



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

SUCC. MISC. APPLICATION NO 34 OF 2019

IN THE MATTER OF THE ESTATE OF YAPINDET MALAMBU (DECEASED)

AND

IN THE MATTER OF TITLE NO. NGONG/NGONG/347

AND

IN THE MATTER OF APPLICATION FOR REVOCATION OF GRANT OF LETTERS OF ADMINISTRATION

BETWEEN

HASSAN KASSIM MALAMBU.....1ST APPLICANT

PIPI YAPINDET LEKISHON.....2ND APPLICANT

NODIA MUTHONI KAIRO.....3RD APPLICANT

HADIJAH SALIM MONTET.....4TH APPLICANT

ALI KOLELA MONTET.....5TH APPLICANT

BETTY MONTET representing OSMAN GEORGE

MONTET (Deceased).....6TH APPLICANT

FATUMA OMAR representing OMAR MONTET(Deceased)..7TH APPLICANT

SOPHIA HASSAN MONTET representing HASSAN

MONTET (Deceased).....8TH APPLICANT

VERSUS

MARIAM WANGARE KASSIM.....1ST RESPONDENT

HASSAN IDDI MALAMBU.....2ND RESPONDENT

RULING

1. By summons dated 18th April 2019, **Hassan Kassim Malambu** and 7 other applicants sought revocation of Grant of Letters of Administration intestate issued by the Chief Magistrate's Court in Succession Cause No. 20 of 2017 to **Mariam Wangare Kassim** and **Hassan Iddi Malambu** and confirmed on 12th February 2019. The applicants also sought orders restraining the two from receiving any proceeds from the National Land Commission for compensation in relation to parcel **No. Ngong/Ngong/347** and or that they be ordered to file detailed accounts for monies received for leasing the said parcel of land.

2. The summons is supported by grounds on its face and an affidavit sworn by the 1st applicant on 18th April 2020.
3. The grounds in support of the summons for revocation of grant are, that; the Chief Magistrate's Court lacked jurisdiction to entertain the petition for grant of letters of administration since value of the deceased's estate was more than 50,000,000; that the petitioners failed to disclose that there were other beneficiaries of the deceased; that the respondents had no consent from the beneficiaries to petition for grant, which amounted to non-disclosure of material facts; that the grant was fraudulently obtained and that the respondents intention was to disinherit the beneficiaries of the estate.
4. In the supporting affidavit, the 1st applicant deposed that the deceased died intestate leaving behind four children namely: Fatuma Hassan, Idd Malambu Hassan, Kassim Malambu Hassan and Mariam Hassan Malambu all now deceased; that the 1st respondent a daughter in-law of the deceased, filed a petition for grant of letters of administration intestate without consulting other beneficiaries of the deceased, leading to issuance of a grant on 14th November 2017, and which was confirmed on 12th February 2019.
5. He stated that the trial court did not have jurisdiction in view of the value of the estate; that another petition for grant of administration of the same estate was filed at the Senior Principal Magistrate's Court at Ngong and that the respondents were aware of it, being **Succession Cause No. 94/2018**. He further stated that the grant was confirmed despite the issue of non-inclusive of other beneficiaries being raised.
6. According to the applicants, the 1st respondent failed to disclose that she was a co-wife to late **Mwanasit Tuta**, who left behind children and, therefore, her action was intended to disinherit other beneficiaries. The 1st applicant further deposed that the 1st respondent leased part of the land for dumping by Contractor of the Standard Gauge Railway (**SGR**) and distributed the money over to a few beneficiaries leaving out others, which she should account for. The applicants contended that the misrepresentation and non-disclosure led to grant and eventually confirmation of the grant excluding other beneficiaries and the grant should, therefore, be revoked.
7. The respondents filed a replying affidavit by the 1st respondent, sworn on 7th October 2019 and filed on 8th October 2019. She deposed that the deceased had five children and not four as contended by the applicants; that she was married to Kassim Hassan Malambu now (deceased) and got 7 children; that she is the administratrix of her late husband's estate and that she is the only widow to Kassim Hassan Malambu.
8. The 1st respondent further deposed that by the time **Yapindet** (her mother-in-law) died four of her daughters were already married; that the deceased had two parcels of land and that she gave Mohamed Kondire parcel No. **Ngong/Ngong/3224** while Iddi Malambu and Kassim Hassan Malambu were given **Ngong/Ngong/347** which they have been utilizing since the deceased passed on.
9. According to the 1st respondent, the deceased distributed all her properties before she passed on; that the applicants are the deceased's grandchildren and since the daughters were married, she could not look for them to consent to her petitioning for grant of representation.
10. The 1st respondent stated the 1st applicant is her stepson born out of wedlock; that Pipi Yapindeti Lekishoni is a granddaughter to the deceased; that Nadia Muthoni was married to Dani Mohammed, a son to Mariam and that Dani passed on after divorce hence she is a stranger to the estate. She also stated that Bett Montet is daughter to grandson of Fatuma and therefore great grandchild, same as Fatuma Dinari and Sophia Montet, which means they are strangers to the estate, or do not rank higher than her late husband whom she represents.
11. The 1st respondent denied that the trial court lacked jurisdiction; that the property was valued at Kshs. 16.8 million; that parcel **No. Ngong/Ngong/347** was meant to be shared between Kassim Hassan Malambu and Iddi Malambu; that she applied for a grant of representation together with son to Iddi Malambu and that the petition filed at Ngong was filed much later after she had been issued with the grant.
12. She maintained that the applicants are strangers to the estate and are driven by selfishness interests and greed, with a view to benefiting from the compensation and merely want to frustrate her.

Evidence

13. The applicant testified that he is one of the applicants and that the application was filed on behalf of 4 houses namely; Hassan Malambu; Mariam Hassan Malambu; Fatuma Hassan Malambu and Kassim Hassan Malambu, who were children of the deceased and are all also deceased. He told the court that the 1st respondent is her step-mother and that the deceased left behind parcel **No. Ngong/Ngong/347** measuring 4.2 acres and no one resides on the parcel of land. He denied that the parcel of land was left for the 1st respondent and Hassan Malambu.
14. He testified that the land was left as the deceased's estate but when the respondents applied for grant of letters of administration they did not inform or consult the rest of the beneficiaries. He also told the court that according to the certificate of confirmation issued by the magistrate's court, those who benefited were the 1st respondent, her children and the 2nd administrators only.
15. He told the court that the grant to his father's estate did not include parcel **No. Ngong/Ngong/347** and, therefore, it did not form part of his father's estate. He also denied that the parcel was given to Iddi Malambu and Kassim Hassan Malambu.
16. In cross-examination, he told the court that the 1st respondents and Hassan Keneiya were issued with the grant for his father's estate; that his mother had died by that time; that he objected to the grant being issued to his step-mother and was included as a beneficiary and got a share of his father's estate.

17. The 1st respondent testified and told the court that the deceased herein was her mother-in-law and relied on their replying affidavit as her evidence before the court. In cross-examination, she told the court that the applicants are from the deceased's family and that they are grandchildren and great grandchildren of the deceased. She admitted that when she applied for grant of representation for her husband's estate, she did not include parcel **No. Ngong/Ngong/347**; that the deceased herein did not leave behind a will; that she applied for grant of representation intestate to the deceased's estate with **Hassan Iddi Malambu** and that the property was distributed to her, her children and the said Hassan Iddi Malambu. She also admitted that her children and Hassan Iddi Malambu are grandchildren of the deceased herein.

18. According to her, the land was purchased by Kassim Malambu and Iddi Hassan for the deceased but they took it back after she died. The respondent admitted that the 1st applicant is her step son but she did not include her in the list of beneficiaries of the deceased's estate although he is son to her late husband and grandchild of the deceased.

Applicants' submissions

19. The applicants filed written submissions dated 12th March 2020 and filed on 18th June 2020. They argued that the magistrate's court issued the grant without jurisdiction; that section 23 of the Law of Succession Act as amended grants, jurisdiction to magistrates' courts to hear applications on any estate whose value does not exceed the magistrates' pecuniary jurisdiction donated by section 7(1) of the Magistrate's Court Act, 2015.

20. According to the applicants, the respondents attached a valuation report for the estate showing that it was valued Kshs. 16.8 million, and by virtue of section 7(1) of the Act, **Hon. B. M. Cheloti** did not have jurisdiction to deal with an estate valued more than her jurisdiction. They relied on **Hon. Lemanket Aramat V Harun Meitamei Lempaka & Others** Petition No. 5 of 2014 which held, citing **Owners of Motor Vessel "Lillian's v Caltex Oil (Kenya) Ltd.**, [1989] KLR 1 that jurisdiction is everything, without it a court of law cannot take any step or proceed with a matter.

21. On capacity, the applicants submitted that the 1st respondent indicated that she was a daughter in law to the deceased. Relying on **Mwikali Ngari and Mary Katolia Mutisyo** Cause No. 547/2012, they argued that part (V) section 36 of the Law of Succession Act provides the ranking of beneficiaries and as such, the 1st respondent did not rank higher in priority than the applicants.

22. The applicants further argued that the 1st respondent is guilty of non-disclosure of material facts relating to the extent of the estate. In particular, they contended that the 1st respondent did not disclose that the deceased was survived by grandchildren and that she intermeddled with the estate by leasing and selling part of that estate against the law.

23. On revocation of grant, the applicants relied on section 66 of the Law of Succession Act to argue that the court has the final say on the person(s) to whom a grant should be issued. They also argued that section 76 provides for grounds upon which a grant may be revoked and annulled. They relied on **Priscilla Ndubi & another V Gerishon Garobu Mbui**, Succession Cause No. 729/2014, for the submission that in any judicial proceedings, parties must make full disclosure to the court of all material facts for the case, including succession cause; and that the primary duty of the probate court is to distribute the estate of the deceased to the rightful beneficiaries.

24. The respondents were given time to file written submissions but did not do so and at the time of writing this judgment they had not complied.

Determination

25. I have considered the summons, the response and submissions by parties. I have also considered the authorities relied on.

26. The applicants are grandchildren and great grandchildren of the deceased. They have applied for revocation of the grant of letters of administration intestate issued to the respondents by the magistrate's court and subsequently confirmed by **Hon. B. M. Cheloti, (SRM)**, on 12th February 2019.

27. The grounds for challenging the grant are that the court did not have jurisdiction; that the 1st respondent had no capacity or ranked lower than the applicants, being a daughter in law to the deceased; that she failed to disclose material facts to the court and that her action was intended to disinherit the applicants.

28. The respondents opposed the summons, arguing that the court had jurisdiction; that the 1st respondent had capacity and that the 1st applicant had benefitted from the deceased and that some of the applicants have no capacity.

29. I have considered the arguments by both sides and perused the record of the court that issued the grant and later confirmed it. The grant was issued on 14th November 2017. The petition for grant filed on 21st February 2017, identified the value of the estate as Kshs. 4,000,000/=. However, in the summons for revocation of grant, the applicants have deposed that their property is valued at more than 50m and that the respondent filed a valuation report at the time of filing the petition for grant, showing that the value of the estate was Kshs. 16.8m, a fact the respondents admits in their replying affidavit. I have not seen this report.

30. There is however a valuation report dated 4th June 2018 by Horizon Valuers Limited, showing that the market value of the property is Kshs. 40 million.

Jurisdiction of the court

31. Magistrate's court has jurisdiction to hear petitions for grant of letters of administration for estates whose value does not exceed its pecuniary jurisdiction. It is not clear who issued the grant but, according to the record, it was confirmed by **Hon. B. M. Cheloti, (SRM)**, on 12th February 2019. Section 7(1) (d) sets the pecuniary jurisdiction of a court presided over by a senior resident magistrate at seven million shillings.

32. Although the petition indicated that the estate was valued at Kshs. 4,000,000/= which would place the matter within the jurisdiction of that court, the valuation report alluded to by parties would take the matter outside the jurisdiction of the court. In that respect and given that both parties agree to there being a report showing that the estate was valued at Kshs. 16.8 million, the trial court did not have jurisdiction to confirm that grant.

33. Secondly, there is a valuation report showing that the market value of the property forming the deceased's estate is Kshs. 40,000,000. The report was filed by the applicants and the respondents have not disputed it. That being the case, it means the estate falls outside the jurisdiction of the magistrate's court whose highest pecuniary jurisdiction exercisable by a chief magistrate is Kshs.20,000,000.

Capacity

34. The applicants have also challenged the capacity of the 1st respondent to apply for grant of representation of the deceased's estate. The 1st respondent is a daughter-in law to the deceased while the 2nd respondent is a grandson. This is clear from the petition for grant filed before the chief magistrate's court. When the respondents applied for the grant, they indicated that the 1st respondent was a daughter-in-law. However, the 2nd respondent indicated that he was a son to the deceased which was not true. The letter from the Chief, dated 12th November 2015, indicated that the property was under the care of the two respondents. The letter did not show the relationship between the respondents and the deceased. It did not also state those left behind surviving the deceased .

35. The petition for grant, form, P & A 5, indicated that the deceased died intestate and left the persons named therein, namely; the two respondents as the only surviving beneficiaries. The summons for confirmation dated 28th November 2018 and in particular the affidavit in support thereof, showed that the deceased left behind other dependants. These were the two respondents named in the petition and 6 others namely; *Mohammed Koitikash Malambu; Omari Kassim Malambu; Yusuf Lumumba Malambu; Lucy Malambu; Halima Mbusiale Malambu and Fatuma Kassim Malambu*. Upon confirmation of that grant, the estate was shared equally among these persons.

36. According to the applicants, the persons listed as beneficiaries in the petition are daughter-in law and grandson, while those who eventually benefited were the two administrators, a daughter in-law and grandson, and the 1st respondent's children, who are grandchildren of the deceased. The applicants argued, therefore, that there was no way the 1st respondent could benefit from the estate as a daughter-in law and leave them, grandchildren, yet her own children who are also grandchildren of the deceased benefited from the estate. They therefore contended that they were disinherited and, for that reason, the grant should be revoked for non-disclosure of important material facts.

37. The applicants further argued that the deceased died intestate and, therefore, she could not have left the property only to some of her children as suggested by the respondents.

38. I have considered the arguments on this issue. There is no doubt that the 1st respondent is a daughter in-law to the deceased while the 2nd respondent is a grandson. The applicants are also grandchildren of the deceased. It is also true that when the respondents petitioned for grant of letters of administration for the deceased's estate, they did not disclose that the deceased had left behind other grandchildren.

39. In the summons for confirmation of grant, the respondents indicated that the deceased left behind other dependants who happen to be the 1st respondent's children and therefore grandchildren of the deceased. Whereas the 1st respondent's children and the 2nd respondent who are grandchildren of the deceased benefitted from the deceased's estate, the applicants were not included as either beneficiaries or dependants, just as the 1st respondent's children and the 2nd respondent were. That was clearly a discriminatory act and was unfair.

40. The applicants have also challenged the 1st respondent's capacity to petition for grant of representation for the deceased's estate, being a daughter-in law. Whether she ranked higher in priority than the applicants, or some of them, is a matter to be decided after hearing all the parties on that aspect. What is however clear, is that the respondents did not disclose important material facts to the court when they petitioned for grant of representation, that there were other grandchildren, other than the 1st respondent's children and the 2nd respondent.

41. Section 76 of the Law of Succession Act, provides for grounds on which a grant may be revoked or annulled. It states;

“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.(emphasis)

42. From the provisions of this section, it is not in doubt that the respondents obtained the grant fraudulently and without disclosing material particulars to the court that there were other persons interested in the deceased's estate; to wit, the applicants. Whether they were to get a share of the deceased's estate or not was a matter to be decided by the probate court.

43. The respondents argued that the deceased had left the property to only two of her sons excluding the applicants' parents. That did not take the property outside the deceased's intestate estate. They themselves petitioned for grant of letters of administration intestate for the deceased's estate, admitting that he deceased died intestate.

44. More over **section 34** of the Act is plain on intestacy. A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect. Admittedly, the deceased did not leave behind a will and, therefore, she died intestate. It could not have been possible that she left behind the disputed property to any person in any other way other than by disposition through a valid will. There is no doubt therefore that this particular property forms the deceased's estate.

45. Having considered the summons, the response and evidence on record as well as the law, the conclusion I come to is that the summons is merited and must succeed. Consequently, the summons dated 18th April 2019 is allowed and I make the following orders.

a. The grant of representation to the deceased's estate issued to the respondents by the chief Magistrate's court on 14th November 2017 is hereby revoked.

b. The certificate of confirmation issued on 12th February 2019 is hereby set aside.

c. Succession cause No. 20 of 17 filed before the Chief Magistrate's court Kajiado is hereby transferred to this court for hearing and determination.

d. A grant of representation to the deceased's estate is hereby issued to HASSAN KASSIM MALAMBU, PIPI YAPINDET LEKISHON, HASSAN IDDI MALAMBU and MOHAMMED KOITIKASH MALAMBU.

e. The new administrators do file summons for confirmation of grant within 3 months identifying the true beneficiaries of the estate and each beneficiary's share.

f. Any compensation money held by National Land Commission be held by the commission until final determination of this matter.

g. No order as to costs.

Dated, Signed and Delivered at Kajiado this 28th July, 2020.

E. C. MWITA

JUDGE