



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

SUCCESSION CAUSE NO. 9 OF 2017

IN THE MATTER OF THE ESTATE OF PATRICK VAATI NDAKA (DECEASED)

EVELYN MARTHA KISWII.....APPLICANT

VERSUS

NDAKA MUTINDA.....1ST RESPONDENT

JOSEPH MBEVO NDAKA.....2ND RESPONDENT

RULING

1. **Patrick Vaati Ndaka** (Deceased) died domiciled in Kenya on the **6th** day of **April, 2001**. Letters of Administration Intestate in respect of his Estate were issued to **Ndaka Mutinda** and **Joseph Mbevo Ndaka** on the **13th** day of **June, 2009** in their capacity as the father and brother of the Deceased. The Deceased was survived by a wife **Esther Martha Kiswii**, sons **Muthiani Thikwa Ndaka** and **Kiswii Vaati**.

2. On the **9th June, 2017**, **Evelyn Martha Kiswii** filed summons for revocation of grant on the grounds that the grant was obtained fraudulently by the making of a false statement and/or by the concealment from the Court of the true identity of the Administrators of the Deceased's Estate and untrue allegations, the Petitioners having lied that they were the Deceased's sons yet they were father and brother, respectively to the Deceased.

3. The Applicant swore an affidavit in support of the application. She deposed that the true identity of the Administrators to the Estate was concealed; she is the only surviving wife of the Deceased with whom they had two (2) sons having married him through the Kamba Traditional Wedding in **1998**. That being the case she has a priority to the Deceased's Estate over the Administration of the Estate.

4. The application is unopposed.

5. It was the submissions of **Omondi Ogutu and Associates** representing the Applicant that the grant was obtained fraudulently as they concealed true dependants of the Deceased. That the Respondents knew very well that the Estate had other beneficiaries including the Applicant and her children but deliberately chose to conceal such material facts so as to disinherit them. In this regard, they relied on the case of **Re Estate of Stephen Mwangi (Deceased) (2018) eKLR** where the Court stated thus:

"... By failing to include the name of the Applicant as a survivor of the Deceased, and notwithstanding that the Applicant filed a parallel Succession Cause, the Respondents obtained the grant fraudulently by making a false statement of fact and by concealing from the Court of something material to the case.

Indeed, the proceedings to obtain the grant were defective in substance as Section 51(2) of the Law of Succession Act requires that an application for grant shall include information as to:

"(g) In cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers, sisters of the Deceased and of the children of any child of his or hers then Deceased..."

6. Further, it was urged that the proceedings to obtain the grant were defective in substance which was contrary to **Section 51(2)** of the **Law of Succession Act** a fact emphasized in the case of **Paul Mutemi vs. Rhoda Mutemi (2016)** where the Court stated thus:

"... it is clear to me that the respondent did not disclose the applicant either as a widow of the deceased or an interested party in the succession cause. The Law of Succession Act requires such disclosure. The forms that are filled under the Succession Rules are themselves worded in such a way that such disclosure is mandatory. In addition, the law requires disclosure of all survivors and dependents who include former wives-see section 29 and 39 of the Law of Succession Act.

It is upon such disclosure that the issue of who is entitled to inherit or not to inherit will be determined factually by the court. The chief's letter to be filed with the application for Grant of Letters of Administration was meant to support or supplement this disclosure ...”

7. That the Applicant was not notified of the proceedings and her consent was not obtained. The grant was therefore irregular.

8. Grounds upon which the grant can be revoked are provided for in **Section 76** of the **Law of Succession Act** which states as follows:

“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.”

9. This is a case where the survivor/beneficiary of the Estate of the deceased has moved this Court to revoke the grant on grounds of concealment of material facts and untrue allegations by the Administrators.

10. A perusal of the primary file shows that by a letter dated **18th May, 2009** authored by **Chief Daniel M. Kawi** disclosed the following individuals as dependants of the Deceased:

i) Esther Martha Kiswii (Wife).

ii) Muthiani Vaati – Son.

iii) Kiswii Vaati – Son.

iv) Bibiana Thikwa Ndaka – Mother.

It was pointed out that the property/assets of the Deceased were under the care of his elder brother **Joseph Mbevo Ndaka** (2nd Respondent). The affidavit in support of the Petition of Letters of Administration Intestate was deponed by the Administrator of the Estate who included themselves as survivors of the Deceased and disclosed the assets that formed the Estate of the Deceased. Other than the names of the nuclear members of the family of the Deceased being included, there is absolutely nothing to suggest that they were aware of existence of the Petition. The fact of petitioning of Letters of Administration Intestate in respect of the Estate of the Deceased should have been disclosed to the applicant.

11. **Section 66** of the **Law of Succession Act** provides thus:

“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 of the intestate estate shall be granted to any executor or executors who prove the will.”

12. The Respondents having failed to respond to the application, it is not disclosed why the Court did not question why preference could not be given to the Applicant as a person who was entitled to obtain Letters of Administration on priority basis with or without association of any other persons.

13. I do note that after the Respondents obtained Letters of Administration Intestate in **2009**, they did not take any other step to have the grant confirmed. This was evidence that they failed to proceed diligently with the administration of the Estate. The information in the letter that was written by the Chief indicated that the property of the Deceased was under care of the 2nd Administrator. This required an interpretation/explanation which could be done during hearing of an application for confirmation of grant. It is not possible to discern whether or not the Administrators failed to proceed with the administration of the Estate deliberately or out of ignorance. In **2016, December** the Court sent out a Notice to the Administrators of the Court's intention to dismiss the matter for failure to take a necessary step. No action was taken by the Administrators.

14. This, therefore, is evidence that the grant issued has become inoperative. In the premises, the Court herein in compliance with **Section 76** of the **Law of Succession Act** proceeds to exercise its discretion by giving the following orders:

(i) The grant herein be and is hereby revoked.

(ii) The Applicant is at liberty to petition for a fresh grant with or without other parties/beneficiaries of the Estate.

(iii) Costs of the application shall be borne by the Respondents.

15. It is so ordered.

Dated, Signed and Delivered at Electronically via Skype this 26th day of May, 2020.

L. N. MUTENDE

JUDGE