**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**SUCCESSION CAUSE NO. 415 OF 2013**

**IN THE MATTER OF THE ESTATE OF JAMIN INYANDA KADAMBI (DECEASED)**

**JUDGMENT**

1. This matter relates to the intestate estate of Jamin Inyanda Kadambai. I have not seen a copy any document that certifies his death, but he is said to have had died on 31st November 1983, a most unlikely date, given that the month of November only has 30 days. The letter, dated 24th May 2013, from the Assistant Chief of Chambiti Sub-Location says that, he died on 31st October 1983, it was said that his national identification documents burnt in a fire incident, hence the absence of a certificate of death. The said letter does not confirm who his survivors were.

2. Representation was sought in this cause, vide a petition lodged herein on 1st June 2013, by Absolom Mulusa Liona and Margaret Mukungu Ndori, in their capacities as "brother" of the deceased. They expressed the deceased to have been survived by the two of them, being a brother and daughter, and to have died possessed of Kakamega/Kegoye/30. Letters of administration intestate were made to them on 2nd October 2013, and a grant was duly issued, dated 9th October 2013. I shall refer to Absolom Mulusa Liona and Margaret Mukungu Ndori, collectively, as the administrators. The grant was confirmed on 27th October 2014, and the property was devolved equally to the brother and daughter of the deceased. A certificate of confirmation of grant in those terms issued, dated 29th October 2014.

3. What I am called upon to determine is a summons dated 3rd November 2016, which seeks revocation of the said grant. It is brought at the instance of Matroba Mideva. I shall hereafter refer to her as the applicant. Her case is that the grant was obtained in a process that was fraudulent as it was founded on false representation and concealment of matter from the court. She states that the legal beneficiaries of the estate were disinherited. The applicant is a daughter of the deceased, and avers that the deceased had 5 children, being herself, the 2nd administratrix, Florence Ngoseywe, the late Henry Kadambi Inyanda and the late Geoffrey Vosena Inyanda. She explains that the 2nd administratrix was a child of the deceased with a woman that he did not marry. She further says that her own mother had pre-deceased the deceased, and so had the siblings of the deceased. She says that the deceased had 2 parcels of land, being Kakamega/Kegoye/30 and 335. She explains that 2 late sons of the deceased, Henry Kadambi Inyanda and Geoffrey Vosena Inyanda, lived on Kakamega/Kegoye/30 until they died in 2013 and 2015, respectively, leaving no survivors, and were buried on the said land. She avers that she had recently established that a grant had been made in the matter, and confirmed, yet she was never involved in the process despite being a child of the deceased.

4. There are responses to the revocation application, by the 2 administrators, and David Isaji Kadambi and Jason Osotsi Amena. In his reply, the 1st administrator, Absolom Mulusa Liona, talks of having been approached by the 2nd administratrix, the applicant and Florence Ngoseywe to buy Kakamega/Kegoye/30 to raise funds for them to inter the remains of Henry Kadambi Inyanda and Geoffrey Vosena Inyanda. He describes the 2nd administratrix, the applicant and Florence Ngoseywe as sisters. He says that they agreed that that he would buy Kakamega/Kegoye/30, and they entered into a sale agreement, in the presence of David Isaji Kadambi and Jason Osotsi Amena. The agreed mode of payment was that the 1st administrator would meet funeral and related expenses, and the balance was to be paid in cash. They then agreed that succession proceedings could be commenced, and Kakamega/Kegoye/30 was to be transferred to his name. He asserts that the daughters of the deceased had consented to the arrangement, and were aware of the sale transactions. He said that he did pay for Kakamega/Kegoye/30, and that the property belonged to him. The affidavit sworn by the 2nd administratrix supports that position, and so do the affidavits sworn by David Isaji Kadambi and Jason Osotsi Amena.

5. There is a further reply by Florence Ngoseywe alias Flora Mwaniga Musungu. She asserts that she does not support the summons for revocation of grant. She describes the 1st administrator as her cousin, and the 2nd administratrix as her half-sister, and the applicant as her sister. She avers that after the late sons of the deceased died, they did not have money for their burial, and so they approached the 1st administrator, and offered to sell to him Kakamega/Kegoye/30, in order to raise money for that purpose. She goes on to confirm the sale transactions, as witnessed by David Isaji Kadambi and Jason Osotsi Amena.

6. The applicant has responded to the replies by asserting that the grant was not obtained procedurally as her consent was not obtained in Form 38, she was not served with the intended petition, she was not served with the summons for confirmation of grant, the survivors of the deceased were not disclosed, the 1st administrator is not a brother of the deceased, the 2nd administratrix was not the sole surviving daughter

of the deceased as the deceased had 5 children, the 1st administrator could only be listed as a liability if he indeed bought the property, among others. She states that she did not sign the document alleged to be a sale agreement for Kakamega/Kegoye/30 as between the 1st administrator and the daughters of the deceased. She further says that the property allegedly sold, Plot No. 30 Kegoye, was strange to her.

7. Further affidavits, said to be supporting affidavits, were filed by Wellington Kedenge Kizira and Alex Mugera Ndori. They aver to have known the deceased, and his children. They say that he had no surviving brother and that the 1st administrator was not his brother. They also state that the 2nd administratrix was not the sole surviving child of the deceased. It is explained that the deceased had land at Visiru and Chambiti, being Kakamega/Kegoye/30 and 335, respectively.

8. The revocation application was disposed of orally. The applicant testified first. She explained that the deceased was her father, who was survived by 3 daughters, his 2 sons having also died. She stated that the 1st administrator was not a brother of the deceased, as the deceased had 3 brothers who were all dead. She described the 1st administrator as a neighbour in Kakamega/Kegoye/30, and a person who was not related to the deceased. She also stated that the 2nd administratrix was not the only child of the deceased alive. She said that the deceased had 2 parcels of land, and that the administrators had disclosed only one of them. She asserted that when representation was sought she did not sign any documents. She asserted that she was unaware that the 1st administrator had bought land. She explained that no one occupied the land, since the daughters lived elsewhere. She described the 1st administrator as a clansman who assisted with the burial of the sons of the deceased after they died. When shown a signature on the alleged sale agreement she said that that was not her signature. Willingstone Kadenge Kizara testified next. He said that the 1st administrator attended funeral arrangements for the sons of the deceased, and paid for the coffin and the food as a relative. He disputed the sale of the land to the said 1st administrator. Alex Mugera Ndoli testified that there was no evidence that the 1st administrator ever bought the land.

9. What is for determination is for revocation of grant. Revocation of grants is provided for under section 76 of the Law of Succession Act, Cap 160, Laws of Kenya, which says as follows:

> "76. Revocation or annulment of grant
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> 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;
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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;
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> (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—
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> (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
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> (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."

10. Under section 76 of the Law of Succession Act, grants of representation are liable to revocation on three general grounds. The first is that the process of obtaining the grant was fraught with problems. It could be that there were defects in the process or that the court was misled in some way. Such would include where the grant was sought by a person who was not qualified to obtain representation to the estate of the deceased, or where certain facts as were required under the law have not been disclosed or were concealed from the court or were misrepresented. The second general ground is where the grant was obtained procedurally and properly, but subsequently the grant holder encountered challenges with administration, such as where they failed to apply for confirmation of grant within the period allowed in law or failed to proceed diligently with the administration of the estate, or failed to render accounts as and when required. The last general ground is where the grant subsequently became useless or inoperative, usually in cases where the sole administrator died or became of unsound mind or was adjudged bankrupt.

11. In the instant case, the applicant raises issues that point to the first general ground, that the process of obtaining the grant herein was attended by challenges. Her principal arguments are that the administrators did not disclose some of the survivors of the deceased, distorted facts, did not involve all the survivors in the process, among others.

12. Applications for grants of representation, which include a grant of letters of administration intestate, are governed by section 51 of the Law of Succession Act. Section 51(2) states the details of what ought to be disclosed, as follows:

"(1) …

(2) Every application shall include information as to—

(a) the full names of the deceased;

(b) the date and place of his death;

(c) his last known place of residence;

(d) the relationship (if any) of the applicant to the deceased;

(e) whether or not the deceased left a valid will;

(f) the present addresses of any executors appointed by any such valid will;

(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) a full inventory of all the assets and liabilities of the deceased; and

(i) such other matters as may be prescribed."

13. The deceased herein died intestate. The provision in section 51(2)(g), requires that all the persons listed or mentioned in there be disclosed, whether or not they will take a share in the estate. That list includes spouses, children, parents, brothers and sisters of the deceased. The deceased herein was survived by 3 daughters. In the petition, the administrators disclosed only one, and at distribution only that one was provided for. Secondly, the 1st administrator was projected to be a brother of the deceased, yet he was not. These amount to concealing matter from the court, and misrepresenting facts to the court. The court was misled to believe that the 1st administrator was a sibling of the deceased, and that the 2nd administratrix was the sole surviving child of the deceased. The existence of the other 2 children was suppressed.

14. Should that be a good enough reason for the court to revoke the grant? Was such non-disclosure fatal to the petition? I do think so. The purpose of petitioning for representation is appointment of personal representatives. The categories of the persons not disclosed herein are those who have prior right to administration, so that their omission resulted in persons who had inferior right to administration or no right at all to administration being appointed. The persons who qualify to apply for administration in intestacy are set out in section 66, which provision gives an order of priority to guide the court in exercising discretion in the matter of appointment of administrators. The provision states as follows:

"66. Preference to be given to certain persons to administer where deceased died intestate

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors: Provided that, where there is partial intestacy, letters of administration in respect."

15. Section 76 grants the court a discretionary power to revoke the grant. So should I exercise that power and revoke the grant? I think I should, for the reasons given in paragraph 14. The persons left out, being children of the deceased, ranked equally with the 2nd administratrix, while the 2nd administrator either had no right to administration, and, if any, he ranked inferior to the entitlement of the 2 daughters left out. He could not possibly have been appointed administrators over the children, and, therefore, there would be good reason to revoke the grant.

16. Rule 7(7) of the Probate and Administration Rules is also relevant. It requires that a person with a lesser right to administration ought to obtain the consent of the person or persons with a greater priority to administration, or get that person or persons to renounce their right to administration or cause citations to issue on them requiring them to either apply for representation in the estate or to renounce their right to so apply.

17. For avoidance of doubt, Rule 7(7) states as follows:

"7 (7). Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has –

1. renounced his right generally to apply for grant; or

2. consented in writing to the making of the grant to the applicant; or

3. been issued with a citation calling upon him to renounce such right or to apply for a grant. "

18. Then there is also Rule 26 of the Probate and Administration Rules, which states as follows:

"26(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 equally or priority, be supported by an affidavit of the applicant and such other evidence as the court may require."

19. Rule 26(1) (2) applies where representation is sought by a person with equal right to others who have not petitioned like him. In such case, the petitioner is expected to notify such persons with equal entitlement with notice. The individuals with entitlement who have not applied for representation would signify that they had been notified of the petition by either executing renunciation of their right to administration or by signing consents in Forms 38 or 39, depending on whether the deceased died testate or intestate. Where a consent or renunciation is not forthcoming, then the petitioner should file an affidavit, ostensibly dealing with these issues, that is by indicating that notice was given to all the other persons equally entitled, and perhaps demonstrating that such persons had failed or refused to renounce their rights or to sign consents to allow him to go ahead with his petition.

20. The 1st administrator in the instant cause, being a distant relative of the deceased, whose claim to the estate appears to be hinged only on an alleged sale, did not have a superior right to administration over the children of the deceased, going by section 66 of the Law of Succession Act. The 2nd administratrix, being a child of the deceased, where there is no surviving spouse, had an equal right to administration of the estate with the other 2 daughters of the deceased who were not named in the petition. A reading of section 66 and Rules 7(7) and 26 of the Probate and Administration Rules would mean the administrators needed to comply with the requirements of Rules 7(7) and 26, since, the 2 daughters left out of the process, had an equal to the 2nd administratrix, and a superior right to that of the 1st administrator, to administration. They had, therefore, to obtain the consents of the 2 other daughters of the deceased before they applied for representation to the estate. To the extent that those consents were not obtained made the process of obtaining the grant wholly defective, and the grant cannot hold, in the circumstances.

21. The administrators have made a lot hay out of the alleged sale of the estate property to the 1st administrator to facilitate burial of the 2 sons of the deceased. The administrators appear to be blind to the fact that the alleged sale happened before the grant was obtained, and, therefore, the estate had not been vested in any one, by virtue of section 79 of the Law of Succession Act, who would have been in a position to exercise the powers of an administrator set out in section 82 of the Law of Succession Act, which include the power to sell estate assets. It is critical to note that sale of or handling of or dealing with estate property without a grant of representation is outlawed by section 45 of the Law of Succession Act, and violation of that provision attracts criminal sanctions. Only the holder of a grant, whether letters of administration or probate, can legitimately handle the property of a dead person, any other person doing so would violate the law, in what is known as intermeddling. The fact that one is child of a dead person does not give them any rights to handle the dead parent's proper unless they have legal authorization, which comes with a grant of representation. The sale alleged in this case happened before a grant had been made, and,therefore, those involved in the process were intermeddling with the estate of the deceased.

22. A valid sale of estate property can only be by those to whom the assets vest by virtue of section 79, and who have the power to sell the property by virtue of section 82. Even then, immovable assets, like land, such as Kakamega/Kegoye/30, cannot be disposed of by administrators before their grant has been confirmed, and if land has to be sold before confirmation, then leave or permission of the court must be obtained. That is the purport of section 82(b)(ii) of the Law of Succession Act. Clearly, the sale transaction that was carried out by the administrators was contrary to sections 45 and 82(b)(ii) of the Law of Succession Act, and was invalid for all purposes. It cannot be asserted at all, and am surprised that persons to whom administration of the estate herein can purport to support a sale transaction that was carried out contrary to the very clear provisions of the law.

23. For avoidance of doubt, sections 45, 79 and 82 of the Law of Succession Act provide as follows:

"45. No intermeddling with property of deceased person

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not

exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration."

"79. Property of deceased to vest in personal representative

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative."

"82. Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—

i. …

ii. no immovable property shall be sold before confirmation of the grant…"

24. The issue of the confirmation process which did not involve the applicant and Florence was also raised. The manner in which confirmation is undertaken is not one of the grounds, under section 76, for revocation of a grant. The only consideration in section 76, relating to confirmation, is where the same is not sought or obtained within one year of the making of the grant. I shall, therefore, not exercise my mind on that issue for now.

25. Overall, I do find merit in the application dated 3rd November 2016. I do hereby allow the same in terms of prayers 2 and 3. I appoint Margaret Makungu Ndori, Matroba Mideva and Florence Ngoseywe, the new administratrices of the estate of the deceased, and a grant of letters of administration intestate shall issue to the accordingly. I had, on 20th January 2021, ordered that the cause herein be transferred to the High Court of Kenya at Vihiga, let the new grant issue out of the Vihiga High Court. The new administratrices, either jointly or severally, shall apply for confirmation of their grant, within 45 days. Any party who shall be aggrieved by the orders made herein is hereby granted leave of 28 days to move the Court of Appeal, appropriately, on appeal.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 6TH DAY OF AUGUST, 2021**

**W MUSYOKA**

**JUDGE**