REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 3 OF 2019

(An appeal from the ruling and orders of Hon. Ochieng, Chief Magistrate,

in Kakamega CMCSC No. 54 of 2016, delivered and made on 1st February 2019)

JOSEPH GODFREY MBAYAKI.....APPELLANT

VERSUS

PATRICK MBAYAKI MASINDE.....RESPONDENT

JUDGMENT

1. The succession cause at the primary court was initiated by Joseph Godfrey A. Sisa, who I suppose is the appellant herein, through a succession petition, filed herein on 16th August 2016, in the matter of the estate of Roman Nasira Sisa, to be known hereafter as the deceased. The deceased was said to have had died on 19th December 1997, and to have had been survived by four (4) individuals, being one daughter-in-law, three sons and a grandson. The daughter-in-law was named as Mary Julie Atieno Ocholla. The sons were named as Joseph Godfrey Mbayaki A. Sisa (the petitioner and appellant herein), Fredrick Munyolo Sisa and Charles Mukenya Sisa. The grandson of the deceased was named as Andrew Nasira Sisa. The assets listed, as comprising the estate, were Bunyala/Budonga/282 and Plot No. 8 Malaha Market. Letters of administration intestate were made to the appellant on 2nd December 2016, and a grant was duly issued, dated 6th December 2016.

2. Patrick Mbayaki Masinde, the respondent herein, then filed a summons for revocation of grant in the succession cause on 13th June 201, of even date. He sought revocation of the grant, and for a fresh one to issue in his name and that of the appellant. He also sought that all subsequent activities carried out after the making of the grant be nullified. He complained that the grant had been obtained fraudulently as the appellant had concealed the fact that the respondent was a beneficiary and dependant of the estate. His case was that the deceased was his grandfather, while the appellant was his paternal uncle, being a brother of the respondent's late father, Pius Masinde Sisa. He disclosed that he was the administrator of the estate of the said late Pius Masinde Sisa. He stated that the appellant had not disclosed, in his petition, in Kakamega CMCSC No. 54 of 2016, that the deceased had other children, being the late Pius Masinde Sisa, Severinas Mbayaki Sisa, Anna Sisa, Sabina Sisa, Naova Sisa and Gaudencia Namwaya. He averred that Bunyala/Budonga/282 was available for sharing equally between the appellant and his siblings, including the ones that he had not disclosed. He asserted that the family of the late Pius Masinde Sisa should have been included in the process. He argued that Andrew Nasira Sisa, a grandson of the deceased, was not qualified to inherit the estate of his paternal uncle, the late Vincent Nyongesa, who had died without family, and whose estate should, eventually, be shared out equally amongst his siblings, who include the father of Andrew Nasira Sisa, one Francis Murunga.

3. The trial record reflects that the appellant was served, and there is an affidavit of service on record, sworn by a process server, on 12th September 2017, and filed in that cause on even date. It would appear from the trial record that the appellant did not respond to the application.

4. The parties argued the application orally, on 18th November 2017. The respondent was the first to present his case. He argued that the deceased, in the cause, was his grandfather, and the appellant had presented the petition for representation without consulting family members, and in the end he left out some family members, such as himself and the daughters of the deceased, from the process. He also stated that the appellant had included a grandson, in the petition, as a survivor of the deceased, which was improper. He stated that two of the daughters of the deceased were not married, and should have been given a share in Bunyala/Budonga/282. He stated that Bunyala/Budonga/277 was not ancestral land, since it had been bought by his father, the late Pius Masinde.

5. On his part, the appellant informed the court that the deceased had three wives with several children. He explained that he was a son from the third house, and that all the children from the first house had all died. He stated that the father of the respondent, that is to say the late Pius Masinde Sisa, and another, Siprino Ceasor, had been given land in 1969, being parcels numbers Bunyala/Budonga/277 and Bunyala/Budonga/270, respectively, while the deceased retained Bunyala/Budonga/282. He stated that the second and third houses were

given Bunyala/Budonga/282 in 1995, and that he had filed the succession cause before the trial court for the purpose of sharing out the said land amongst members of the second and third houses, who he said were the late Vincent Nyongesa, the appellant himself, Fredrick Munyolo Ceasor, Ben Nasira Ceasor and Charles Mukenya. He asserted that the deceased did not give out any land to his daughters. He stated that the respondent's share was in Bunyala/Budonga/277, while Vincent Nyongesa's share was in Bunyala/Budonga/282. He submitted that the respondent was a grandson of the deceased, and was not entitled to a share in Bunyala/Budonga/282. He stated that Antony Murunga was to take the place of the late Vincent Murunga, who had been given a share of Bunyala/Budonga/282.

6. After reviewing the law and the facts presented, the trial court concluded that the grant had not been obtained fraudulently, but on the basis of a mistake, with regard to inclusion of certain beneficiaries. The revocation application was allowed to permit the respondent join the administration. The grant on record was revoked, and it was directed that a fresh grant issue to the appellant and the respondent.

7. The appellant was aggrieved by the said ruling, of 1st February 2019, hence the instant appeal, vide the memorandum of appeal, undated, but filed herein on 27th February 2019. He raised several grounds: that the trial court had erred in appointing the respondent as administrator when he did not have priority in law; the revocation application was allowed yet the grounds for revocation of grant stated in section 76 of the Law of Succession Act, Cap 160, Laws of Kenya, had not been proved; that the trial court considered matters relating to distribution while the only issue before the court was about administration; that the trial court failed to consider that the respondent was not a son of the deceased, but a grandson, whose own father had been given his own share during the lifetime of the deceased; that the trial court failed to consider that the deceased had already provided for his wives, and the available land was the second and third houses; that the trial court failed to consider that the land on the ground had been shared out and settled on, and there was no remaining space to be distributed to the respondent; and that the trial court had failed to consider the letter from the Chief, which had set out the lawful heirs of the estate available for distribution.

8. Directions were given on 25th November 2019, that the appeal would be canvassed by way of written submissions. Both sides have filed written submissions. The appellant's written submissions are dated 28th September 2020, and were filed on 26th September 2020; while the respondent's written submissions are dated 16th July 2020, and were filed herein on 18th July 2020.

9. In his written submissions, the appellant cites section 66 of the Law of Succession Act, to argue that as a son of the deceased he had priority over the respondent in terms of entitlement to administration of the estate. He next cited section 76 of the Law of Succession Act, to argue that the application was urged orally yet it raised grave issues that required proof through oral evidence. He submitted that the respondent had failed to prove, on a balance of probabilities, that the grant was obtained through fraud or secretly. He submitted that the court had erred in making the respondent a co-administrator, as that defeated the interests of the sons and grandsons of the deceased. He further submitted that the trial court erred when it awarded to the respondent the right to inherit the land in question. On his part, the respondent submitted that the appellant had admitted that the deceased had daughters, yet the said daughters had not been disclosed to the court when he sought representation. He cited the decisions in *Ibrahim vs. Hassan & Charles Kimenyi Macharia, Interested Party* [2019] and *In the Case of the Estate of Tabitha Waithera Kamau* {DCD).

10. Let me start by stating that the grant, in Kakamega CMCSC No. 54 of 2016, is yet to be confirmed, and, therefore, the estate has not been distributed. I raise this issue because the matter of the sharing of the assets came up in that matter, and it has also been alluded to in the proceedings that are now before me. The dispute that was before the trial court, and which has now been escalated to me, was on administration of the estate, that representation to the estate was sought in a manner that was not inclusive, and that it resulted in some of the heirs being left out. The question that I have to determine is whether the grant made to the appellant had been obtained properly, and was the trial court justified in revoking it.

11. The application before the trial court was premised on section 76 of the Law of Succession Act, which provides as follows:

> "76. Revocation or annulment of grant
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> 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;
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> (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;
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> (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;
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> (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."

12. Under section 76, a grant of representation may be revoked on three general grounds. The first general ground is where there were issues with the manner in which the grant was obtained. It must be demonstrated that the process was defective or deficient in some way. It must also be demonstrated that the process was fraudulent in that there was either misrepresentation of facts or concealment of important facts from the court. The second general ground is, where the grant is obtained properly, but there are deficiencies in the manner the grant-holder goes about the administration of the estate. It would mean maladministration generally, such as where the grant-holder fails to apply for confirmation of their grant within the period allowed in law or fails to proceed diligently with administration of the estate or fails to render accounts as and when required to. The third general ground is where the grant has become useless or inoperative due to subsequent events, such as the death or bankruptcy of a sole administrator.

13. In the application that was before the trial court, the principal ground for seeking revocation was that the appellant had obtained the grant through a fraudulent process, by concealment of matter from the court, in that not all the survivors of the deceased were disclosed to the court. The respondent is not a child of the deceased. His connection with the deceased is that he is a grandson of the deceased, by virtue of being a son of one of the late sons of the deceased.

14. The deceased herein died on 19th December 1997, after the Law of Succession Act, had come into force on 1st July 1981. According to section 2(1) of the Law of Succession Act, the dispositive provisions of the statute apply to the estate of a person who died after the Act came into force on 1st July 1981. That would mean that it should govern distribution of the estate of the deceased herein. The deceased died intestate. Where an intestacy occurs, section 51(2)(g) of the Law of Succession Act applies.

15. Section 51 sets out the process for applying for simple administration, regardless of whether the deceased died before or after 1st July 1981. The provision states:

"51. Application for grant

(1) Every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.

(2) Every application shall include information as to—

(a) the full names of the deceased;

(b) the date and place of his death;

(c) his last known place of residence;

(d) the relationship (if any) of the applicant to the deceased;

(e) whether or not the deceased left a valid will;

(f) the present addresses of any executors appointed by any such valid will;

(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) a full inventory of all the assets and liabilities of the deceased; and

(i) such other matters as may be prescribed."

16. The language of section 51(2)(g) of the Law of Succession Act is clear that the persons to be disclosed in the application for representation are the immediate survivors of the deceased, that is to say surviving spouses, children, parents, siblings and children of any siblings who are dead. The provision is in mandatory terms; these individuals must be disclosed. It should not be a question of the persons who are entitled to a share in the estate being disclosed, but of disclosure of the persons who survived the deceased. The question as to who should get a share in the estate comes up at a later stage, at confirmation, and that should be the stage at which the administrator should inform the court about the persons who are entitled to a share in the estate, and explain why they should get a share, and why other individuals should not get a share.

17. The evidence that came out before the trial court was that the deceased was related to respondent, he was a grandfather of the respondent, since the respondent was a grandson of the deceased, by dint of being a son of a late son of the deceased. Going by the provisions of section 51(2) (g) of the Law of Succession Act, members of the family of the late Pius Masinde Sisa ought to have been listed in the petition as they form part of the family of the deceased that ought to be disclosed under section 51(2)(g). The grandchildren of the deceased, by his son, Pius Masinde Sisa, ought to be disclosed in place of their late father, otherwise, were he alive, the late Pius Masinde Sisa would be the proper person to disclose instead of his children.

18. My understanding of section 51(2)(g) is that the petitioner is required to disclose all the surviving spouses and children of the deceased. In this case, it merged that the deceased died a polygamist, having married three times. The appellant herein was obliged to disclose all the survivors of the deceased from all three houses, and not just from the three that he thought were entitled to a share in the estate. He created an

impression, to the court, that the persons disclosed were the only survivors of the deceased, or, to put it differently, the only members of the family of the deceased still alive. It emerged that the deceased had daughters, even from the two houses that he claims were entitled to a share in the estate, yet he did not disclose them, although the said daughters were children of the deceased. Whether the daughters were entitled to take a share in the estate is a matter for consideration at the confirmation of the grant. At the point of seeking representation or administration to the estate the law requires that they be disclosed. They were not disclosed, and, therefore, the court was misled, whether fraudulently or innocently. Therefore, there was no compliance with section 51(2)(g).

19. The non-compliance with section 51(2)(g) of the Law of Succession Act is an indication that there were procedural defects in the manner the grant was obtained. There was fraud and misrepresentation to the extent that the administrator only disclosed a section of the survivors of the deceased. He sought to mislead the court into believing that the deceased did not have those other family members who were not disclosed, and that he, and the persons disclosed, were the only persons available to succeed the deceased. There was concealment of important matter from the court, to the extent of that non-disclosure or concealment of the other survivors of the deceased. That meant that a large number of survivors was locked out of the succession process. It matters not whether the nondisclosure or concealment was fraudulent or innocent or as a result of a genuine mistake.

20. With regard to who qualifies for appointment as administrator, Section 66 of the Law of Succession Act, is relevant. Section 66 says:

> "66. Preference to be given to certain persons to administer where deceased died intestate
>
> 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."

21. Rule 7(7) of the Probate and Administration Rules operationalizes section 66 of the Act. Under Rule 7(7), consents or approvals are required with respect to applications for representation, or appointment as administrators, by persons who have a lesser entitlement to a grant of representation. Rule 7(7) states as follows:

> "Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that very person having a prior preference to a grant by virtue of that section has –
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> a. renounced his right generally to apply for a grant; or
>
> b. consented in writing to the making of the grant to the applicant; or
>
> c. been issued with a citation calling upon him either to renounce such right or to apply for a grant."

22. Section 66 of the Act should also be read together with Rule 26 of the Probate and Administration Rules. The said Rule requires that where the person petitioning for representation has a lesser or equal right or entitlement to administration, he should either get the persons with superior or equal right or entitlement to renounce their right or to consent to him applying or cause citations to issue to them to apply for representation. These provisions are in mandatory terms. Rules 26 of the Probate and Administration Rules says as follows:

> "26(1). Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.
>
> (2). An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equally or priority, be supported by an affidavit of the applicant and such other evidence as the court may require."

23. From the material that was before the trial court, I can see that the appellant was a son of the deceased. The deceased had been survived by children and grandchildren from several houses. Some of the sons of the deceased had died, hence the children of those children, who are the grandchildren of the deceased, came into the picture, as representatives of their dead parents. All these categories of survivors had equal entitlement or claim to administration with the appellant. That required him to comply with Rule 26 of the Probate and Administration Rules, by doing those things that the said Rule requires. He did not do any of the things envisaged in that provision. The provision is in mandatory terms. Failure to comply with it could be fatal. The appellant argued that the persons he did not disclose were not entitled to a share in the

estate, for reasons that he gave. However, that still did not override the provisions of section 66 of the Law of Succession Act and Rule 26 of the Probate and Administration Rules. The respondent, members of the first house of the deceased and the daughters of the deceased (whether married or single) still had equal right or entitlement to administration of the estate of the deceased with the appellant. His right or entitlement to administration was not, by all means, superior to theirs. He should have consulted them. He should have obtained their consents. He should have caused citations to issue for service upon them. The failure or omission to do so exposed his grant to revocation

24. Section 66 of the Law of Succession Act should be read together with section 51(2)(g), the persons with priority to administration would also be immediate family members as listed in section 51(2)(g), in that order. The persons entitled to administer the estate of the deceased person herein should be members of the family of the deceased, as per the priority list in section 66 of the Law of Succession Act, or as the family itself may choose. It would appear that there was no surviving spouse, and the deceased was survived by children and grandchildren. According to section 66, the appellant, being a son, had priority of entitlement to administration over the respondent, a grandson. However, the father of the respondent, who was a son of the deceased, was dead, and, therefore, according to sections 41 and 51(2)(g) of the Law of Succession Act, the respondent, by fact of the decease of his father, was standing at the same level with the appellant, and he had equal entitlement to administration with the appellant.

25. I have recited section 51 of the Law of Succession Act, here above, at paragraph 15, but I have not yet recited section 41, the same says:

> "Property devolving upon child to be held in trust
>
> Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate."

26. Section 39(1)(c) of the Law of Succession Act, brings out the same spirit. Section 39 provides as follows:

> "Where intestate has left no surviving spouse or children
>
> (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—
>
> (a) father; or if dead
>
> (b) mother; or if dead
>
> (c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none
>
> (d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
>
> (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.
>
> (2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund. 40. Where intestate was polygamous."

27. From the material that was before the trial court, as I discerned it from the trial record, I hereby dispose of the grounds of appeal as follows. I have dealt with Ground 1 of the memorandum of appeal herein, in paragraphs 19, 20, 21, 22 and 23 of this judgment. Since the father of the respondent was a son of the deceased, and was himself deceased, the respondent was at equal footing with the appellant with respect to entitlement to administration. The deceased had also died a polygamist, and the other houses deserved representation in the administration of his estate. I have addressed Ground 2 of the appeal in paragraphs 11, 12, 13, 14, 15, 16, 17 and 18 of this judgment, and found that the grant was obtained on the basis of concealment of material information or nondisclosure, whether the same was fraudulent or innocent or occurred by mistake, is irrelevant. The requirements for revocation of the grant were met. I have dealt with Ground 3 of the memorandum of appeal in paragraph 10 of this judgment. The trial court did not base its decision on distribution, and, therefore, the discussion, by the trial court, on distribution, had little bearing on the outcome the said court ultimately came to with respect to administration. The issues raised at Grounds 4, 5 and 6 of the appeal should come up at the confirmation of the grant. The matter the trial court was considering was not on distribution of the estate, but on the right to administration, whether the respondent had already gotten his share of the estate is neither here nor there, and so is the issue as to whether the deceased had shared out his property amongst his three wives prior to his death. Regarding Ground 7, the trial court heard the parties, and material was disclosed which was sufficient for it to make the informed decision that it made.

28. Overall, I have not found any material upon which I can disturb the decision of the Chief Magistrate, of 1st February 2019, made in Kakamega CMCSC No. 54 of 2016. The said decision is hereby upheld. The appeal is, accordingly, dismissed. There shall be no order as to costs. Let the cause file in Kakamega CMCSC No. 54 of 2016 be returned to the Chief Magistrate's court for finalisation, and the appeal cause file herein be closed. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 30th DAY OF October, 2020

W. MUSYOKA

JUDGE