



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 4 OF 2020

SABERA MAKENA.....APPELLANT

VERSUS

DANIEL BARIU MUTEMBEI.....RESPONDENT

(An appeal from the ruling and order of Hon. G. Sogomo PM made on 2/5/2019 in Tigania PM's Court Succ Cause No. 82 of 2018)

J U D G M E N T

1. The appellant, was dissatisfied with the Ruling delivered on 2/5/2019 pursuant to leave given on 3/12/2019, she filed her appeal on 13/1/2020 in which she raised nine grounds of appeal that may be summarised as follows: -

“a) That the trial court erred in changing the date for the delivery of the ruling without giving any reason or notice to the appellant.

b) The trial court erred in failing to appreciate and make any findings on the grounds for revocation of the grant raised in the application before it.

c) That the trial court erred in finding that the appellant was not entitled to equal share of the deceased estate without giving any reasons at all.

d) That the trial court erred in failing to properly interpret and apply the provisions of section 76 Cap 160 Laws of Kenya.

e) That the learned magistrate erred in awarding and assessing the costs against the appellant without giving her an opportunity of being heard”.

2. On 29/6/2020, the parties were directed to file their respective submissions. Only the appellant filed her submissions. It was submitted that the respondent did not consult or include the names of the daughters of the estate when he took out the letters of administration and that their consent was not obtained prior to taking out of the letters of administration. She relied on **section 51 of the Law of Succession Act and Rule 26 of the Probate and Administration Rules.**

3. This being a first appeal, this Court is enjoined to reconsider the evidence, evaluate the same and draw its own conclusions (See, **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**).

4. **M'Mbura M'Nairuti** (“the deceased”) died on 3/8/2007. According to the introduction letter by the area chief dated 30/6/2017, the deceased left behind **Daniel Bariu Ntuambura, Bernard Mwiti M'Mbura and Francis Kiliungu M'Nja**. On 20/11/2017, **David Bariu Ntuambura** (“the petitioner”) petitioned for letters of administration. Those who gave their consent were **Bernard Mwiti Ntuambura and Francis Kiliungu**.

5. A Grant of letters of administration was issued to the petitioner on 26/1/2018. He subsequently applied for confirmation on 11/5/2018. Those who consented to the confirmation were shown to be **Daniel Bariu Ntuambura, Bernard Mwiti Ntuambura, Francis Kiliungu M'Nja and Sabera Makena**. The same was confirmed on 18/5/2018 and the estate distributed as follows: -

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a) Daniel Bariu Ntuambura..... 0.41 ACRES

b) Bernard Mwiti Ntuambura..... 0.41 ACRES

c) Francis Kiliungu M’Nja.....0.43 ACRES

d) Diana Karambu Iitu Miitu.....0.41 ACRES

e) Sabera Makena.....BALANCE

6. On 15/11/2018, the appellant filed Summons for revocation of the grant. She contended that no consent had been obtained from the daughters of the deceased to institute the cause, that her signature was obtained fraudulently, that **Francis Kiliungu M’Nja** was not related to the deceased and therefore not a beneficiary of the estate.

7. The respondent opposed the Summons vide his replying affidavit sworn on 5/12/2018. He averred that **Francis Kiliungu M’Nja** had obtained 0.43 acres from the deceased prior to his demise. That the daughters had renounced their rights during a clan meeting held on 6/12/2016.

8. On 13/2/2019, **Pauline Kalanyu, Regina Mwikaria and Dianah Karambu** filed a notice of withdrawal of advocate and withdrew their claim. They stated that they had not instructed the advocate and that they had consulted with the Njuri Ncheke and agreed to withdraw the claim since they may go against their father’s wishes and be cursed.

9. The main issues as can be construed from the grounds of appeal are; **Whether the trial court erred in dismissing the appellants summons for revocation of grant and Whether it erred in apportioning costs of the application to the appellant.**

10. **Section 76 of the Law of Succession Act** sets out the grounds upon which a grant can be revoked. These include that; the proceedings to obtain the grant were defective in substance, the grant was obtained by the making of a false statement or by concealment from the court of something material to the case, the grant being made by an untrue allegation of fact essential in point of law to justify the grant, amongst others.

11. The appellant pleaded concealment of material facts. The record is clear that the daughters of the deceased were not listed as beneficiaries of the estate. Further, only **Bernard and Francis** signed the consent to institute the cause.

12. In the Summons for confirmation of grant, it was alleged that the appellant had consented to the mode of distribution. She denied this fact and contended that her signature had been forged.

13. The information that should be contained in an application for grant is set out in **section 51(2)** of the **Law of Succession Act**. The relevant provision is **section 51(2)(g)** of the **Act** which states as follows: -

“51(2) An application shall include information as to –

(g) in cases of total or partial intestacy, the names and addresses of all previous spouses, children, parents, brothers and sisters of the deceased and of the children of any child of his or hers then deceased”.

14. **Section 51(2)(g)** aforesaid should be read together with **Rule 7(1) (e) (i)** of the **Probate and Administration Rules** which states as follows: -

“Where an applicant seeks a grant of representation to the estate of a deceased person ... the application shall be by a petition... containing... the following particulars-

e) in cases of total or partial intestacy –

(i) the names, addresses, marital state and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving spouse or child, like particulars of such person or persons who would succeed in accordance with section 39(1) of the Act”.

15. In **Musa Oluoch Aber v Margaret Onyango Ogembo & another [2015] Eklr.** it was held: -

“... Full disclosure is a mandatory requirement and it does not matter that the deceased made provision for the other survivors during his lifetime. To this requirement there are no exceptions....”

16. The court before whom the petition is presented must be able to ascertain who all the survivors of the deceased are from the record. These must include those already provided for.

17. From the record, it is clear that the daughters of the deceased, including the appellant, were not involved in the institution of the cause. The letter by the chief did not list them as beneficiaries. The trial court did not consider this fact.

18. The appellant complained that her signature in the consent to confirmation had been forged. This was neither denied nor controverted.

19. That contention therefore to be taken to be the truth. It is therefore clear that there was concealment, false statements and material

nondisclosure of facts relevant to the proceedings. The trial court did not resolve this issue.

20. Accordingly, I find that the appeal is meritorious and I allow the same. The grant be and is hereby revoked.

21. Having revoked the grant, I find it imperative that this court determines the distribution of the estate of the deceased. I find authority on the provisions of **section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules.**

22. I should first consider whether Francis was a beneficiary of the estate of the deceased. The petition did not mention that the deceased had any liabilities. Francis was listed as a son of the deceased. This was a misnomer which however, cannot be attributed **Francis** but the respondent.

23. I have looked at the sale agreement dated 10/6/2001 between the deceased and Francis. The same was signed by the deceased during his lifetime. That was a liability on the estate. The sale was of 0.43 acres in the estate property for Kshs. 1.1 million. A sum of Kshs. 500,000/- was paid and the balance was to be paid after transfer. The said agreement looks valid for all intent and purposes. Accordingly, to this Court's mind, the same was a valid liability that should have been disclosed by the petitioner in the petition.

24. The deceased died intestate leaving behind no spouse. In this regard, the estate ought to have been distributed in accordance with **section 38 of the Law of Succession Act.** The same provides: -

“Where an intestate has left a surviving child or children but no spouse the net estate shall subject to the provisions of section 41 and 42 devolve upon the surviving child, if there be only one or shall be equally divided among the surviving children.”

25. The trial court in its determination held that it is not the remit of the court to impose equal distribution of a deceased legacy and the role of the court is limited to ensuring that the apportionment is equitable. With due respect, that was a misdirection. The position of the law is that the estate should in the circumstances of this case be distributed equally unless the parties agree. The parties having not agreed, the provisions of **section 38 of the Act** apply in full.

26. From the record, Diana, Regina and Pauline who are three daughters of the deceased had renounced their interest in the estate. In this regard, the estate is distributable amongst the sons and one daughter of the deceased after removing the 0.43 acres belonging to Francis.

27. Accordingly, the estate of the deceased will be distributed as follows: -

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a) Daniel Bariu Ntuambura.....0.324 acres

b) Bernard Mwiti Ntombura.....0.324 acres

c) Diana Karambu Iitu Miitu.....0.324 acres

d) Sabera Makena..... 0.324 acres

e) Francis Kiliungu M’Nja.....0.43 acres

28. A fresh grant be and is hereby issued in line with the mode of distribution aforesaid.

It is so decreed.

DATED and DELIVERED at Meru this 24th day of September, 2020.

A. MABEYA

JUDGE