to show that the deceased died at the said Taito Farm while under the care of the applicant as alleged by the applicant.

For the foregoing reasons, this court must hold that the present application apart from clearly being that of a stranger to the estate of the deceased is devoid of any merit and was brought rather belatedly for any consideration as a dependant thereby suggesting that it was an afterthought from the very beginning.

The application is thus dismissed with costs to the respondent.

[Read and signed this 15th day of July, 2014.]

J.R. KARANJA.

JUDGE.