



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

P & A APPEAL NO. 69 OF 2019

IN THE MATTER OF THE ESTATE OF THE LATE MUREI MANYAMBE

GILBERT MARANGO MULEIAPPELLANT

VERSUS

EDWIN MARANGO WANJALA.....RESPONDENT

[An appeal from the Ruling and Order in Succession cause No. 12 of 2018 delivered on 30 .7.2019 in Webuye P.M.C.C. by Hon B. Limo S.R.M]

JUDGEMENT

Vide Summons for revocation or annulment of Grant dated 19th March, 2019, the appellant (objector/applicant in the trial court) sought;

1. That the grant of letters of administration intestate made to Edwin Marango Wanjala the administrator/respondent herein be revoked/annulled.
2. That this honourable court be pleased to appoint GILBERT MARANGO MULEYI and EDWARD KIMINGICHI MULEYI to be joint administrators of the estate of the late Murei Manyambe and thereafter be granted time to apply for confirmation of grant.
3. Costs of this application be provided for.

The grounds in support of the prayers sought were that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court something material to the case, 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, that the administrator left out other heirs of the estate and that the administrator is not related to the deceased.

The applicant in his affidavit deponed that the petitioner is the son to the late Charles Wanjala Muleyi, not the deceased's son hence does not have first priority, that the petitioner tends to distribute non-existent assets, that he did not seek or obtain consent from the rightful heirs of the deceased nor from his father's heirs to receive the share on their behalf.

He depones that the respondent wastes the deceased estate by unlawful sale, that he did not obtain consent from the deceased children on the mode of distribution and that Gwin Nekesa, Hellen Muleyi, Roseline Muleyi and Gladys Muleyi who are the deceased daughters and alive were left out.

In sum total, the objector prayed that the grant be revoked and other heirs be appointed to administer the estate and that fresh administrators be given time to file for confirmation of grant.

The respondent filed a replying affidavit in opposition to the application. It was his disposition that he is the deceased's grandson, that the deceased had 3 wives all deceased, that the appellant herein belongs to the 3rd wife, that the deceased owned 2 parcels of land namely Ndivisi/Muchi/859 and Plot 251 in Kitale measuring 16 and 5 Acres respectively.

The respondent deponed that the family agreed to divide the land according to the wives where the 1st wife's house was given 6 Acres, the 2nd wife 6 acres and the 3rd wife 2 acres out of the Ndivisi plot. That the objector's family was settled by the deceased in Kitale in the early 1978. That he was chosen by the elders to be the administrator and that he paid Kshs 240,000/= to get discharge of the Ndivisi land from ICDC and that the cause was gazetted inviting objections. That the objector was delaying the confirmation of grant since he did not intend to

finance the succession process.

Directions were given and parties filed written submissions and the court was to make its determination based on the submissions so filed. The respondent did not file his submissions.

The objector submitted that the grant was obtained on the basis of misrepresentation of facts since all the beneficiaries were not disclosed and that he and other beneficiaries never consented to the succession process. He further submitted that he never consented on the mode of distribution and finally that being the son of the deceased, he has locus to institute the proceedings.

He cited Section 76, of the law of Succession Act, Rules 26 and 40(8) of the Probate and Administration Rules and the cases of *Ngaii Gatumbi alias James Ngaii Gatumbi (deceased) Nairobi high Court Succ. Cause No. 783/1993*, *Samwel wafula Wasike Vs Hudson Simiyu Wafula (1993) LLR* and *In the matter of the estate of Isaac Kieru Njuguna (deceased) Nairobi High Court Succ. Cause No. 1064/1994*.

The learned trial magistrate delivered his ruling on 25th July, 2019 as follows;

Any beneficiary alleging to have been left out ought to have annexed in his affidavit a letter of the chief where the deceased was resident to give more credence to their submissions in support of the objector's claim.

Having perused the pleadings, minutes of the family meetings and proposed mode of distribution of parties, I find that the application for summons for revocation of grant duly issued by court to lack merit.

Having dismissed the subject application, the proposed mode of distribution filed on 14th March, 2019 is duly adopted as the distribution of the court. The estate shall be distributed as such.

Dissatisfied by this ruling, the appellant preferred this appeal on the grounds;-

1. That the learned trial magistrate erred in fact and law when he failed to take cognizance of the fact that the respondent failed to list all the beneficiaries of the state of the deceased MUREI MANYAMBE before dismissing the summons for revocation of grant preferred by the appellant.

2. That the learned trial magistrate erred both in fact and law when he held that the appellant had been specifically provided for in the mode of distribution proposed by the respondent hence occasioning a miscarriage of justice.

3. That the learned trial magistrate erred in fact and law when he confirmed the grant of letters of administration intestate including Plot No. 251 Kanyarkwat, property that never formed part of the deceased estate.

4. That the learned trial magistrate erred in fact and law when he failed to take cognizance of the fact that the appellant's and other beneficiaries' consent was never sought by the respondent before filing of the succession cause in court.

5. That the learned trial magistrate erred in law and fact when he failed to hold that the respondent obtained the grant of letters of administration intestate fraudulently and on the basis of misrepresentation of facts.

6. That the learned trial magistrate erred in law when he deliberately failed to recognize land parcel Number NDIVIS/MUCHI/859 as the only asset forming the estate of the deceased.

7. That the learned trial magistrate erred in fact and law when he failed to hold that the respondent was unfit to administer the estate of the deceased having vetoed the disposal of land forming part of the estate and him being a grandson to the deceased.

8. That the learned trial magistrate erred in fact and law when he confirmed the grant of letters of administration intestate without affording all parties and beneficiaries an opportunity to advance their mode of distribution before court.

9. That the learned trial magistrate erred in fact and law when he confirmed the grant contrary to the provisions of section 76 of the Law of Succession Act, cap 160 and Rules 26 and 40(8) of the probate and Administration Rules.

Thereafter the appellant filed his written submission and the respondent did not. Mr. Otsiula learned counsel raised the following issues for determination.

1. Whether grant was obtained in accordance with the law of Succession Act Cap 160 Laws of Kenya?
2. Whether the respondent is fit to administer the estate of the deceased?
3. Whether this appeal should be allowed in its entirety?

On the first issue, counsel submits that the grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case. That the respondent failed to disclose all the beneficiaries in the distribution of the estate. That the

deceased had sold part of his property and this was not disclosed. That the deliberate failure by the respondent to involve all the beneficiaries at the time of filing these proceedings, failing to list them among the beneficiaries or seek their consent is in bad faith and amounts to concealment of material facts.

Counsel submits that had the court been made aware of the existence of other beneficiaries, it would have declined to issue the grant for want of compliance with the law, that the petition ought to have been accompanied by the consent as provided for under section 26 of the Probate and Administration Rules and finally that there is no evidence that the appellant and the excluded beneficiaries were informed or invited to consent before the filing of the succession cause.

Counsel cited the provisions of Section 76 of Cap 160, Rule 26 of the Probate and Administration Rules.

On the second issue, counsel submits that the respondent is unfit to administer the estate as he intermeddled with its affairs, vetoing the disposal of the land forming part of the estate without the knowledge of other beneficiaries. That the respondent was only a grandchild to the deceased who had living children willing to administer the estate. That the appellant being the deceased's son is entitled to apply for revocation of the grant.

Counsel relies on the provisions of Section 45 and 66 of the Law of Succession Act and the authorities in **Veronicah Njoki Wakagoto(2013)eKLR, Re Estate of M'Ngarithi M'Miriti (2017)eKLR** in support.

It is submitted on the 3rd issue that Rule 41(3) and 42(2) of the Probate and Administration Rules empowers the court before confirmation of a grant to remove contested properties from the schedule and restore them for distribution if found to form part of the estate.

The appellant submits that it was erroneous for the court to confirm the grant and listing Plot 251 Kanyarkwat as forming part of the estate. That the mode of distribution does not favour all the beneficiaries and the same beneficiaries were not given an opportunity to advance their mode of distribution before the trial court. Counsel cited the case of **Re Estate of Francis Peter Njuguna (2016)eKLR**.

The respondent herein (petitioner/respondent in the trial court) petitioned for grant of letters of administration of the estate of Murei Manyambe (hereinafter the deceased) on 5th April, 2018. The cause was gazetted on 31st May, 2018 and a grant of letters of administration issued on 16th July, 2018. Subsequently, the respondent filed the summons for the confirmation of grant on 14th March, 2019 and the summons for revocation of grant were filed on 19th March, 2019.

On the 1st issue; this court notes from the record that the deceased had 3 wives namely;- Florah Muhaye, Alet Rebecca and Jane Mary Loice. That the objector is the son to Jane Mary Loice while the respondent is a grandson to the deceased and his father Charles Wanjala (Deceased) was the 1st wife's son.

The appellant's contention here is that the proceedings leading to the issuance of grant and finally confirmation were in defective in substance inter alia that the respondent did not disclose all the beneficiaries of the estate.

Under Section 76 of the Law of Succession Act Cap 160, it is provided; -

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-***

The respondent in his replying affidavit dated 29th July, 2019 at paragraph 7 admits that indeed the appellant is the deceased's son together with four other children.

This court has perused the affidavit in support of petition for letters of administration intestate and under paragraph 4 thereof, the appellant is not listed a beneficiary. This court cannot ascertain whether this error/omission was inadvertent or intentional. At paragraph 5 thereof, it is indicated that the respondent is related to the deceased by virtue of being his son/daughter. This is not true as he is a grandson to the deceased.

Under Rule 26 of the Probate & Administration Rules, it is provided;

- 1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.***
- 2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in***

default of renunciation, or written consent in form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

This court has also perused the consent to the making of a grant of administration (Form 38) and clearly, the appellant's name is not included meaning that his consent was neither sought nor obtained.

The proceedings also disclose that on 4/4/2019 when the matter had been fixed for confirmation of Grant, there was none of the beneficiaries in court. It was brought to the court's attention that an objection had been filed. Subsequently, it appears that the beneficiaries never attended court for confirmation of the said grant save for the impugned ruling in which the trial court proceeded to adopt the mode of distribution filed on 14th march, 2019.

While revoking a grant, Nyakundi J. in *Re Estate of Lesinko Sokorte Kirayio (Deceased) [2017] eKLR* held;

Next, I turn to the manner in which the grant issued on 22nd May 2014 was confirmed. A scrutiny of the pleadings reveals that consent was not obtained from all the beneficiaries. In addition, on the day the certificate of confirmation was issued, only the Respondent was in court.

The court has also scrutinized the summons for confirmation of grant filed in court on 14/3/2019. I note that the consent on the mode of distribution therein was not executed by all the beneficiaries; more so the appellant.

In *Isaac Kireru Njuguna, Succession cause 1064 of 1994 (1)*, Aluoch J. in revoking the Grant of Letters of Administration held;

When I considered all this evidence, I came to the conclusion that the mode of distribution of the assets of the deceased in this Succession Cause was flawed!

The deceased survivors and were adults as shown in form P&A 5, never consented to the mode of distribution as required by law.

Further, in the matter of the *Estate of Ezekiel Mulanda Masai, Eldoret P&A 4 of 1992* Etyang J held;-

“It has been conceded by Ambrose Nambosio Namulanda (the Petitioner/Respondent) that Jesicah Mukhwana Namulanda is his step mother (the widow of the deceased) and Wilson Mukiti Mulanda is the eldest son of the applicant. Yet they have been left out from the list of the deceased's dependants. The petitioner/respondent purported to identify the deceased's estate in an affidavit filed on 21 May 1996. He applied for and granted letters of administration to administer that whole estate singly. In fact, the estate of the deceased has not been distributed to all his surviving widow and children of the deceased. For the above reasons the grant issued to the petitioner/respondent confirmed on 1st July 1993 is hereby revoked as prayed”

Consequently, in the instant case, I also come to the conclusion that since all the beneficiaries of the deceased were not involved or consented to the mode of distribution this grant must be revoked and fresh letters of administration applied for.

For the foregoing reasons, I find merit in the appeal and consequently make an order that the Grant of Letters of Administration issued to the respondent on 11th July, 2018 and confirmed on 31st July, 2019 be and is hereby revoked in its entirety. The dependents to apply for fresh letters of administration. Costs to the appellant.

DATED and DELIVERED at BUNGOMA this 23rd day of June, 2021.

S.N. RIECHI

JUDGE