



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

SUCCESSION CAUSE NO.24 OF 2018

IN THE MATTER OF THE ESTATE OF JEREMIAH MAINA MAKIMI (DECEASED)

JOYCE WANJIKU JEREMIAH.....1ST APPLICANT

VERSUS

LOICE NYAGUTHII KABUTU.....1STRESPONDENT

JUDITH WAMBUI KABUTU.....2NDRESPONDENT

RULING

1. This matter relates to the estate of JEREMIAH MAINA MAKIMI, deceased who died intestate on 17.5.2009. A grant of temporary Letters of Administration were issued to LOISE NYOKABI KABUTU and JUDITH WAMBUI KABUTU who are a widow and mother respectively.

2. They proceeded to file a Summons for Confirmation of grant dated 3.11.2010 and listed the following as the beneficiaries;

LOICE NYAGUTHII KABUTU - WIDOW

AJMM - SON 7 YEARS

MKM - SON 4 YEARS

JOYCE WANJIKU JEREMIAH - MOTHER

3. The schedule of the properties was listed as follows;

a) PLOT NO.KIINE/SAGANA/[...]

b) PLOT NO.42 SAGANA

c) TITLE NO.KIINE/SAGANA/[...]

d) TITLE NO.KIINE/SAGANA/2276

e) TITLE NO.KIINE/SAGANA/3638

f) MWERUA/KITHUMBU/1454

g) MOTOR VEHICLE REGISTRATION NO.KBA 221Y NISSAN

h) A/C NO. [...] BARCLAYS BANK MOMBASA NKRUMAH

i) A/C NO. [...] KCB BANK MOMBASA

j) SAFARICOM SHARES DC [...]

4. LOISE NYAGUTHII proposed the mode of distribution in a supplementary affidavit sworn on 12.7.2012 as follows;

a) PLOT KIINE/SAGANA/[...] - LOISE NYAGUTHII KABUTU, AJM

b) PLOT NO.42 SAGANA – LOISE NYAGUTHII KABUTU

c) TITLE NO.KIINE/SAGANA/[...] – LOISE NYAGUTHII KABUTU, MK

d) TITLE NO.KIINE/SAGANA/3638 – LOISE NYAGUTHII KABUTU

e) TITLE NO.KIINE/SAGANA/3638 – LOISE NYAGUTHII KABUTU

f) MWERUA/KITHUMBU/1454 – LOISE NYAGUTHII KABUTU, ALEX MUGWANJA

g) MOTOR VEHICLE REGISTRATION NO.KBA 221Y NISSAN – LOISE NYAGUTHII KABUTU

h) ACCOUNT NO. [...] BARCLAYS BANK MOMBASA – NKRUMAH ROAD BRANCH – LOISE NYAGUTHII KABUTU

i) SAFARICOM SHARES DC [...] – LOISE NYAGUTHII KABUTU

The grant was confirmed and a certificate of confirmation of grant was issued on 15.10.2012. The grant was confirmed at the High Court sitting in Mombasa where the cause was filed before it was transferred to Baricho Court following an order of this court on 5.12.2017.

5. A summons for revocation of grant was filed by JOYCE WANJIKU JEREMIAH who contends that the grant was obtained fraudulently by making of a false statement or by concealing some material facts. She contends that the petition was filed in collusion with a stranger leaving out the biological mother of the deceased without her consent.

The Petitioners have not provided for her and yet she was entirely dependent on the deceased. That the Petitioners filed the cause in Mombasa while all the properties of the deceased are situated within the jurisdiction of this court.

6. The Respondent opposed the application and filed a replying affidavit. She depones that the applicant is her mother-in-law. She denies making any untrue allegations or concealing material facts from the court. That JUDITH WAMBUI KABUTU is her mother and a mother-in-law to the deceased. The deceased used to live in Mombasa and that is the reason why the cause was filed in Mombasa. She prays that the application be dismissed.

7. The application proceeded by way of oral evidence in court. Parties adduced evidence and thereafter filed submissions. I have considered the evidence adduced, the submissions and the averments. The issue which arises for determination is revocation/annulment of grant.

8. The Law of Succession Act Cap.160, to be referred to as the Act, makes provision for revocation. The Court has jurisdiction to annul the grant on it's own motion or on an application by an interested party. Section 76 of the Act provides;

“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 has ordered or allowed; 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. The Sections provides for the situations where the Court may order revocation of grant. The applicant has raised two issues;

- a) fraud
- b) concealment from court of material facts
- c) failing to make provisions for a dependant who is the mother of the deceased.

The applicant submits that the grant was filed secretly in Mombasa without the knowledge and participation of the applicant. There is no dispute on this fact. From the record the person who was indicated as the mother of the deceased, JUDTH WAMBUI KABUTU is actually the mother-in-law of the deceased. The Petitioner concealed something material from the Court as she never indicated that the 2nd Petitioner was actually her mother and not deceased's mother. The form P& A 80 indicates that the Petitioner's name widow and mother. She concealed material facts.

10. The Petitioner's filed the Petition in Mombasa though all the properties of the deceased were in Kirinyaga. I see this as calculated to ensure that the applicant would not know about the succession cause. The applicant and the Petitioner had obtained a Chief's letter addressed to Senior Principal Magistrate Kerugoya, document No.1 on the applicant's list of documents. The Petitioner did not act in good faith. Her intention was to disinherit the applicant. At the end of the day she did not give her any property or funds which were in the bank. The applicant was a dependant. In her affidavit she depones that she entirely relied on the deceased as she had retired and was sickly. The respondent acknowledged that the applicant has been sickly for a long time.

Section 29 of the Act defines dependant;

For the purposes of this Part, "dependant" means

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

No provision was made for the applicant. She was not in court when the grant was confirmed nor was she informed. Fraud under Section 76 of the Act is proved where the grant is obtained by making a false statement.

11. I am also asking myself whether the Petitioner concealed some facts from the Court because of the manner in which the grant was confirmed. This is because the form P & A 5 indicated that two of the dependants were minors. The grant states that land parcels would be registered to LOISE KABUTU, AJM and MK in equal share and yet the two are minors. The two minors could not be registered as proprietors of land. If this was brought to the attention of the Court it could have ordered that the Petition be registered in trust. Since there were minor children, there was a resulting trust and their interest had to be safeguarded. Section 58 (2) of the Act provides;

"Where an application for a grant of letters of administration in respect of an intestate estate is made by one person alone and a continuing trust arises the court shall, subject to section 66, appoint as administrators the applicant and not less than one or more than three persons as proposed by the applicant which failing as chosen by the court of its own motion".

As submitted by Counsel for the applicant there were errors apparent on the face of the grant. The interest of the minors were not safeguarded.

The applicant was not in Court when the grant was confirmed nor was the Co-Administrator. The intention of the Petitioner was to keep the applicant out of the picture. It cannot be said there were two administrators as required under Section 58 of the Act as the person who was recognized in the Chief's letter was the applicant and she was not informed.

12. The action by the Petitioner of making false statements that the 2nd Petitioner was the deceased's mother was not only fraudulent but criminal. Section 52 of the Act makes it an offence for any person to make willful and reckless statements in application for grant. The Section provides;

"Any person who, in an application for representation, wilfully or recklessly makes a statement which is false in any material particular shall 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".

A grant obtained by making false statements cannot stand. Parties cannot be allowed to get away with willful acts of deceit.

13. The applicant has proved that the grant was obtained fraudulently by making a false statement and concealing from court something material to the case. This is a sufficient ground to warrant this court to revoke the grant. I have considered the case cited by the applicant. Priscilla Ndubi & Another –V- Gerishon Gatobu Mbui 2018 eKLR where the Court ordered the grant to be revoked for none disclosure of material facts during the confirmation of grant. I am persuaded by the holding as parties who come to seek justice in Court must as a mark of good faith disclose all relevant facts to enable the court to dispense justice fairly. The Judge stated;

“Needless to state that in any Judicial proceedings, parties must make all disclosures to the court of all material facts to the case including successions cases. This general rule of Law emphasizes utmost good faith (uberimaefide) from parties who take out or are subject to court proceedings. The said responsibility is part of justice itself. Accordingly, none disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice such must immediately be subjected to serious reverse osmosis to purify the streams of justice if society is to be accordingly regulated by law.... The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries”

14. The contention that summons are nullity having been filed at the Principal Magistrate’s Court Baricho cannot stand. It is now water under the bridge as the anomaly was rectified when an application to transfer the matter to this court was made and granted. It is a procedural technicality which should not bar the court from doing substantive justice. Article 159 (20 (d) of the Constitution mandates court to do justice without undue regard to procedural technicalities. What court considers is whether the party has been prejudiced. The Petitioner has not stated what prejudice she has suffered. In my view since the application was transferred to this court which has jurisdiction the court has discretion to hear and determine the application other than strike it out. The authority cited in the estate of Joshua Ojodeh – deceased is persuasive.

15. The Petitioner has raised the issue that the applicant was not a dependant. The Act under Section 29 defines dependant among others, to mean parents of the deceased person who were being maintained by the deceased prior to his death. The applicant in this case qualifies as a dependant under the Section. She has tendered evidence to prove that the deceased used to send money to her. It is not unusual for children to give money and other material support to their parents. In this case the applicant was sickly and had retired from employment. It is therefore not farfetched for the applicant to say that she was receiving money from her son. Under section 29 of the Act the court exercises discretion to make provision for the parents if they are able to demonstrate that they were dependent on their deceased children immediately prior to her death. The parent is not required to prove beyond any reasonable doubts, it is sufficient if she proves on a balance of probability that she was depending on the deceased prior to his death. The applicant has demonstrated this on a balance of probabilities.

IN CONCLUSION

From what I have stated above, I find that the applicant has satisfied the requirements under Section 76 of the Law of Succession Act to warrant this Court to order that the grant be revoked. I find that the application has merits. I order that the grant of Letters of Administration which was confirmed on 15.10.2015 shall be revoked.

The applicant is appointed as a Co-Administrator of the estate of the deceased together with the 1st Petitioner. The 2nd Petitioner is removed from the cause.

The applicant to file an affidavit of protest to the confirmation of grant within 45 days. Each party to bear own costs.

Dated and delivered at KERUGOYA this 23rd day of January 2020.

L. W. GITARI

JUDGE