



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**SUCCESSION MISC. APP. NO. 58 OF 2019**

**IN THE MATTER OF ESTATE OF NCHUE OLE LEPATEI KORONGORO (DECEASED)**

**SULAI NCHUE.....1<sup>ST</sup> APPLICANT**

**TOM NCHUE.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**NATAANA ENE NJUE LEPATEI.....1<sup>ST</sup> RESPONDENT**

**IBRAHIM LEI OLE SONDAI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before court is summons dated 23<sup>rd</sup> July 2019, seeking revocation of the grant of administration intestate issued on 21<sup>st</sup> March 2012 and issuance of a fresh grant to the 1<sup>st</sup> applicant **Sulai Nchue** and the 1<sup>st</sup> respondent **Nataana Ene Njue Lepatei**.
2. The grounds upon which the summons is premised as they appear on the face of the summons, are that the respondents concealed material facts from the court when they applied for the grant; that the proceedings leading to obtaining the grant were defective; that the respondents completely disinherited the applicants and that the deceased's estate was given to strangers.
3. The applicants also stated that they are currently facing prosecution and possible jail term as well as eviction from their land by the 2<sup>nd</sup> respondent. They further express fear that the 2<sup>nd</sup> respondent may dispose of the property forming part of the deceased's estate to their detriment.
4. The 1<sup>st</sup> applicant filed an affidavit in support of the summons sworn on 23<sup>rd</sup> July 2019. She deposed that she is daughter to the deceased; that the deceased left behind 8 children and the 1<sup>st</sup> respondent (widow); that the deceased left behind only one property **Kajiado/Kaputiei Central/xxx** measuring about 253 acres on which the deceased's family resides
5. According to the 1<sup>st</sup> applicant, in January 2019, strangers went to their parcel of land and informed them that part of the land was theirs and showed them a certificate of confirmation of grant issued by the court. It was then that they realized that their father's estate had been distributed without their knowledge and none of the children had been given a share even though they were residing on the land.
6. She stated that when she perused the petition for grant of letters of administration intestate, she was surprised to note that the net value of the estate comprising 253 acres, had been indicated as Kshs. 90,000 which showed that the respondents had misled the court on the value of the estate which was in excess of the magistrate court's jurisdiction.
7. It was the 1<sup>st</sup> applicant's assertion that according to the certificate of confirmation, a stranger was given more than half of their father's estate without justification. She maintained that her mother, the 1<sup>st</sup> respondent, had informed her that the 2<sup>nd</sup> respondent had no claim over the estate and took advantage of her (1<sup>st</sup> respondent's) illiteracy and old age to benefit from the estate yet he (2<sup>nd</sup> respondent) was only a surety in the petition for grant of letters of administration who was not meant to benefit from the estate.
8. She deposed that the 2<sup>nd</sup> respondent had now filed a suit to restrain them from occupying and using their land and on top of that, they have been charged in **Criminal Case No. 280 of 2019** where the 2<sup>nd</sup> respondent is the complainant. She further deposed that the 2<sup>nd</sup> respondent had already sub-divided the portion of the land into two, a clear indication that the property may be disposed of any time.

9. The 1<sup>st</sup> respondent filed a replying affidavit sworn on 7<sup>th</sup> October 2019. She admitted that she was the administratrix of her late husband's estate and that she petitioned for a grant of representation intestate for the estate. She however stated that prior to filing the petition for grant of letters of administration intestate, the title deed for the land got lost. She was informed by one of her sons and the 2<sup>nd</sup> respondent that they could assist her get a replacement for the lost title deed.
10. According to the 1<sup>st</sup> respondent, she believed that the process she was undertaking was for replacement of the lost title deed but not for distribution of the estate. She maintained that her children did not sign the consent for distribution of the estate and that the certificate of confirmation did not represent the views of the beneficiaries. She stated that only **Wilson Ntetuka Taraiya** who had purchased 40 acres should have been included in the certificate of confirmation and not the 2<sup>nd</sup> respondent who had no claim against the estate.
11. She also stated that she was surprised to learn that after confirmation of grant the Executive Officer at Kajiado Law Courts executed transfer forms on her behalf leading to subdivision and subsequent transfer of the land to the 2<sup>nd</sup> respondent which was strange and unknown to her. She maintained that she was never approached by anyone to execute the forms and that the 2<sup>nd</sup> respondent took advantage of her age and illiteracy to take their land.
12. The 2<sup>nd</sup> respondent filed a replying affidavit sworn on 16<sup>th</sup> October 2019. He deposed that he was given the land through Succession Cause No. 76 of 2011 after consultations between him, the 1<sup>st</sup> applicant and her siblings and their mother (the 1<sup>st</sup> respondent) after he purchased 110 acres from them.
13. He stated that during the succession proceedings, he was approached by the 1<sup>st</sup> respondent and **William Nchore** and other children of the deceased to assist them with money to complete the succession proceedings. They went to the offices of **Lesinko Njoroge & Gathogo Advocates** where the 1<sup>st</sup> respondent and her children agreed that he be included in the Succession Cause as a creditor. The grant was issued and later confirmed in his presence, that of the 1<sup>st</sup> respondent and her children. He was then given 110 acres from the estate and that all the beneficiaries, including the applicants, signed transmission forms. He maintained that the present application is meant to force him cede 40 acres to the family. He also stated that there is another application for revocation of grant pending before the Chief Magistrate's Court.
14. He denied that there was any fraud or misrepresentation to warrant revocation of the grant. He also stated that although many people had purchased land they had not been included in these proceedings.
15. The 1<sup>st</sup> applicant filed a supplementary affidavit sworn on 16<sup>th</sup> November 2019 denying that they signed the consent on mode of distribution of the estate for purposes of confirmation of the grant. They denied that the signatures belonged to them.
16. The applicants filed written submissions dated 21<sup>st</sup> October 2020. They submitted that there was no dispute that none of the deceased's children got a share of their father's estate; that they did not sign the consent forms on the mode of distribution of the estate and that the lower court's record did not show that they were present when the grant was confirmed.
17. It was also their submission that the 1<sup>st</sup> respondent as petitioner for grant of letters of administration concealed the fact from the beneficiaries. They also submitted that the 2<sup>nd</sup> respondent inherited the deceased's estate without any claim of right and his claim that he purchased the land had not been substantiated since no evidence had been placed before court. They maintained that the 2<sup>nd</sup> respondent was only a surety and, therefore, he could not be both surety and beneficiary in the same estate. They further argue that had they been party to what took place in the lower court, the 2<sup>nd</sup> respondent could not have sued them to force them out of their land.
18. The 2<sup>nd</sup> respondent also filed written submissions dated 6<sup>th</sup> October 2020. He argued that although section 76 of the Law of Succession Act is clear on the grounds for revocation of grant, the applicants did not show what material facts were concealed from the court. According to him, the value of the estate of KShs. 90,000 indicated in the petition was correct and the applicants had not produced a valuation report to assist the court determine whether the value of the estate was more than that. He relied on *re Estate of Mutugi Mbutii (deceased)* [2018] eKLR regarding the jurisdiction of Magistrate Courts.
19. On whether the proceedings for obtaining the grant were defective, he argued that the application for confirmation of grant was signed by all the children of the deceased including the applicants; that they also signed the form 38 (transmission form (form 38) and that they were represented by an advocate. He relied on *Margaret Wacheke Mutuola v Jane Wanjiru Watoro & Others* [2012] eKLR.
20. The 2<sup>nd</sup> respondent maintained that the application is defective and an abuse of the court process since the applicants had filed a similar application dated 16<sup>th</sup> May 2016 which is still pending before the Magistrate Court.
21. According to the 2<sup>nd</sup> respondent, this court lacks jurisdiction to entertain the application since section 23 of the Magistrates Court Act 2015 amended section 48 of the Law of Succession Act and the present application was filed when the new law was in operation. It is the 2<sup>nd</sup> respondent's view that the application ought to have been filed in the magistrate's court.
22. He also argued that the applicants want to revoke the grant issued on 26<sup>th</sup> March 2012 yet they have not sought to revoke the certificate of confirmation of grant. He urged that the application be dismissed.
23. I have considered the summons, the response and submissions. I have also perused the record of pleadings filed at the magistrate's court. What is clear from the petition for grant of letters of administration intestate dated 12<sup>th</sup> September 2011 and filed before the magistrate's court, is that the 1<sup>st</sup> respondent was listed as widow of the deceased a fact that has not changed. In fact, the applicants confirm that she is the widow of the deceased and their mother.

24. Section 66 of the Law of Succession Act is clear on the priority when it comes to petitioning for grant of representation intestate. The 1<sup>st</sup> respondent as widow and who was first in priority, petitioned for the grant as allowed in law. On that score, there would be no reason to fault her for petitioning for grant of letters of administration intestate.
25. It is also clear from the petition that she disclosed the only property left behind by the deceased and listed all the beneficiaries to the estate. There is no allegation that any of the beneficiaries of the estate were left out. Again there is no blame cast on the petitioner in that respect.
26. The reason why the applicants seek revocation of the grant is that the petitioner did not disclose to them that she was petitioning for grant of letters of administration intestate. The 1<sup>st</sup> respondent deposed that she did not know that she was petitioning for a grant of letters of administration. According to her, the title deed for the land had been lost and her son, **William Nchue** together with the 2<sup>nd</sup> respondent informed her that they could assist her get a replacement of the lost title deed and she believed that was the process she was going through. She did not know that what she was undertaking was succession proceedings for the estate of her deceased husband. She readily admitted that her children were not aware and did not sign the consent on the mode of distribution. She once again does not seem to bear any blame on what happened with regard to obtaining the grant of representation.
27. In my view, it would have been unnecessary to revoke the disputed grant of letters of administration given that it was issued to the widow, the person who was first in priority and there being no evidence that she left out any of the beneficiaries to the estate. I will come to this issue later.
28. The real issue is whether the certificate of confirmation of grant reflected the wishes of the beneficiaries and should therefore be sustained. The applicant's case is that the 2<sup>nd</sup> respondent was given a share of the estate without any justification. Indeed, a perusal of the certificate of confirmation of grant issued on 1<sup>st</sup> August 2013 shows that the 2<sup>nd</sup> respondent was given 110 acres from the estate.
29. The 1<sup>st</sup> respondent argued that she was made to believe that the process was for replacement of the lost title deed but not to distribute the deceased's estate. Even then, only **Wilson Ntetuka Taraiya** would get a portion of the land because he had purchase some land from them. She maintained that the 2<sup>nd</sup> respondent took advantage of her age and illiteracy to take their land without any justification.
30. I have carefully read the 2<sup>nd</sup> respondent's replying affidavit and submissions to this summons. I have also perused the petition for grant of letters of administration intestate filed before the magistrate's court. There is no denial that the 2<sup>nd</sup> respondent swore an affidavit as the 1<sup>st</sup> respondent's surety in that petition. Although he argued before this court that he was a creditor to the estate, the petition showed that liability was nil. He was therefore neither as a creditor nor beneficiary of the deceased's estate.
31. The 2<sup>nd</sup> respondent's claim was that he purchased the land from the deceased's family and that all beneficiaries were aware of this fact. According to him, he gave the beneficiaries money to assist them in the succession proceedings. If that happened is not a matter before this court. In any case, he did not demonstrate through tangible evidence that he was entitled to the land he got and why. I must hasten to point out here, that this is court is not dealing with a land dispute between the parties on whether or not there was such purchase as that is a matter not within the remit of this court.
32. I have again perused the certificate of confirmation of grant dated 1<sup>st</sup> August 2013. It true that none of the beneficiaries of the deceased's estate got a share of the estate. The 1<sup>st</sup> respondent was given 103 acres while **Wilson Ntetuka Taraiya**, who according to the 1<sup>st</sup> respondent, purchased land from them, got 40 acres. The 2<sup>nd</sup> respondent got 110 acres which was more than what the deceased's widow got. It is interesting that the 2<sup>nd</sup> respondent could get 110 out of 253 acres (almost half of the estate) without any explanation, leaving the deceased's family with only 103 acres. This was an injustice laced with greed, to say the least.
33. The story does not end there. The applicants complained that they did not sign the consent form on the mode of distribution. Indeed, the consent dated 30<sup>th</sup> July 2013 and filed on 1<sup>st</sup> August 2013 is suspect. It has initials as the signatures.
34. Regarding proceedings for confirmation of grant, the matter appeared before court on 25<sup>th</sup> July 2013 but was stood over generally. Later on the same day, the matter was mentioned but not all beneficiaries were in court. The matter was stood over to 1<sup>st</sup> August 2013 when the summons for confirmation of grant was allowed. The court's record is silent on whether the beneficiaries were present in court. The applicants' claim that they were not in court cannot be dismissed off hand.
35. The applicants further complained that transmission forms were signed on behalf of the 1<sup>st</sup> respondent by the executive officer of the court, raising the bonafides of the 2<sup>nd</sup> respondent's argument that he rightly got the land. Once again, the record of the lower court shows that a notice of motion dated 5<sup>th</sup> November 2014 was filed on 7<sup>th</sup> November seeking an order directing the Executive officer of the court to execute or sign documents including transmission form for the parcel of land **Kajiado/Kaputiei Central/xxx** on behalf of the 1<sup>st</sup> respondent. The Executive officer executed the documents as directed by the court. This adds an interesting aspect to this matter. If the 2<sup>nd</sup> respondent's claim that he purchased the land did it have to get to that? I think not.
36. Having considered the summons, the responses as well as and perused the record, It is clear to this court that the summons raises substantial issues as to the propriety of giving the 2<sup>nd</sup> respondent such a large portion of the estate. The court is also satisfied that the beneficiaries have demonstrated that they were left of out in the distribution of the estate and, therefore, their grievance is merited.
37. As I stated earlier, it would not have been necessary to revoke the grant of representation issued by the court on 26<sup>th</sup> March 2012, given that it was given to the widow who was first in priority as required by the law. However, from the history of this matter as enumerated above,

and bearing in mind the age and literacy level of the administratrix (1<sup>st</sup> respondent) and to avoid misinformation and misdirection, the proper action to take for the benefit of the estate and those beneficial to it is to accede the summons to revoke the grant.

38. Consequently, the summons dated 23<sup>rd</sup> July 2019 is allowed and I make the following orders.

- 1. Succession Cause No. 76 of 2011 filed before the Chief Magistrates Court is hereby transferred to this Court for hearing and final determination.***
- 2. The grant of letters of administration issued by the Chief Magistrate's Court on 26<sup>th</sup> March 2012 is hereby revoked and the certificate of confirmation of grant issued on 1<sup>st</sup> August 2013 cancelled.***
- 3. A grant of letters of administration intestate is hereby issued to NATAANA ENE NJUE LEPATEI and SULAI NCHUE***
- 4. The new administratrixes do file summons for confirmation of grant without delay, taking into account the interests of WILSON NTEKUTA TARAYIA, whose right to 40 acres is acknowledged by the beneficiaries.***
- 5. Parties are at liberty to move the Environment and Land Court for purposes of determining the issue of title over PARCEL Nos. KAJIADO/KAPUTIEI CENTRAL/xxxx and xxxx.***
- 6. An order is hereby issued restraining any transaction over parcel Nos. KAJIADO/KAPUTIEI CENTRAL/xxxx and xxxx until determination of the issue of title to those parcels of land by the Environment and Land Court.***
- 7. The 2<sup>nd</sup> respondent shall pay costs of this application.***

**DATED SIGNED AND DELIVERED AT KAJIADO THIS 24TH DAY OF SEPTEMBER 2021**

**E C MWITA**

**JUDGE**