



REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE NO 267 OF 2009

IN THE MATTER OF THE ESTATE OF KIMUKONYI TUWEI (DECEASED)

AND

JOSEPHINA KANDA.....PETITIONER

VERSUS

SAMUEL KIPKOSGEI KANDA.....OBJECTOR

RULING:

1. Before Court is a chamber summon dated the 14th of June 2010 brought under Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules seeking revocation or annulment of Grant of Letters of Administration intestate made to the Petitioner on the 3rd of December 2009 and confirmed on the 22nd of June 2010.

2. In the said summon, the objector seeks the following orders;

- a) The Grant made on 3rd December 2009 to Josephina Kanda be revoked and/or annulled.
- b) This Honorable Court do issue orders for restriction against any dealings on land parcel No. **CHERANGANY KOITUGUM /525** pending the hearing and determination of this application inter-parties and thereafter pending the determination of this cause
- c) The petitioner be stopped from intermeddling with the deceased estate.

3. The application is supported by the affidavit of the objector/applicant herein sworn on the 14th of June 2010 wherein he averred that he is a son to the deceased having been adopted and stayed with the deceased and his late wife since 1976 making him a beneficiary of the estate of the deceased. The applicant further averred that the grant confirmed on the 22nd of June 2010 in favour of the petitioner was acquired fraudulently with material facts being concealed namely; that the deceased had 2 households with the applicant/objector being the son from the 1st household and secondly, that there was another succession proceeding before Iten Law Courts that had been concluded and distribution of the estate done.

4. The application is opposed by the petitioner/respondent herein through grounds of opposition dated the 17th of September 2010 and a replying affidavit sworn on the 8th of October 2010. In the affidavit, the petitioner/respondent disputes the allegations made by the applicant noting that the applicant is a stranger and has never been a dependant of the deceased. Moreover, she averred that she duly filed her succession cause at Eldoret and the petition was duly published in the Kenya Gazette vide Gazette Notice No. 11526 dated the 9th of October 2009 and no objections were received, thus the allegations of non-disclosure and misrepresentation are ill-conceived. She therefore averred that the application by the objector/applicant filed at Iten, was malicious and with the intent to defraud the dependants of the estate.

5. Directions were given on 20th of September 2010, to the effect that the application dated the 14th of June 2010 would be disposed of by way viva voce evidence with further directions given on the 8th of March 2021 that submissions be filed within 21 days' time.

OBJECTOR'S/APPLICANT'S CASE

6. The applicant's case is premised on three grounds namely;

- i. That the proceedings to obtain the Grant and Confirmation thereof were defective in substance

ii. That the Grant was obtained fraudulently by making of false statements and/or concealation from the court of material facts

iii. That the petitioner totally misled this Honorable court on the facts relating to the Estate of the deceased.

7. In support of his application, the applicant through his supporting affidavit sworn on the 14th of June 2010 averred that the petitioner/respondent herein misled the court and obtained the said grant without involving the dependants and real beneficiaries of the estate who have the legal and beneficial interest in the estate.

8. Moreover, the applicant averred that the petitioner/respondent commenced the current succession cause at Eldoret to the exclusion of other beneficiaries including the applicant and with full knowledge that there was another succession cause at Iten namely **ITEN SRMCC SUCC. CAUSE NO. 29 OF 2009** in which the petitioner/respondent fully participated in.

9. In this regard, the applicant averred that the petitioner failed to disclose before court pertinent and material facts including;

a. That the deceased had two houses with the 1st house being that of the applicant's late mother one Maria Kimukuny,

b. That the applicant is one of the dependants of the deceased being his son and therefore entitled to be heard in the proceedings,

c. That there was another succession cause at Iten which had been concluded and distribution of the estate done.

10. The applicant further averred that he is the adopted son of the deceased Kimukuny Tuwei and the late Maria Kimukuny whom he had been staying with since 1976 and prior to the deceased death, possession and occupation of each house had been ascertained and indeed confirmed by a panel of elders meeting.

11. The applicant therefore remains apprehensive that the petitioner herein intends to lock him out of the proceedings herein with the ultimate intention of dispossessing him the use of his portion of subject land namely **CHERANGANY/KOITUGUM/525**.

12. In support of his application, the applicant called four witnesses.

13. PW-1, Samuel Kipkosgei Kanda who is also the objector/applicant herein, testified to the effect that he is a son of the deceased having been adopted in 1976 at the age of 6 years. He also testified that the deceased had two wives namely Maria Kimukuny and Josephine Kanda (the petitioner herein) with Maria as the 1st wife and Josephine being the second wife having been married to the deceased in 1979. Moreover, PW-1 testified that his mother, Maria, died in the year 1998 and produced her death certificate marked as PEXB-1 while his father passed on, on the 20th of December 2007 and a copy of his death certificate produced as PEXB-2. He further testified that the only dispute is with regard to the land namely **Cherangany Koitugum /525** and not any other assets of the deceased. In his testimony, the applicant/objector objected to the petition by the Petitioner on grounds that she excluded the first house and failed to disclose that there was another succession cause ongoing at Iten of which the petitioner was fully aware of.

14. However, on cross-examination, PW-1 admitted that the grant issued to the petitioner/respondent preceded his, considering that the petitioner's grant was issued on the 3rd of December 2009 while the Iten grant was issued to the objector/applicant on the 31st of March 2010.

15. On the other hand, PW-2, a Mr. Kibet Maigut testified (in Marakwet and the same was translated by Peter Kisang to English), to the effect that he was the deceased brother and that the deceased had two wives, Maria and Josephine. He confirmed that the deceased was the father to the objector/applicant herein and reiterated this position on cross examination noting that the Objector/applicant is the biological son to Maria. Furthermore, he testified that he had attempted to distribute the deceased estate in honor of the deceased wishes but the same was rejected by the deceased 2nd wife who is the petitioner/respondent herein.

16. PW-3 Joseph Kipkemoi Rotich testified that he has known the objector/applicant since 1974 (when the objector was 4 years old) noting that the objector's mother, Maria, was his sister and that the deceased Kimukuny Tuwei adopted the objector/applicant in line with the Marakwet tradition namely; by providing alcohol and other items. He testified that the objector was adopted in 1974 and the deceased had him circumcised and took care of him. Furthermore, he testified that the deceased went as far as paying dowry for the objector/applicant considering him as his own son and upon the deceased death, the objector/applicant herein was given the deceased stick and spear. PW-3 also testified that the estate of the deceased had been distributed according to customary laws with the 1st house receiving 17 acres and four heads of cattle and the 2nd house getting 14 acres and six heads of cattle.

17. On cross-examination, PW-3 testified that Maria had earlier been married and that the Objector/Applicant herein was a biological son to Maria having come from Maria's previous marriage. He further testified that the objector cannot inherit from his biological/natural father after adoption and as such, the objector should benefit as a son of the deceased and also as representing the 1st household and his late mother Maria.

18. Finally, PW-4, Everline Wanyama, a judicial officer attached to the civil registry at the SRM's court in Iten testified and produced the court file in Succession Cause No. 29 of 2009 as PEXB-3 together with the court decree in Land Dispute Tribunal Case No 14 of 2009, which show that the distribution in Succession Cause No 29 of 2009 and the decision of the Land dispute tribunal is the same.

19. Finally, the objector/applicant relied on the case of ***In the Matter of the Estate of Stephen Mwangi (Deceased) (2018) eKLR*** where the court revoked grant on account of failure by the respondent to include the name of the applicant as a survivor of the deceased notwithstanding the fact that the applicant had filed a parallel succession cause.

PETITIONER/RESPONDENT'S CASE

20. The petitioner/respondent herein through grounds of opposition dated the 17th of September 2010 and a replying affidavit sworn on 8th of October 2010 opposed the application on grounds that the application was incompetent in law, it was made in bad faith and that the application lacks merit as to the contentment of the material facts.

21. In the affidavit, the petitioner/respondent disputed the allegations made by the applicant noting that the applicant is a stranger and has never been a dependant of the deceased.

22. Moreover, she averred that she duly filed her succession cause at Eldoret and the petition was duly published in the Kenya Gazette vide Gazette Notice No. 11526 dated on the 9th of October 2009 and no objections were received, thus the allegations of non-disclosure and misrepresentation are ill-conceived.

23. In fact, the petitioner/respondent averred that while awaiting confirmation of grant, the applicant proceeded and obtained another grant of letters from Iten Court and attempted to proceed and distribute the estate prior to confirmation of grant. She attached a letter marked as JK-1 from the District Land Registrar to the district commissioner Marakwet District.

24. She therefore averred that the petition by the objector/applicant filed at Iten, was malicious and with the intent to defraud the dependants of the estate.

25. The petitioner/respondent have however not submitted their submissions in compliance with the Court's direction given on the 8th of March 2021 and despite being served by the objector/applicant on the 11th of December 2020 (return of service was filed).

ANALYSIS AND DETERMINATION

26. The only issue for determination is whether the objector/applicant has made a case for the revocation of grant issued to the petitioner/respondent.

27. The application for determination is predicated on *Section 76 of the Law of Succession Act, Cap 160, Laws of Kenya* which is instructive to reproduce hereunder.

It provides:

“76. Revocation or annulment of grant

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;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

28. A reading of Section 76 indicates that a grant of representation, whether confirmed or not, may be revoked or annulled at any time by court on its own motion or on application by an interested party. This position has been cited with approval in a litany of cases. See for example, *In Re Estate of Naftali (Deceased) (2002) 2 KLR 684* and *In Re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR*.

29. Section 76 contemplates that revocation should be on any of the grounds listed therein namely: the proceedings to obtain a grant being defective in substance; the grant having been obtained by reliance on false statements, non-disclosure or concealment of important matter or information; the person to whom grant was made having failed to apply for confirmation within the prescribed time or having failed to

diligently administer the estate or having failed to produce to the court within the prescribed time any inventory or account of administration as required in law or produces an inventory or account which is false; and finally, the grant having become useless and inoperative through subsequent circumstances. See *W M Musyoka, Law of Succession, Law Africa Publishing 2006 at 179-181*.

30. An application for revocation not based on the grounds set out in section 76 automatically fails as was held *In the Matter of the Estate of Patrick Mbugua Njoroge (deceased) Nairobi High Court Probat and Administration No. 659 of 1989*.

31. Moreover, an application for revocation under Section 76 concerns itself with the process; that is, the proceedings leading up to the confirmation of grant. An applicant must therefore prove that the proceedings leading to a confirmation of grant were muddled by procedural defects in the application for or making of the grant or that the proceedings were attended by fraud through false statements and concealment of material information, or was obtained by an untrue allegation of a fact that is essential to the point.

32. *In the Matter of the Estate of L A K – (Deceased) (2014) eKLR* the Court affirmed that;

“Revocation of grants is governed by Section 76 of the Law of Succession Act. The relevant portions of Section 76 are paragraphs (a), (b) and (c) since the issues raised relate to the process of the making of a grant. A grant may be revoked where the proceedings leading up to its making were defective, or were attended by fraud and concealment of important matter, or was obtained by an untrue allegation of a fact essential to the point.”

33. Similarly, *In Re Estate of Agwang Wasiro (Deceased) [2020] eKLR*, the honorable court held that;

“Under section 76 of the Act, a grant of representation is liable to revocation on three general grounds. The first ground would be where the process of obtaining it was attended by glaring difficulties, such as where the same was defective, say because the person who obtained representation was not qualified to be appointed as personal representative, or the procedural requirements were not met for some reason or other. It could also be because the petitioner used fraud or misrepresentation or concealed important information in order to obtain the grant. The second general ground is where the grant is obtained procedurally, but the administrator subsequently runs into difficulties during the process of administration of the estate. Such difficulties include his failure or omission to apply for confirmation of his grant within the period allowed in law, or where he fails to exercise diligence in administration of the estate, such as where he omits to collect or get in an asset, or where he fails to render accounts as and when he is required to do so by the law. The third general ground is where the grant has become inoperative or useless on account of subsequent circumstances, such as where the sole administrator died or loses the soundness of his mind or is adjudged bankrupt.”

34. In the instant case, the applicant/objector anchors his case on a single ground namely, fraudulence through false statements or concealment of material information. In particular, the applicant/objector contends that the petitioner/respondent intentionally and knowingly left out the objector/applicant as a dependant of the deceased in her succession cause at Eldoret and secondly, that the petitioner/respondent failed to disclose that there was another parallel succession proceeding at the Iten Court, of which the applicant/objector testified that the petitioner was fully aware of.

35. Consequently, the Court has to examine the procedure for applying of grant in light of objector/applicant’s claim that he was left out as a survivor of the deceased.

36. The procedure for applying for grant of representation is set out under *Section 51 of the Law of Succession Act and rule 7 through to rule 14 of the Probate and Administration Rules*. In particular, the most relevant provisions, for the purpose of this application, are in subsection (2)(g), which state as follows:

“Application for Grant

51. (1) ...

(2) Every application shall include information as to—

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(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)..."

37. **Section 51(2) (g)** is couched in mandatory terms and requires a petitioner to disclose the names and addresses of all the surviving spouses, children, parents, brothers and sisters of the deceased and of the children of any pre-deceased child of the deceased. **In the Matter of the Estate of Mwaura Mutungi alias Mwaura Gichingo Mbura alias Mwaura Mbura (deceased) Nairobi High Court Succession Cause No. 935 of 2003**, the court affirmed that it is mandatory that all these details be disclosed, failure to which an application for grant cannot be made. See also **W M Musyoka (supra) at 156-157**.

38. In her petition for letters of administration together with the affidavit in support of the petition dated the 22nd of June 2009, the petitioner/respondent indicated clearly that the deceased died intestate and included herself and her three daughters as the surviving dependants of the deceased. Similarly, in her summons for confirmation of grant and the affidavit in support of the confirmation of grant, the petitioner/respondent listed herself and her three daughters as the only persons surviving the deceased. From both lists, it is clear that the objector/applicant was excluded.

39. This could be because the petitioner/respondent considers the objector/applicant a complete stranger and not a child of the deceased as noted in her replying affidavit. However, from the evidence adduced before court at hearing, PW-2 and PW-3 confirmed that the deceased adopted the objector/applicant between 1974 and 1976 and had been caring for him and treating him as his own son to the extent of having him circumcised, paying his dowry and his school fees. It is also clear that family members and community members knew the Objector/Applicant as the deceased son.

40. There is therefore no doubt in my mind that the objector/applicant is an adopted child of the deceased. It is trite law that an adopted child takes on the intestacy of the adoptive parent. See **Musyoka (supra) at 110**. Additionally, **Section 3(2) of the Law of Succession Act contemplates that illegitimate children** (defined to include a child born to female person outside wedlock, a child whom a male person recognized or in fact accepted as his child or for whom he has assumed permanent responsibility) can benefit from deceased estate provided that the male deceased person accepted or assumed permanent responsibility. **In Willingstone Muchigi Kimani v Rahab Wanjiru Mugi Nairobi Court of Appeal Civil Appeal Number 168 of 1990**, the Court of Appeal affirmed this position.

41. From the evidence adduced before Court, it is clear that the deceased not only accepted the objector/applicant as his son but also assumed permanent responsibility to the extent that he had him circumcised, paid his school fees and dowry; and further upon his death, the deceased stick and spear were given to him.

42. From the foregoing, it is vivid that the objector/applicant is a son to the deceased and therefore entitled to the estate of the deceased. His exclusion therefore offends the provisions Section 51 2 (g) of the LSA.

43. As regards concealment/non-disclosure of material fact, the objector submitted that the petitioner/respondent was aware of another succession cause at Iten. However, on cross examination, PW-1, the objector/applicant herein admitted that the petitioner/respondent petition was filed first and his came later on. Indeed, from the record before court, it is clear that the petitioner/respondent petition was filed on the 1st of October 2009 while the Objector/applicant succession cause at Iten was filed on the 22nd of October 2009. Moreover, the Grant was issued to the petitioner/respondent on the 3rd of December 2009 while the Iten grant was issued to the objector/applicant on the 31st of March 2010.

44. In the foregoing circumstances, it is the objector/applicant who filed his petition late and ought to have been aware of the succession cause filed in Eldoret considering the fact that it was duly published in the Kenya Gazette on the 9th of October 2009. I must also point out the fact that the objector/applicant in his petition at the Iten Court excluded the petitioner/respondent as a beneficiary but included the petitioner/respondent's three daughters of which is as well against the provisions of Section 51 2(g) of the LSA.

45. **In the Matter of the Estate of Peter Minik (deceased) Machakos High Court Probate and Administration 13 of 1998** the court considered non-disclosure of some of the survivors of the deceased as concealment of material information and proceeded to revoke the grant.

46. In the instant case and as considered above, the petitioner/respondent failed to disclose that the objector/applicant was a child of the deceased.

47. The objector has therefore proven that there was non-disclosure and or concealment of material information.

48. The upshot is that the Applicant has achieved the threshold for revocation of the grant herein.

49. Consequently, the application is allowed and the grant issued to the petitioner/respondent on the 3rd of December 2009 and confirmed on the 22nd of June 2010 is revoked.

50. To move the matter forward and to avoid inordinate delay, a grant should issue to both the petitioner and the objector for purpose of administration and distribution of the deceased's Estate.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 26th day of April, 2021.

In the presence of:-

Miss Wahome for the objector

Firm of Kimaru Kiplagat for the petitioner (absent)

Gladys - Court Assistant