



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO: 2314 OF 2010

IN THE MATTER OF THE ESTATE OF CECILIA WANJIKU NDUNG'U (DECEASED)

NJOROGE KATOTO.....APPLICANT

VERSUS

JOSEPH MWANGI NJOROGE.....RESPONDENT

JUDGEMENT

The applicant in the application dated 17th November 2010 seeks revocation or annulment of the grant made on 10th May 2010 to the respondent in Kiambu SRMCSC No. 27 of 1999. He argues that there was fraud and that the proceedings to obtain the grant were defective. The principal ground is that the respondent is a nephew of the deceased, while the applicant is a brother of the deceased and therefore the person with prior entitlement to administration of the estate. The applicant argues that his nephew did not notify him before he applied for the grant.

In his reply the respondent does not comment on the relationship between the deceased and the applicant, but he concedes that deceased was his aunt. He states that the family was aware of his application for grant in this cause. He explains the reason behind his applying for the grant to be that the deceased was childless, and she had adopted him in 1965 as her son. She provided him with his basic needs as a child and he, in return, took care of her during her old age, in particular during the time she battled with cancer. He says that that explains why he ended up having custody of all her official documents. After he death, according to the respondent, the family, including the applicant, met and resolved that her estate ought to devolve upon the respondent, and so he sought representation to the estate. He asserts that he obtained the grant openly and without concealing anything. He also defends the confirmation proceedings. He argues that while the deceased was ailing the applicant resided at Kibera and only surfaced when she was on her death bed. He states that his own mother is still alive and therefore the applicant is not the only sibling of the deceased who is alive. He accuses the applicant of having fraudulently transferred estate property without involving him and his mother.

The parties agreed by consent to have the matter disposed of by way of written submissions. Both parties subsequently filed their respective submissions. The applicant submits that the respondent misled the court that he was the only person surviving the deceased, yet there were other beneficiaries. He presented himself to the court as a son of the deceased, while in reality he was a

nephew. He cited the decision of Lenaola J in *In the Matter of the Estate of Makumba Khaemba Malala* (2010) eKLR, where it was asserted that the identities of beneficiaries and their interests in the estate is a material factor and once it is established that they were concealed then the process of obtaining the grant becomes flawed. On his part the respondent submits that he was a defendant of the deceased within the meaning of **Section 29** of the Law of Succession Act, and therefore the only person entitled to inherit her property.

The certificate of death one record shows that the deceased died on 27th March 1998 at the Kenyatta National Hospital of cardiopulmonary arrest due to metasis due to cancer of the cervix. A letter from the Assistant Chief of Kawaiinda Sub-Location, Karuri, dated 7th July 1998 confirmed that she never married and had no children, but that she had adopted the son of her sister, the respondent herein, and had built him a house at Kawaiinda. The respondent petitioned for a grant in Kiambu SRMCSC No. 27 of 1999 on 8th February 1999. He presented it in his capacity as a nephew of the deceased. In P&A 5 he listed himself as the only person who survived the deceased. The petition was gazetted on 21st May 1999 through Gazette Notice No. 2755. Grant of letters of administration intestate was made to the respondent on 22nd June 1999. It was confirmed on 21st April 2010. It would appear that it the confirmation which provoked the Summons for Revocation dated 17th November 2010 and filed in court on 18th November 2010.

The application dated 17th November 2010 is premised on **Section 76** of the Law of Succession Act and Rule 44 of the Probate and Administration Rules. For avoidance of doubt I will quote the relevant portions of **section 76** verbatim. **Section 76** provides as follows, that: -

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 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;...'

The applicant's case is that the process of obtaining the grant was defective and fell afoul of the matters set out in **Section 76(b)** (c) of the Law of Succession Act. His complaints are as follows:

- a. That he had priority over the respondent to apply for grant;
- b. That the respondent concealed from the court the fact that there were survivors of the deceased, or conversely, misrepresented to the court that he was the only person who survived the deceased; and
- c. That he was not informed of the petition by the respondent for grant of representation.

It is common ground that the applicant is a brother of the deceased, while the respondent is a nephew of the deceased. The deceased died intestate. According to the scheme of entitlement to inherit the estate of an intestate set out in Part V of the Law of Succession Act, a brother of the deceased has a superior right to that of the nephew in circumstances where the deceased is not survived by a spouse, children and parents. The relevant provision in Part V is section 39, which provides as follows:

'(1) where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the estate 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...'

Going by **Section 39** of the Law of Succession Act, the applicant no doubt has a superior right to inherit the estate of his sister as against the respondent. Similarly, he has a superior entitlement to the administration of the estate as against the respondent, by virtue of section 66 of the Law of Succession Act, which provides that –

‘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 their respective beneficial interests as provided by Part V...’

The respondent’s right to both the estate and its administration could not supersede that of the applicant or even be equal to it. It takes particular cognizance of the fact that the respondent’s mother, a sister of the deceased, is alive, and herself has a superior right to the estate as against that of the respondent.

The respondent’s case is that he did not petition for letters as nephew of the deceased, but as her son for the deceased had adopted him back in 1965. As a child of the deceased, the respondent would no doubt have a superior right to that of the applicant, to both the estate and its administration. The question that needs to be answered is whether the respondent was indeed a child of the deceased. He claims to have been adopted. He did not lead any evidence at all to show that he was indeed adopted, whether formally or informally. If there was a formal adoption, then the relevant court order ought to have been placed before me. If the adoption was informal, then adequate evidence ought to have been adduced. He asserts that the deceased provided for his needs during his minority. That by itself is not sufficient. It could very well be that she was just assisting her sister’s child. The respondent himself says that his mother is alive or at least was alive as at the death of the deceased. The respondent’s mother ought to have made a statement to support or verify the respondent’s claim to having been adopted by the deceased. The respondent is her son; she should have explained how and when she gave up her son for adoption by the deceased.

I note from the papers filed in court at the time that the respondent applied for the grant describe him as a nephew of the deceased rather than a son of the deceased. The petition, P&A No. 80, indicates that he presented the petition in his capacity as a nephew of the deceased. In the affidavit in support of the petition, the respondent listed himself as the person who survived the deceased and indicated that he was related to the deceased as her nephew. If the respondent had indeed been adopted as he alleges in these revocation proceedings, why did he not disclose that in the petition. Why did he have to describe himself as a nephew rather than an adopted son?

The position stated in the respondent’s affidavit in support of the application differs from that advanced in his written submissions. Whereas it is asserted in the affidavit that he was an adopted son and therefore the person entitled under Part V of the Law of Succession to the estate, it is argued in the submissions that he was a dependant of the deceased. These two positions are not tenable. If the respondent claims to be entitled to a share under Part V, he cannot claim later to be a dependant. A dependant is that person who is entitled to a share in intestacy but who has not been provided for under the will of the deceased or during the intestate administration of the estate. He moves the court under **Section 26** of the Law of Succession Act to have the court intervene and make provision for him. In this case, the respondent has not been deprived. He has taken out letters and the estate has devolved to him. Consequently the

provisions of Part III of the Act, on dependency, are of no application at all. Those provisions include the definition of dependant in **Section 29**.

It appears that the respondent cites **Section 29** to support his assertion that he had been adopted by the deceased, by arguing that he was a dependant by dint of having been taken in by the deceased as her own child. This specific definition of dependant is found in **section 29(b)**. It will be noted that **Section 29(a)** (b) refer exclusively to estates of deceased male persons, while **Section 29(c)** refers to the estate of a deceased females. This then means that under **Section 29(b)** only a child that had been taken into the family of a male person and treated as his own will be regarded as a dependant of such male person. That is not so with respect to a female person taking in a child and treating him as her own. This interpretation of the provision is clear beyond doubt. The provision was construed in the terms by the Court of Appeal in *Willingstone Muchigi Kimari vs. Rahab Wanjiru Mugo* CA No. 168 of 1990. The argument therefore that he had become a son of the deceased by dint of **Section 29** of the Law of Succession Act does not hold.

Even if the deceased had adopted the respondent as a son, that by itself did not absolve him, while applying for the grant, from disclosing the other persons who had survived her. **Section 51** of the Law of Succession Act provides for application for grants of representation. **Section 51(2)** states that –

‘an application shall include information as to –

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouse, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased.’

Rule 7(1) (e) of the Probate and Administration Rules carries a similar provision, which states that –

‘...the application shall be by petition in the appropriate Form supported by an affidavit in one of Forms 3 to 6 as appropriate containing, so far as they may be within the knowledge of the applicant, the following particulars –

e. In cases of total or partial intestacy –

i. The names, addresses, marital state and description of all surviving spouses and children of the deceased, or , where the deceased left no surviving spouse or child, like particulars of such person or persons who would succeed in accordance with **section 39(1)** of the Act...’

Rule 7(1) (e) of the Probate and Administration Rules departs to an extent from **Section 51(2)** of the Law of Succession Act. The Probate and Administration Rules is subsidiary to the Act, and therefore the provisions in **Section 51(2)** override Rule 7(1) (e) of the Probate and Administration Rules. **Section 51(2)** is in mandatory terms, therefore the person petitioning for grant of letters intestate must disclose all the persons listed in **Section 51(2)**. That did not happen in this case. The respondent listed only one person as surviving the deceased, that is himself.

I need not say more. The proceedings leading up to the making of the grant in Kiambu SRMCSC No. 27 of 1999 were defective. The proceedings were founded on misrepresentations and concealment of information. It does not matter that the misrepresentation was innocent or fraudulent. The picture presented to the court was a distortion of the reality. This is a proper case where the court ought to move under **Section 76** of the Law of Succession Act to revoke the grant made to the respondent.

I feel disposed to make the following final orders: -

1. That the grant made to the respondent on 22nd June 1999 in Kiambu SRMCSC No. 27 of 1999 is hereby revoked.

2. That the certificate of confirmation of grant issued on 10th May 2010 is accordingly cancelled.
3. That all transactions carried out on the basis of the said certificate are hereby nullified.
4. That the court file in respect of Kiambu SRMCSC No. 27 of 1999 shall be returned to the Kiambu Chief Magistrate's Court for further handling.
5. The parties are at liberty to move the Kiambu Chief Magistrate's Court for representation in the usual manner.
6. The applicant is entitled to the costs of this application.

DATED, SIGNED and DELIVERED at NAIROBI this 10th DAY OF October 2013.

W. M. MUSYOKA

JUDGE