



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 1035 OF 2010

IN THE MATTER OF THE ESTATE OF CECILIA NYANJUKI IKUA (DECEASED)

SIMON IKUA NYANJUKI.....APPLICANT

VERSUS

VINCENT THANGA IKUA.....RESPONDENT

RULING

1. The application is premised under the provisions of Section 76 of the Law of Succession Act and Rule 44(1) of the Probate and Administration Rules; the applicant seeks a revocation of the grant of letters of administration dated 28/02/2019 made to Vincent Thanga Ikua ('**Vincent**') and confirmed on the 26/02/2016 on the grounds that;

(a) The proceedings to obtain the Grant were defective in substance.

(b) That the grant was obtained fraudulently by making of false statement and by concealment from court of something material to the case;

(c) That costs be met by the respondent.

2. The application was supported by the grounds on the face of the application and a Supporting Affidavit made by the applicant dated the 28/02/2019;

3. Directions were given on the 13/11/2019 and after hearing the parties testimonies this court directed the respective counsels to file and exchange final written submissions; hereunder is a summary of the parties respective submissions;

THE APPLICANT's CASE

4. The applicant **Simon Ikua Nyanjuki** stated that the deceased **Cecilia Nyanjuki Ikua** who died on the 4/04/2006 was his mother; at the time the petition was initiated by the respondent he was an adult aged 19 years and his sister was aged 21 years; the respondent who is their uncle and a brother to the deceased unlawfully claimed to be a dependant and fraudulently applied for the letters of administration;

5. The respondent then confirmed the Grant and proceeded to unlawfully distribute the estate to strangers the estate of the deceased; in that he fraudulently included his son Charles Maina Thanga as a beneficiary whereas the son was not named as a beneficiary in the petition; the respondent has distributed and given himself properties in the deceased's estate and also given himself the lion's share of the proceeds from subsequent sales of the deceased's properties;

6. The respondent also distributed the lion's share of the deceased's property to himself; the respondent has taken occupation of the applicant's mothers house yet he never lived with the applicant family prior to his mother's demise; when the applicant attempted to take possession of the family home the attempt was thwarted by the respondent who hired goons to chase him away; whereas he his own home in Karatina and in Nairobi

7. The applicant and his sister contend that they never signed the Consent to the Confirmation of the Grant; and together with his sister they had attended court once under the mistaken belief that they were merely confirming the land that had been sold;

8. The applicant reiterates that the respondent has been clearly fraudulent in the whole proceedings as he gave false statements and has failed to proceed diligently in the administration of the estate and has kept properties for himself;

THE RESPONDENTS' CASE

9. The respondent in response opposed the application and his testimony was that there was nothing defective with the Cause at its commencement; there was a Chiefs letter that disclosed the existence of his late sister and that the applicant and his sister were the deceased's children; the two children had signed the Consent Form 38 and both were in attendance at the Confirmation of the Grant;
10. The applicant was an adult at that time and to save face was now saying that he did not understand the import of the proceedings; that failing to understand does not satisfy the criteria of Section 76 of the Law of Succession Act;
11. The respondent submitted that there was no concealment of any material facts; that the estate was distributed by the court with full participation of the applicant, the sister and the respondent and the bulk of the estate was to be transmitted jointly to the applicant, his sister and the respondent;
12. The applicant had admitted that he had attended court but went there thinking it was to confirm assets that had been sold by the deceased; which then showed there was no concealment otherwise the persons who had purchased would have filed protests or objection proceedings;
13. The Grant was confirmed in 2012 and after this the applicant signed transmission documents between the years 2013 to 2018 where together with his sister and the respondent they all jointly sold off several assets forming part of the estate; the parties had agreed on the mode of sharing of the proceeds with part of it going towards the cost of completing the transmission; it was the applicant's contention that the respondent did not utilize the proceeds for the agreed purpose; and the respondent submitted that such an omission does meet the threshold of obtaining the Grant fraudulently;
14. Having failed to substantiate fraud the applicant alleged that there was a stranger introduced in the confirmation of the Grant; the respondent reiterated that the applicant and his sister were in attendance at the court confirmation but did not object to the introduction of their cousin;
15. In conclusion the respondent submitted that the effect of revoking the Grant after it had been confirmed would make all the purchasers from the deceased and all the purchasers from the applicant, the sister and the respondent, victims of fraud by the applicant and his sister;
16. The application did not satisfy the provisions of Section 76 of the Succession Act as the applicant was an active participant from the commencement to the determination of the cause; and urged this court to dismiss the application.

ISSUES FOR DETERMINATION

17. After hearing the parties and upon reading the parties rival submissions this court has framed the following issues for determination;
- (i) Whether the respondent was a dependant of the deceased;
 - (ii) Whether the Grant was obtained fraudulently or by concealment from the court of something material to the case;

ANALYSIS

Whether the respondent unlawfully listed himself as a dependant of the deceased:

18. The late Cecilia Nyanjuki Ikua to whom this cause relates passed on 4/04/2006 and the respondent herein petitioned for Letters of Administration and was issued with Grant dated 7/02/2011 and a Certificate of Confirmation was issued on the 21/01/2012;
19. The applicant's contention is that the respondent who is their uncle and a brother to the deceased unlawfully claimed to be a dependant and fraudulently applied for the letters of administration;
20. This issue can be broken into two parts; one part is whether the respondent was a dependant of the deceased; and the second part is whether he unlawfully listed himself as a dependant; in addressing the first part, to be a dependant the respondent must fall within the categories described in Section 29 so as to qualify as beneficiaries; Section 29 of the Law of Succession reads as follows;

'Section 29. Meaning of a dependant

For the purposes of this part, "dependant" means-

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**
- (b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sister, and were being maintained by the deceased immediately prior to his death;**

21. It is not in dispute that the respondent was a brother of the deceased; the applicant did not dispute this fact in his evidence; the Chiefs letter dated the 13/04/2009 to which the respondent made reference to corroborates this fact and a portion of it reads as follows;

“One Vincent Thanga Ikua (Brother to the deceased) was appointed to be the administrator of the estates of the late Cecilia Nyanjuki Ikua.”

22. When petitioning for the Letters of Administration the applicant described himself as a brother of the deceased and was issued with the Grant on the 7/02/2011; thereafter the respondent applied for the Confirmation of the Grant vide his application dated 2/11/2011 and in his Supporting Affidavit sworn on the same date he deponed that he was one of **‘the other surviving dependants of the deceased’**;

23. The evidence of the applicant was that his uncle was neither a beneficiary nor a dependant on the deceased; and that his uncle never lived with them during his mother’s lifetime; it is noted that the respondent did not adduce any evidence in rebuttal nor did he tender any evidence at trial that demonstrated that the deceased had taken him in and/or that he had been maintained by her prior to her demise;

24. From the evidence adduced this court is satisfied that the respondent does not qualify to be described as a surviving dependant of the deceased as set out under Section 29 of the Act; having made a finding that the respondent was not a dependant the second portion of this issue that is whether he unlawfully listed himself as a dependant can be incorporated into the next issue;

Whether the Grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case;

25. This court reiterates that when the respondent applied for the Confirmation of the Grant he described himself therein as a dependant of the deceased; this statement was made under oath in his Supporting Affidavit; the inclusion of himself as a dependant when his role was clearly spelt out in the Chiefs letter amounts to the making of a false statement;

26. This court also notes from the court record that when petitioning for the Letters of Administration the respondent sought and obtained the requisite consent from the applicant and his sister; but when seeking for the grant to be confirmed the respondent did not obtain the requisite written consent from them as required by Rules 26 (2) of the Probate and Administration; this provision requires the signing of Form 39 by all persons entitled to benefit or a renunciation; and the provision reads as follows;

“26 (2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any person shall in default of renunciation, or written consent in form 38 or 39, by all persons so entitled in equally or priority, be supported by an affidavit of the applicant and such other evidence as the court may require”.

27. In instances where the parties/beneficiaries are not in agreement they would be at liberty to file a Protest or when they have proved to be un-cooperative then these parties can be cited;

28. From the evidence adduced by the applicant it is apparent that the failure by the respondent to obtain the applicant’s consent and that of his sister was a deliberate act with a calculated intention to deprive the applicant and his sister of their inheritance; and one unlawful act perpetrated by the respondent is evident in the distribution of the four (4) shares in Naromoru Farms Co-op Soc.Ltd Plot No.215 to his son who was neither a purchaser from the deceased nor was he listed as being entitled to benefit from the deceased’s estate;

29. The above act of distribution to his son was not denied by the respondent but the explanation given was that the applicant and his sister were in attendance at the court confirmation and never objected to the distribution to their cousin; notwithstanding the attendance of the applicant and his sister at the court confirmation hearing the absence of their written consent speaks volumes and it is apparent that the act of omission was deliberate as the respondent did not want to disclose to the rightful beneficiaries his fraudulent proposed mode of distribution where he had included himself and his son as beneficiaries;

30. This court is satisfied that the respondent made a false statement on oath and unlawfully listed himself as a surviving dependant; and finds that the exclusion of a written consent Form 39 duly signed by the applicant and his sister amounted to concealment of a material fact that would have enabled the court make a justified determination of the cause;

31. This court finds that the respondent acted contrary to the provisions of Section 76 of the Act and Rule 26 of the Probate and Administration Rules; and is satisfied that the Grant and the resultant Certificate were obtained fraudulently by the making of a false statement and by concealment from the court of something material to the case;

32. The court is satisfied that the applicant has met the threshold for the Revocation of the Grant.

FINDINGS AND DETERMINATION

33. From the afore-going reasons this court makes the following findings that;

- (i) The Respondent is found not to be a dependant of the deceased and is not entitled to directly benefit from the deceased’s estate;
- (ii) The Grant and resultant Certificate of Confirmation was obtained fraudulently by the making of a false statement and concealment from the court of facts material to the cause;
- (iii) The application is found to have merit and is hereby allowed;
- (iv) The Grant and the resultant Certificate of Confirmation issued to the respondent are both hereby revoked; a Fresh Grant to issue in the joint names of the applicant and his sister Elizabeth Nyakabete Nyanjuki;

(v) The estate of the Deceased to revert to its original state; the administrators being siblings to distribute the properties comprising the **NETT**estate of the deceased into equal shares;

(vi) Parties at liberty to apply;

(vii) Each party shall bear their own costs.

Orders accordingly.

Dated, Signed and Delivered Electronically at Nyeri this 11th day of February, 2021.

HON.A.MSHILA

JUDGE