



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

SUCCESSION CAUSE NO 32 OF 2011

IN THE MATTER OF THE ESTATE OF ISAYA OMAIL ARUSHA (DECEASED)

BETWEEN

DAVID KAMANDA ARUSHA.....1ST PETITIONER

VERONICA NYAMBURA WAMBUGU.....2ND PETITIONER

AND

LUCIA KEMUNTO ONCHIRI.....1ST OBJECTOR

NANCY BANCHIRI ARUSHA.....2ND OBJECTOR

RULING

1. This succession cause relates to the estate of **ISAYA OMAI ARUSHA**. **Daniel Kamanda Arusha ('Kamanda')** applied for letters of administration and was granted with grant on the 25th May 2011.
2. **Luciah Kemunto Onchiri** through her application dated 6th February 2012 applied for revocation of grant issued to Kamanda. Subsequently Veronica Nyambura ('*Nyambura*') on 14th August 2015 filed an application to have the grant issued to Kamanda revoked. The application filed by Nyambura was set down for hearing and grant issued in the joint names of Nyambura and Kamanda. The two administrators then filed summons for confirmation of grant dated 24th November 2016. The application was allowed and grant confirmed with the court directing that deceased property be shared equally among the deceased beneficiaries, Kamanda, Nyambura and Boniface Omai Arusha.
3. Nancy Banchiri Arusha *alia* Jerusha Banchiri on 26th January 2018 filed summons for revocation of grant dated 25th January 2018 seeking that Kamanda and Nyambura be restrained from dealing with the deceased's estate and the grant issued to them be revoked. The application was on the grounds that Nancy was the deceased's widow and that the administrators had already withdrawn Kshs 400,000/-. The application was also premised on the ground that Nyambura was a stranger to the deceased's estate. The applicant was apprehensive that the two administrators are likely to utilize the Kshs 2,440,000/- held by the deceased's former employee Kenatco Taxis Limited.
4. Nancy in her supporting application averred as follows: that the deceased was survived by herself, Lydia Bosibori Arusha, Kamanda, Moris Rioba Makori, Naomi Makori and Boniface Omai Arusha. That the administrators, Kamanda and Nyambura concealed the other beneficiaries in their application. That Nyambura was not a beneficiary in the deceased's estate as her mother was not married to the deceased. She further averred that the administrators are likely to waste the estate thus disinheriting the other beneficiaries.
5. Nyambura filed a replying affidavit dated 15th August 2015 claiming that Lydia Bosibori Arusha, Morris Rioba Makori and Naomi Makori are not the deceased's children. She averred that Nancy never cohabited with the deceased and that she had fraudulently purported to file **Succession Cause No 97 of 2010** by obtaining a letter from the Chief of Kegogi Location knowing that the deceased was not resident in the area. She also alleged that Nancy had changed her name in her ID Card No 5987866 reading Nancy Banchiri Makori to Nancy Banchiri Arusha.
6. Luciah Kemunto Onchiri ('*Luciah*') filed a replying affidavit dated 14th October 2020 averring that she got married to the deceased in 1990 and resided at Baba Dogo Nairobi till his demise on the 17th July 2009. She claimed that Nancy left the deceased and she raised Kamande. In her reply Luciah claims that administrators have excluded her and her children. She advanced that it is only fair that the grant issued herein be revoked. She averred that Nancy separated with the deceased and got remarried elsewhere. That she is apprehensive that the

funds held by Kenatco Taxis Ltd may be released to the administrators. She claimed that Nyambura was not the deceased's daughter and is not entitled to a share of the estate. She averred that the children named in Nancy's application are children from her second marriage. She also proposed that the share to Kamande be less the amounts collected from the deceased's accounts.

7. Owing to the issues raised in the application and affidavits, this court directed that the matter be heard through viva voce evidence. This court also ordered that the deceased's estate be preserved owing to the fact that Kshs 400,000/- that had been withdrawn by Kamande.

8. Nancy Banchiri Arusha ('Nancy') testified as Pw1. She testified as follows; that the deceased was her husband and Kamanda is his son. The deceased did not have another wife and that she is his only wife. That her children are Lydia Bosibori, Kamanda, Moris Rioba Arusha, Naomi Makori and Boniface Omai Arusha. She does not know Veronica Nyambura Wambugu.

9. On cross examination she testified that she obtained a grant in **Succession Cause No.97 of 2010**. She also testified that Luciah Kemunto Onchiri is the mother of Boniface Arusha and the wife deceased. That she had separated with the deceased before the deceased married Luciah. She conceded to having other children with another man after her separation with the deceased.

10. On 8th December 2020 Luciah testified by adopting her affidavit dated 14th October 2020 as her evidence in chief. On cross examination she testified that the deceased married her in 1990 and they were married for 19 years. She testified that she stayed with the deceased until his demise on 17th July 2009. She explained that the deceased gave her father money as dowry before the death of her father. She recalled that the deceased had not completed dowry because he was yet to give her father 1 cow and 2 goats. She also testified that she has two other children other than Boniface. She further testified that she did not know Nyambura and only knew her after the succession cause was filed.

11. Kamande testified as Dw1. He testified as follows: that he filed a petition in this court. The deceased is his father and the objector Nancy is his mother. That Luciah was not his father's wife but a concubine. On cross examination he testified that he stayed with Lucia and that she is the one who brought him up. That he had a brother called Boniface. That the deceased had a shamba in Kisii and Nakuru.

12. Nyambura (Dw2) testified that her mother was Loice Wangoi and her father is the deceased. That Kamanda is her step brother and that they were brought up together with Boniface Omari who is their younger brother. She explained that after the court appointed her as an administrator they divided the land between herself, Kamanda and Boniface. She further explained that Kamanda represented her mother's interest. On cross examination she testified that she has not acquired a birth certificate. That the deceased had 3 wives and Kamanda's mother.

13. The 2nd objector and the 2nd administrator filed written submissions. 1st objector did not file written submissions.

ANALYSIS AND DETERMINATION

14. Before considering the application on revocation, I must first make a determination on whether the deceased was polygamous. Although Nancy testified during her examination in chief that she was the deceased's wife, during cross examination she conceded they had separated. Kamanda testified that Luciah was no more than the deceased's concubine however on cross examination he testified that he was brought up with Luciah clearly indicating that the deceased was living with Luciah. I have also considered the testimony by Luciah who testified that she was the deceased wife. Her evidence was clear and remained unshaken on cross examination. Luciah recalled that she got married to the deceased in 1990 and that they were married for 19 years. She also testified that she stayed with the deceased in Baba Dogo Nairobi until his demise on 17th July 2009. She further testified that the deceased paid her dowry although not the whole amount. Having considered the evidence in totality I find that Lucia was the deceased wife at the time of the deceased's demise.

15. I now turn to consider the main issue for determination which is whether the applicant has established a case for revocation of grant. **Section 76 of the Law of Succession Act (Chapter 160 of the Laws of Kenya)** provides as follows:

"A grant of representation whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by interested party or its own motion: -

a) That the proceedings to obtain the grant were defective in substance;

b) That the grant was obtained by the making of a false statement or by concealment of from the court of something material to the case.

c) That the grant was made by an untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

d) 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 a year from the date thereof or such longer period as the court has ordered or allowed; 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 paragraph (e) and (g) of section 83 or has produced such investigation or account which is false in any

material particular; or

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

16. Having considered the evidence from all the parties and the submissions the next issue for determination is whether Nancy has established a case for revocation of grant and whether the grant should be issued to her. It is not contested that Nancy filed **Succession Cause No 97 of 2010** alleging that she was the deceased’s widow. She was then issued with a grant dated 29th April 2010. In her testimony during cross examination she testified that she had separated from the deceased and had other children with someone else. She also recognized that the deceased’s wife was Luciah. It therefore follows that the allegations made by Nancy in her application for grant in **Succession Cause No 97 of 2010** were untrue and that she is not the deceased’s wife and therefore the grant cannot be issued to her.

17. I shall now turn to consider the grant issued to Kamanda and Nyambura should be revoked. It is not contested that Kamanda is the deceased’s son. However, the hugely contested issue was whether Nyambura was one of the deceased’s beneficiaries.

18. Nyambura claims that she was one of the children of the beneficiaries and in that regard, she was required to prove her claim on a balance of probabilities. However, other than alleging that she was the deceased child she did not produce any evidence to support her claim.

19. On the other hand, Luciah testified that she came to know her only after the succession cause was filed. She had lived with the deceased son Kamande but denied staying with Nyambura. Kamande and Nancy also testified that they did not know that Nyambura was the deceased child. It is not however clear why Kamande had agreed to jointly administer the estate alongside Nyambura who is not a beneficiary of the estate.

20. In the end with no evidence to prove that Nyambura is the deceased’s child, the grant issued to her (a stranger who is not one of the deceased’s beneficiaries) and Kamande is one that must be revoked.

21. In the upshot, the final orders to be made in this matter are as follows –

- a) The Grant of Letters of Administration issued to **VERONICAH NYAMBURA** and **DANIEL KAMANDA ARUSHA** and subsequently confirmed are hereby revoked.
- b) A fresh grant is hereby issued jointly to **LUCIAH KEMUNTO ONCHIRI** and **DANIEL KAMANDA ARUSHA** forthwith.
- c) The joint administrators are directed to file for confirmation of grant within sixty (60) days hereof.
- d) Mention on 20th September 2021 to confirm compliance and for further directions.

Dated, Signed and Delivered at KISII this 29th day of June, 2021.

R. E. OUGO

JUDGE

Mr. Soire **For the 2nd Respondent**

Mr. Kerongo H/B **For the 2nd Objector**

1st Petitioner **Absent**

Ms. Ivyao **Court Assistant**