



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 214 OF 2008

IN THE MATTER OF THE ESTATE OF MAKOSI NGEI –DECEASED

- 1. PAUL NGEI MAKOSI**
- 2. REGINA KAKUVI MAKOSI**
- 3. GEORGE NDAMBUKI MAKOSI**
- 4. EMMA DANIEL KALII**
- 5. REBECCA MAKOSI**
- 6. CHARLES MATHEKA MAKOSI**
- 7. PHILOMENA K. MUTUKU.....APPLICANTS**

-VERSUS-

JOHN MUTISO MAKOSI.....RESPONDENT

RULING

1. By Summons for Revocation of Grant dated 7th June, 2019, the Applicants seek an order that the Grant of Letters of Administration issued to **John Mutiso Makosi**, the Respondent herein on 14th December, 2009 be revoked.

2. The application was supported by an affidavit sworn by **Charles Matheka Makosi** on 7th June, 2019. According to the deponent, the applicants are children of the deceased herein, **Makosi Ngei**, who died on 7th July, 2002. However, the Respondent who is their brother secretly applied for grant of letters of administration of the deceased in 2002 which grant was issued on 7th August, 2008 and was confirmed on 30th December, 2009 without involving them and without their knowledge.

3. It was deposed that the Respondent obtained the said grant fraudulently through serious non-disclosure of material facts by deceiving the court that he was the only beneficiary.

4. According to the deponent the Respondent has moved quickly and selfishly transferred three parcels to himself and to one **Semu Ndiku** and is intending to dispose of other parcels to third parties to the detriment of other beneficiaries. The Respondent was also accused of refusing to fairly distribute the Estate of the Deceased equally amongst the beneficiaries and children of the deceased and has instead sidelined them.

5. In his replying affidavit, the Respondent has instead of tackling the substratum of the Summons whether or not the applicants are children and beneficiaries of the estate of the deceased and whether he involved them while petition for the Grant, has instead concentrated on opposing the grant of injunctory orders.

6. In the Replying Affidavit sworn by the Respondent, he made it clear that he does not have any dealings whatsoever in Plots Makueni/Kisisngo/ 695, 698 and 699 because he does not have any family there. He averred that he does not use the property and barely visits the place and neither did the late **Kaswii Makosi**, first wife to the deceased, **Makosi Ngei**, visit the place. Further the Respondent

herein indicated that the parcel Mitaboni/Ngiini/2060 and Mitaboni/Ngiini/2632 were not part of the estate of the deceased as it is personal property of **John Mutiso Makosi**, the respondent.

7. On behalf of the Respondent, it was submitted that when applying for letters of representation, the Respondent herein made it apparent to the court that the deceased had three wives. This was evidenced by the letter by the area assistant chief who confirmed that the deceased had three wives and the second and third wives had relocated to Makueni for over 20 years. The respondent also presented the sentiments of the deceased who had indicated that the first family was to remain in Machakos and the other two families in Makueni. As such the respondent only applied for letters of administration for the estate of the deceased in Machakos only and only listed the first family as the beneficiaries. Therefore, according to the Respondent, he did not deliberately fail to disclose material facts as alleged by the applicants.

8. It was his view that he had no intention of depriving the other families of their share in the estate of the deceased. According to him, the estate of the deceased in Machakos totals to 3.85 Ha while the parcels in Makueni amount to 53.17Ha, this means that by any means the other families in Makueni have the largest share of the deceased's estate. Therefore, if we speak of equal rights as beneficiaries to the estate of the deceased, the respondent stands to lose greatly for not having any share from the property in Makueni.

9. In the Respondent's view, he only applied for the grant for the estate of the deceased in Machakos. That is why when the grant was issued the only parcels of land that were registered in the names of the respondent are Mitaboni/Ngiini/2057 and Mitaboni/Ngiini/2061. The other parcels of land in Makueni still read the name of the deceased Makosi Ngei. The two families in Makueni have the right to apply for letters of administration intestate for the property in Makueni which was left to them by the deceased. However, if the families feel that the distribution is not fair and equal among all beneficiaries and children of the deceased, then the court can direct that the whole estate of the deceased be divided equally and based on the provisions of Rule 63 of **Probate and Administration Rules** and the opinion of the court **In re Estate of Njau Kanyoria(Deceased) [2019] eKLR**, the court may review of the confirmation orders to accommodate the said assets and beneficiaries.

10. The Respondent disclosed that he has no issue with the process of succession being done afresh; the only problem would be that it would be going against the deceased's wishes, but since the applicants herein claim that the distribution was not done fairly, then let it be done again and equally among all beneficiaries.

Determination

11. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

12. Section 76(a), (b) and (c) of the **Law of Succession Act** provides as hereunder:

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 the 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;

13. In this case it is not in doubt that the Applicants are children of the deceased. They allege, which allegation is not disputed, that they were never informed when the Respondent was applying for grant of representation for the estate of the deceased. The Respondent however contends that he only applied for grant in respect of the properties which the deceased had bequeathed to his family and left the others hence the other beneficiaries are free to similarly seek grant of representation in respect of their entitlements.

14. With due respect to the Respondent such a procedure is unknown in law. There can only be one grant of representation in respect of a deceased's estate. This must be so because section 51 of the **Law of Succession Act** provides as follows:

(1) An application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.

(2) An application shall include information as to-

(a) the full names of the deceased;

(b) the date and place of his death;

(c) his last known place of residence;

(d) the relationship (if any) of the applicant to the deceased;

(e) whether or not the deceased left a valid will;

(f) *the present addresses of any executors appointed by any such valid will;*

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

(h) *a full inventory of all the assets and liabilities of the deceased; and*

(i) *such other matters as may be prescribed.*

15. Section 66 of the *Law of Succession Act*, Cap 160, Laws of Kenya 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;*

16. Under Part V of the Act, the children of a deceased person rank equally. In this case the Applicants and the Respondent are the children of the deceased. Accordingly, there is no superior right to a grant as between them. Accordingly, any person seeking to petition for Grant ought to have sought their consent or cited them before doing so.

17. Part VI Rule 26(1) of the *Probate and Administration Rules* provides that:

Letters of administration shall not be granted to any applicant without notice of every other person entitled in the same degree as or in priority to the applicant.

18. Therefore, what the law requires is that a notification be given to every person entitled in the same degree as or in priority to the applicant. Rule 22(1) of the *Probate and Administration Rules* (hereinafter referred to as “the Rules”) however provides that:

A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto.

19. A citation, it was held in the Estate of Sheikh Fazal Ilahi [1957] EA 697 in which the Court relied on *Henderson on Testamentary Succession (4th Edn)*, is an instrument issued by the court, citing persons to come in and show cause why a grant should not issue to a particular person. It was therefore held in Maamun Bin Rashid Bin Salim El-Ruhmy vs. Haider Mohamed Bin Rashid El-Basamy [1963] EA 438 that:

*“Where a person claiming to be an heir (or the heir of an heir) of a deceased person applies for a grant of administration, citations should not be issued to other heirs whose existence is disclosed in the petition having an equal right as a matter of course but only when for some special reason the court sees fit to make such an order. The object of a non-contentious citation is to call upon a person who has a superior right to a grant to take the grant. Thus any person who is interested in having an estate administered may apply for a grant of representation, but if there are persons who have a superior right to obtain the grant, he must cite such persons calling upon them to apply for the grant. If the person cited fails to apply for a grant or renounce their right to it, the grant may, subject to the usual conditions, be given to the *citor*. It follows that, save in cases where the court thinks it necessary to do so; non-contentious citations should not be issued unless the petition discloses that the person seeking the grant has a lesser right than some other person who has failed to take the necessary steps to obtain it... If on the other hand the person cited concedes that the person who has applied has a right to the grant but contends that he has a superior right, then, the proper course for him to adopt (after he has been served with citation) is to enter appearance to the citation and himself apply for a grant to be made to him if he so wishes. If the person cited enters appearance but takes no further step, the *citor* may apply on summons for an order that the person cited to take the grant within a stated time and in the event of the latter neglecting to do so, the grant will be ordered to be made to the *citor*...The only issue before the court in a cause brought as a result of a caveat being entered is whether or not the person who has applied for the grant is entitled to it and there is no issue as to whether he or some other person has a better right to the grant.”* [Emphasis supplied].

20. It was therefore held by Kneller, J (as he then was) in Kiboko vs. Assistant Land Registrar and Others [1973] EA 290 that:

“Citations need not be ordered to issue to all persons shown as heirs in the petition of the deceased for a grant of letters of administration of the estate. They need not be ordered as a matter of course to issue for heirs shown in the petition to have an equal right. They should go forth to anyone shown to have a superior right to take up the grant or for any other special reason.”

21. It is therefore clear that unless the Court thinks otherwise, the Citor must be a person who is himself entitled to a grant, in the event that a person with a superior right fails to take up the grant or for any other special reason. Where two or more persons have equal rights to grant of representation, there is no necessity for a citation to be made unless when for some special reason the court sees fit to make such an order. In those circumstances, one of them is at liberty to apply for grant and the Court may in its discretion join the other persons if it deems fit.

22. In this case, it is clear that the Applicants were not notified as required in Part VI Rule 26(1) of the *Probate and Administration Rules* despite the fact that they rank in priority to the Respondent and the reason given by the Respondent does not qualify as one of the reasons recognised by law.

23. I agree with the holding in the case of Monica Adhiambo vs. Maurice Odero Koko [2016] eKLR in which the court stated as follows:

“... a closer look at the process she took in applying for the said grant of letters of administration reveal that the said grant was obtained through fraudulent non-disclosure of material facts...None of these two beneficiaries had given the petitioner consent in terms of Rule 7(7) (a) (b) and (c) of the Probate and Administration Rules...The petitioner in the instant case did not rank higher than the objector in priority in seeking a grant of administration intestate and was required before making of the grant to furnish this court with information and satisfy the court that the objectors having prior preferences to a grant being all children of the deceased, had renounced their right generally to apply for the grant or had consented with making of the grant to the petitioner or that they had been issued with a citation calling upon them either to renounce such right or to apply for a grant. The petitioner therefore acted in contrary to the mandatory provisions of Rule 7(7) of the Probate and Administration Rules and it's no wonder my sister Sitati J had to revoke the petitioner's grant for non-disclosure of material facts...With that said, the fact that the petitioners title over the original suit land was revoked will automatically affect the interested parties ownership over the suit property because it will be a corruption of the law to validate how the original suit property belonging to the deceased was transferred to the petitioner. The fact remains that the petitioner stole a march over the other beneficiaries who were also to benefit on equal status on the property of the deceased and it would be unfair to validate the illegal actions of the petitioner by invoking Section 93 of the Law of Succession Act. The reality of the situation is that provisions of Section 93 do not validate unlawful acts and what was intended by Section 93 was where a grant is properly and lawful issued then, Section 93 can come to the rescue of such a purchaser. In my humble view the underlying objective of the law of Succession Act is to ensure that beneficiaries of deceased persons inherit the property.”

24. In the premises, I am satisfied that the proceedings to obtain the grant were defective in substance and that there was concealment from the court of something material to the case. Accordingly, the Grant of Letters of Administration issued to **John Mutiso Makosi** on 14th December, 2009 is hereby revoked.

25. I hereby appoint **John Mutiso** and **Charles Matheka Makosi** as joint administrators of the estate of **Makosi Ngei**. They should expeditiously proceed to apply for confirmation of Grant. However, before doing so none of the properties of the deceased should be disposed of or in any other manner alienated. I further direct that this dispute be referred to mediation for the purposes of proper distribution of the estate of the deceased.

26. As the applicants did not comply with the directions of this court to furnish the court with soft copies in word format, there will be no order as to costs.

27. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 14th day of January, 2021.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Mutinda for Mr Muli for the Respondent

CA Geoffrey