REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 305 OF 2008

IN THE MATTER OF THE ESTATE OF THIRUAINE MWITARI Alias THIRUAINE MWITARI (DECEASED)

N'NABEA M'IMANYARA KAINDA.....PETITIONERS/RESPONDENTS

VERSUS

STANLEY BUNDI

PAULINA NKURUGUCHU M'TWAMWARI.....OBJECTORS/RESPONDENTS

AND

M'MUNGANIA M'MBOROKI.....APPLICANT

RULING

1. By Summons under certificate of urgency dated 18/01/2021 and brought under section 47(b)(c) Rule 73, 44(1) of the Law of Succession Act and Article 60 of the Constitution, the applicant seeks, in the main, that the grant issued and confirmed to the petitioners by the court be revoked. The grounds upon which the application is premised are set out in the body of the application and the supporting affidavit of M'Mungania M'Mboroki, the applicant herein, sworn on 18/01/2021. He contends being the only son to the deceased and beneficiary to the estate who was excluded and not involved in the cause by the petitioners. He adds that him and the mother, Ciomuthamia, now deceased, were chased away from their home. His further contention is that the property known as Nyaki/Chugu/234 has never been owned by the deceased hence it ought to be removed from the cause. He deposed that the petitioners presumed he was dead and lied that the deceased had no living relatives. He procured and exhibited an affidavit sworn by the 2nd petitioner on 19/01/2021 in support of his application

2. The application was opposed by the replying affidavits sworn on the 05/02/2021, by Stanley Bundi and Paulina Nkuruguchu M'Twamwari, the objectors. The two aver that the applicant is a stranger and an imposter to the estate of the deceased who has been invited by the 2nd petitioner in order to hoodwink the several people the said administratrix has sold parts of the estate property to. The 1st objector in particular takes issues with the name of the applicant as befitting those born prior to mid-1940 and contends that if true he should have been of the age of majority by the time the deceased died and should have acquired an identity card in the name of the deceased prior to the death of the deceased. He asserted having been with the deceased at the time of death, that his wife had abandoned him long before and then wondered why it took the applicant a whopping 33 years to claim his inheritance with a contention that the time limited by cap 22 had caught up with the applicant. That deponent disparages the evidence of the 2nd administratrix as false for reason that she was married long after the death of the deceased and had no knowledge of the history.

3. The affidavit by Paulina reiterates the assertions by Stanley and reiterates that she was born and brought up in the same village and later married in the home before Ludia and had never heard of the applicant. The two prayed for the application to be dismissed for being an afterthought, aimed at delaying the execution decree at the behest of the second administrator.

4. The applicant filed a supplementary affidavit on 19/04/2021 which basically reiterated the averments in his affidavit in support of the application with an addition that the objector was so young by the time the deceased died such that he could not understand his affairs.

5. The court on 09/01/2021 gave timelines within which to file and exchange the respective parties' submissions. On 18/05/2021, while the respondents confirmed that they had filed their submissions, the applicant intimated that he would solely be relying on his affidavits in support of the application.

6. The respondents submitted that the applicant has not proved that he was a son and/or dependant to the deceased, and therefore his application should be dismissed. The decision of **Zipporah W.Mwangi v Zipporah W.Njoroge(2017)eKLR** was cited for the proposition that other rights to land, including trust and adverse possession, can be resolved by a succession court.

7. I have considered the affidavits and the submissions on record. The issue for determination is whether the grant should be revoked on the basis that a child and beneficiary was excluded**.**

8. Section 76 of the Law of Succession Act sets out the requirements for revocation or annulment of grant. It provides:-

> **"A grant of representation, whether or not confirmed, may <u>at any time</u> 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;**
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> **(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.**

9. While the respondents take the view that the application is time barred, I read the section of the Act to allow a challenge to the grant at any time and I do not construe the same to give room for the importation and application of the limitation statute in succession causes. A succession cause seeks to ascertain the beneficiaries to an estate and how the net estate ought to be shared between them. Such a cause is *sui generis* and is not a cause in tort, contract or even one for recovery of the property of the estate to be regulated by Limitation of Actions Act. I find guidance by the court of Appeal in **Ansazi Gambo Tinga & another v Nicholas Patrice Tabuche [2019] eKLR** where the court said: -

> **"…the summons for revocation of grant presented by the respondent is not an "*action to recover land*" for purposes of Section 7 of the Limitation of Actions Act (See Musa Nyaribari Gekone *supra).* The application can thus not be deemed to fall under the provisions of section 7 of the Limitation of Actions Act aforesaid. "**

10. I find no merit in the opposition grounded on statute bar and now seek to go to the merits of the application. The only reason why the applicant wants the grant revoked is allegedly because, as the only son of the deceased, he was completely left out of distribution. That assertion is supported by the affidavit of one of the administrators whose explanation for failure to include the applicant in the cause I find to be least plausible. Incredible because the three introductory letters, issued thirteen years apart, never adverted to the applicant at all. I note that the letter dated 17/10/2014 despite being detailed in its narration makes no reference to the applicant yet it says that the entire family sat and agreed on how to share the estate. How is it the entire family met and none could remember the existence of the applicant

11. I have perused the entire record and in particular the three introductory letters by the chief, Chugu location, dated 08/05/2002, 17/10/2014 and 21/01/2015 listing the deceased beneficiaries. I have equally looked at the determination of the court delivered on 10/12/2020 and noted that the judge read the file in great depth, went through the history thereof and resoundingly found that the deceased died childless. That is a decision that stands and cannot be ignored unless properly challenged by an application for review, if the applicant can fit within parameters of review, otherwise by way of an appeal. It is a matter that I consider to merit being rested for good unless there be availed cogent evidence to warrant its resurrection. Here, I find no credible evidence on the applicant being a child of the deceased. To the contrary, the persons to whom the estate was distributed are all proved and admitted beneficiaries of the estate. The applicant has not placed any material whatsoever before the court to support his allegation that he is a son to the deceased. I find that the applicants onus to prove being an interested party, as a son, was never discharged and the application must thus fail.

12. Does it count that no less than a person associated with the estate in the honoured position of the administrator supports the application? I find that it would matter a great deal save for the conduct of that administrator. In the judgment now sought to be upset, the judge bemoans the status of the file as a muddle which should have been avoided had the administrators acted diligently and properly. I find the narration by the judge in his judgment at 3 and 19 to show the 2nd administrator as not acted in consonance with her office as a trustee. She has opposed every attempt to distribute the estate and wind it up. In this matter she now supports the position of the applicant challenging a finding of the court on the assets of the estate otherwise than by appeal. That is a conduct that is not expected of an administrator. In the two paragraphs, the judge writes: -

> **"On 19/1/2017 the applicant herein filed summons seeking for an injunction, inhibition and cancellation of subdivision and transfer of NYAKI/CHUGU/234 and the parcels excised from it, NYAKI/CHUGU/356 and NYAKI/KITHOKA/4. However, through a consent order dated 4/7/2018 this court directed that the confirmation orders be set aside, Ludia Kainda and**

Pauline Nkuruguchu M'twamwari were appointed as joint administratrix, the inhibition orders on the said plots to remain in force and Ludia Kainda was ordered to apply for confirmation within 14 days. Thereafter, the 2nd administratrix and interested parties were to file their protest.

The said orders prompted the 2nd petitioner to file her proposal and distribution of the estate dated 25/10/2018 where she stated that she has no interest in NYAKI/CHUGU/356 and NYAKI/KITHOKA/4 and therefore cannot distribute what she does not have."

...Both families agree that the deceased and M'Nabea (also deceased) occupied the land registered in the name of the other since the 1970's. The estate of the deceased is not claiming L.R. NO. NYAKI/CHUGU/356 though it was registered to the deceased herein. This land was duly registered into the name of late M'Nabea by the personal representative of the registered owner. It is not estate property. Similarly, the family of M'Nabea is not claiming L.R No. NYAKI/CHUGU/234. Given the facts of the case, L.R NO. NYAKI/CHUGU/234 is estate property. In sum, the estate property consists in L.R NO. NYAKI/CHUGU/234 and NYAKI/KITHOKA/4. I so find and hold"

13. It is clear to me the conduct of Ludia Kainda did not please the Judge who then directed the right thing to be done. That must be done.

14. I further note from the judgment and the affidavits filed that the said 2nd administrator has indeed sold or had portions of the property transferred to her children. If that has happened, then one would ask the question what benefit would be served by the application. Can that administrator be believed to assert now that the applicant should be recognized as a beneficiary and to share in the estate of the only two properties she has sworn on oath to be beyond her for purposes of distribution. I find that the application by the applicant is meritless, is belated, an afterthought and cannot escape the accusation by the respondents that the intention is to keep some undisclosed purchasers at bay and away from demanding transfer of parts of the estate on the basis that the matter is pending in court unresolved.

15. I make the final conclusion that the application fails and having found that it was bereft of merits as well as bona fides, I order that the applicant pays the costs thereof which, in order to hasten the conclusion of the matter, I assess at Kshs 30,000.

16. In the interests of case management and pushing the file towards closure, I direct that the judgment dated 14th December 2020 but read on 16th December 2020 be implemented expeditiously and the administrators to report back to court on the 23/11/2021

Dated, signed and delivered at Meru, by MS Team, this 28th day of June 2021.

Patrick J O Otieno

Judge

In presence of

Miss Soi for the applicant

Mr. Mwarania for the respondent

Patrick J O Otieno

Judge