



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 151 OF 2002

IN THE MATTER OF THE ESTATE OF ZADOCK MBIHANE (DECEASED)

JUDGMENT

1. This matter relates to the estate of Zadock Mbihane, who died on 7th December 1993. According to the letter from the Chief of Shamakhokho Location, dated 13th March 2002, the deceased had been survived by a widow, Malola Chanzu Mbihane, and two sons, Eshimaeri Chonerwa Mbihane and Jacob Masitsa Mbihane. He was said to have owned a property known as Tiriki/Senende/450.

2. Representation to his estate was sought vide a petition lodged herein on 24th April 2002, by Malda Chanzu Mbihane, Eshimaeri Chonerwa Mbihane and Jacob Masitsa Mbihane, in their capacities as widow and sons of the deceased. They expressed the deceased to have had died possessed of Tiriki/Senende/450 and to have been survived by the individuals mentioned in the Chief's letter that I have mentioned above. Letters of administration intestate were made to them on 29th July 2002, a grant was duly issued, dated 6th August 2002. I shall consequently refer to three as the administrators. The said grant is yet to be confirmed.

3. What I am tasked with determining is the summons for revocation of the grant. The application is dated 19th May 2004 and was lodged herein on even date, by Peter Magozwi Mbihane, to be hereinafter referred to as the applicant. The grounds upon which the application was premised are set out on the face of the application, while the factual background is given in the affidavit in support of the application, sworn by the applicant on 19th May 2004. He sought that the grant made to the administrators be revoked. He complained that the grant was obtained by concealment of vital and material facts, failure to furnish the court with a full list of the names of heirs and beneficiaries, and failure by the administrators to appreciate that the deceased had and maintained two homes who were all entitled to the estate. He averred that the deceased had married two wives, both deceased, being Robai Mugava Mbihane and Malda Chanzu Mbihane. The first wife was said to have had two sons, being the applicant and one Hesbone Mungairwa Mbihane. The children of the second wife were identified as Eshimael Chonelwa Mbihane and Jacob Masitsa Mbihane. He complained that the administrators had concealed the existence of the first house from the court. He submitted that the grant was wrongly made to the administrators in the circumstances.

4. There is a replying affidavit by Jacob Masitsa Mbihane, sworn on 13th April 2017. He averred that property in question was ancestral maternal land having been what his late mother Malda Chanzu Mbihane had inherited from the estate of her late parents. He avers that the applicant was his brother out of a relationship between their father and a cousin's wife that he inherited under customary law, and, therefore, he was not entitled to a share of their maternal ancestral estate. He stated that the deceased person's property was at a place called Vokoli under the care of their uncle and awaiting administration. He has attached to his affidavit a letter from the Chief of Senende Location which purports to explain the position.

5. Directions were given that the said application be disposed of by way of oral evidence.

6. The oral hearing happened on 7th November 2019. The applicant was the first on the witness stand. His principal case was that the deceased was a polygamist with two wives and children. He stated that the deceased did not have two parcels of land, but just one. He stated that he lived on the same parcel of land with the administrators. He further stated that the deceased had daughters. There were seven daughters from the first house, but there were none from the second house.

7. The administrators testified next. Eshimaeri Chomerwa Bihane was the first on the stand. He conceded that the deceased had two wives, being Malda and Robai. He stated that Malda had ten children, being two sons and seven daughters. He said that he did not know the children of Robai, adding that the only child he knew from that house was the applicant. He identified the applicant as his brother from another mother. He said that he did not obtain his consent before he filed the petition for grant of representation because he could not find him. He also stated that the daughters did not also consent to his petition.

8. Jacob Masitsa Mbihane testified next. He stated that his father had only one wife, his mother, Malda Chanzu, who had ten children. He conceded that the applicant was also a child of the deceased. He said that the deceased had not married the mother of the applicant, and that she was just a girlfriend. He stated that the land the subject of the dispute was registered in the name of his mother, Malda Chanzu, saying that she had inherited from her father. During cross-examination he stated that the land was registered in the name of the deceased. He said that they did not involve the daughters of the deceased in the matter because they were all married, and would not be interested in the property.

9. The Law of Succession Act provides for revocation of grants under section 76, which states as follows:

“76. Revocation or annulment of grant

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—

(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.”

10. Under section 76 of the Act, a grant of representation is liable to revocation on three general grounds. The first ground would be where the process of obtaining the grant was attended by glaring difficulties, such as where the same was defective, say because the person who obtained representation was not qualified to be appointed as personal representative, or the procedural requirements were not met for some reason or other. It could also be because the petitioner used fraud or misrepresentation or concealed important information in order to obtain the grant. The second general ground is where the grant is obtained procedurally, but the administrator subsequently runs into difficulties during the process of administration of the estate. Such difficulties include his failure or omission to apply for confirmation of his grant within the period allowed in law, or where he fails to exercise diligence in administration of the estate, such as where he omits to collect or get in an asset, or where he fails to render accounts as and when he is required to do so by the law. The third general ground is where the grant has become inoperative or useless on account of subsequent circumstances, such as where the sole administrator died or loses the soundness of his mind or is adjudged bankrupt.

11. In the instant case, the applicant appears to anchor his case on the first general ground, that there were issues with the manner the grant was obtained. He has raised arguments about the process of obtaining the grant having had challenges. He has not complained about anything that would bring the case within the second general ground, nor the third ground. My understanding of his case is that the process of obtaining the grant was defective, as the administrators used fraud, misrepresentation and concealed matter from the court. His principle argument is that his consent was not obtained before the grant herein was sought. He is also asserting the administrators did not disclose to the court the existence of the second house of the deceased.

12. The framework for applications for grants of representation is set out in section 51 of the Law of Succession Act. The most relevant portions, for the purpose of this application, are in subsection (2)(g), which state as follows:

“Application for Grant

51. (1) ...

(2) Every application shall include information as to—

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(f) ...

(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)..."

13. My understanding of section 51(2) (g) is that the petitioner is required to disclose all the surviving spouses and children of the deceased. The provision is in mandatory terms. The administrators herein only disclosed themselves. They created an impression to the court that these individuals were the sole survivors of the deceased. The deceased had other children with a woman known as Robai and seven daughters with Malda. This information came from the testimonies at the oral hearing. The children of Robai and the daughters of Malda were not disclosed to the court. Therefore, there was no compliance with section 51(2) (g).

14. To my mind the above indicates procedural defects in the manner the grant was obtained to the extent that the administrators did not comply fully with the requirements of section 51(2) (g). There was fraud and misrepresentation to the extent that they did not disclose all the persons who survived the deceased. They misled the court into believing that the deceased did not have a second family and any female children. There was concealment of important matter from the court, to the extent that they did not disclose the sons of Robai and the seven daughters of the deceased. That meant that a fairly good number of survivors was locked out of the succession process. The motive of that act is unknown but it would be wholly irrelevant.

15. The administrators have made a lot play about the estate property, Tiriki/Senende/450, not being estate property because it had been inherited by their mother from her father, and therefore it did not belong to the deceased. There are two issues that I would like to address here. Firstly, from the certificate of official search dated 15th March 2002, the said property is indicated as having been registered in the name of the deceased on 29th April 1974. To that extent the same is estate property. No evidence has been placed before me to demonstrate that the property emanated from the family of Malda's parents. No explanation nor a background was given as to why, if the property was meant to be inheritance for Malda, the same ended up being registered in the name of the deceased. Secondly, whether the applicant was entitled to the property or not was not a ground for being omitted from the administration process in his father's estate. The issue of who is entitled to what out of the estate is for consideration at the point of distribution of the estate and not at the time of seeking representation.

16. From what I have stated so far I can safely conclude that the process of obtaining the grant herein was defective and attended by misrepresentation and concealment of matter from the court to the extent that the administrators did not disclose to the court the existence of the children from the second family and the seven daughters of the deceased with Malda.

17. In the end, the final orders that I shall make in this matter are as follows:

(a) That I hereby revoke the grant that was made herein on 29th July 2002 to the administrators;

(b) That I hereby appoint Eshimaeri Chomerwa Bihane, Jacob Masitsa Mbihane and Peter Magozwi Mbihane administrators of the estate of the deceased, and I direct that a grant of letters of administration intestate be made to them;

(c) That I hereby direct the administrators appointed above, whether jointly or severally, to apply for confirmation of their grant within the next forty-five (45) days;

(d) That in the application to be filed under (c) above, the administrators shall disclose all the daughters of the deceased and shall provide for them in accordance with section 38 of the Law of Succession Act;

(e) That any daughter of the deceased who shall be unwilling to take her share of the estate shall file an affidavit renouncing that interest or attend court at the oral hearing of the confirmation application to state her position;

(f) That any survivor of the deceased and any other interested person who shall not be in agreement with the proposed distribution shall be at liberty to file an affidavit of protest to the proposed distribution;

(g) That the matter shall be mentioned after forty-five days on a date to be given at the delivery of this judgement for compliance and further directions; and

(h) That any of the parties who is aggrieved by the orders made herein shall have twenty-eight days to file an appeal at the Court of Appeal.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24th DAY OF January, 2020

W. MUSYOKA

JUDGE