



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

SUCCESSION CAUSE NO. 28 OF 2006

IN THE MATTER OF THE ESTATE OF HARRISON MRAMBA THOYA (DECEASED)

THE PUBLIC TRUSTEE

(Administrator of the Estate of Harrison Mramba Thoya)

THE HON. ATTORNEY GENERAL.....APPLICANTS

AND

RAYMOND MITSANZE BAYA

RUWEDA HUSSEIN SWALEH.....RESPONDENTS

Coram: Hon. Justice R. Nyakundi

Hon. Attorney General for the applicants

Muranje advocate for the 1st respondent

Katsoleh advocate for the 2nd respondent

JUDGMENT

Raymond Mitsanze Baya, Zawadi Kahindi Jali, Hannington Baya Thoya and Tune Ndaa Mzungu, hereinafter referred as the applicants filed this summons for revocation or annulment of grant duly issued to the Public Trustee as the administrator General to the Estate of the deceased **Harrison Mramba Thoya** issued on 11.12.2018 vide **Succession Cause No. 28 of 2006**. That a declaration be made for revocation or annulment of the grant on the grounds of it being obtained fraudulently by the making of a false statement to the Court in support of the grant of letters of administration.

In support of the revocation is an affidavit sworn by **Raymond Mitsanze Baya, Hannington Baya Thoya, Zawadi Kahindi Jali** dated 11.11.2019 in which each of them asset principally as follows:

- 1. That, evidently, the Public Trustee in applying for the grant herein was misled and was seized of incorrect information as to the rightful dependents of the deceased.***
- 2. That the Court acting on such false misrepresentation and non-disclosure of material facts proceeded to confirm the grant leaving out some of the real dependant of the deceased entitled by Law to inherit a share of the Estate.***
- 3. That it is significant for the Court to take notice that Zawadi Kahindi Ali, was at the time of the deceased death one of the spouses who also had sired children with the deceased.***
- 4. That besides the aforesaid spouse being disinherited it applied in equal measure to the children as evidenced in the affidavit and annexures.***
- 5. That at the inception of the petition for grant of letters of administration the public trustee concealed such material facts on survivorship and dependency, necessitating this application for revocation.***

The respondent **Raymond Baya** did file a replying affidavit and deposes as follows:

1. *That in the petition for grant of letters of administration some of the children in the said estate were wrongfully left out as part of the beneficiaries.*
2. *That its true as averred in the affidavit of Zawadi Kahindi with regard to her being inherited by Harrison Mramba Thoya, the deceased in this cause that as part of the family provision plot No. 546 was at material times sold to offset debts and also be used for education and maintenance of the children in the deceased estate.*
3. *That after payment of expenses the balance of the purchase price was shared equally amongst the deceased's three (3) wives – to wit Kadzo Harrison Mramba, Sidi Charo Kazungu and Zawadi Kahindi Jali.*
4. *That there is also a large parcel of land (unregistered) measuring 15 acres or thereabouts Makumba village, Bura sub-location Dagamra Location which had been bought by the deceased person herein before he died, in the same neighbourhood as our ancestral land which land has wrongfully been omitted from the estate of the deceased herein yet the same should properly be part thereof and be subject to the distribution to all deceased person's dependants/heirs.*
5. *That failure to disclose to the public trustee/ and or the Court, the aforesaid material particulars regarding the parcels of land forming part of the estate of the deceased was fraudulent.*

Besides the above summons for revocation, on 24.9.2019 the Public Trustee vide summons expressed under Section 45 of the Law of Succession, Rule 49 and 73 of the Probate and Administration Rules seeking conservatory and or prohibitory order to preserve Plot No. 546 – Maweni situated in Malindi to bar and restrain the 2nd respondent **Ruweda Hussein Swaleh** or anyone claiming under her, from dealing with the aforesaid parcel of land in a manner that defeats the administration of the estate of the deceased **Harrison Mramba Thoya**.

I have carefully considered both applications and the affidavit evidence, submissions adduced by the respective applicants. In my view, two issues stand out: First, whether the confirmed grant of letters of administration issued to the Public Trustee should be revoked. Secondly, whether the Public Trustee deserves grant of a prohibition and injunctive orders in respect of parcel No. 546 Maweni – in Malindi.

Determination

The Law under Section 76 of the Succession Act Cap 160 of the Laws of Kenya, a grant of letters of administration may be revoked or annulled if the Court establishes either by an application or *suo moto* on any of the following grounds:

- (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 untrue allegations of a fact essential in point of Law to justify the grant notwithstanding. That the allegations were 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 to proceed diligently with the administration of the estate or to produce to the Court, within the time prescribed, any such inventory or account of administration as required by the provisions of paragraph (e) and (g) of Section 83 or has produced any such inventory or account which is false in any material particular.*

In the case of the matter of the Estate of **James Kiarie Muiruri (Deceased)** Succession Cause No. 2413 of 2003, it was held:

“a grant is liable to be revoked for irregularities and especially where a grant is made without first obtaining the consents of other beneficiaries entitled to benefit from the inheritance of the deceased Estate.” (See also in the mater of the Estate of **Mutambu Ndeke (Deceased)** Succession Number 2688 of 2002). In the matter of the Estate of **Isaac Korero Njuguna deceased** Succession Cause Number 1064 of 1994.

In evaluation of the affidavits filed in support of summons for revocation the following characteristics of the process leading to grant of and confirmation of letters of administration issued to the Public Trustee emerges.

First, the applicants have demonstrated that the Public Trustee in petitioning for grant of letters of administration omitted to disclose material information on survivorship and dependants of the deceased.

Secondly, as pointed out by the applicants, the dependency of **Zawadi Kahindi Jali, Raymond Mitsanze Baya, Mzungu Dawa Baya Thoya, Kadii Baya Thoya, Kaneno Baya Thoya, Kabura Baya Thoya, Hannington Baya Thoya** from the record and proceedings held prior to the confirmation of the impugned grant of letters of administration by the Public Trustee on 3.11.2006, subsequent gazzetement on 18.3.2010, the grant of the initial letters of administration on 23.3.2010 and final confirmed certification of confirmation on 11.12.2018, there was no consent of all the other beneficiaries. Thirdly, The applicants seeking revocation have laid bare their claim of non-inclusion and misrepresentation by the Public Trustee on the rightful beneficiaries and mode of distribution of the deceased Estate.

The fact of the matter is that on the material facts disclosed by the applicants, there is no corresponding answer by the Public Trustee denying, nevertheless that they are not qualified to inherit the Estate of the deceased. I think, with respect to dependency Section 29 of the Law of Succession act is intended to protect all such heirs prescribed in the making of a grant of representation unless there are compelling

reasons for exclusion to disinherit any of the dependants.

I consider, therefore the process referred to in the matter of the grant of letters of administration was flawed and defective on the basis of omitting eligible dependants who did not consent to the issue of the grant to the Public Trustee.

Further, the applicants' contention that large parcel of land measuring 15 acres or thereabouts Makumba village, Bura Sub-location which had been in possession of the deceased before his demise was not part of the Public Trustee inventory for it to be distributed amongst the beneficiaries.

I am persuaded that any movable and or immovable property of the deceased is subject for distribution under the scheme provided for in the Law of Succession. It bears emphasis that the proper procedure as provided for in Section 35, 36, 38 and 40 of the Law of Succession Act Cap 160 of the Laws of Kenya ought to take effect. Therefore, leaving out inventory of some properties and other necessary beneficiaries as defined in Section 3 and 29 of the Act renders the proceedings to obtain the grant of letters of administration defective in substance.

Having said so, the applicants besides the applicable provisions under Section 76 of the Act, they have on their side Rules 26 and 40 (8) of the Probate and Administration Rules which are quite clear and couched in the following language.

“That letters of administration shall not be granted to any applicant without notice to every person entitled in the same degree as or in priority to the petitioners. There is nothing to show that the consents of the applicants in writing were obtained by the Public Trustee.”

The upshot therefore is that, the summons for revocation of the confirmed grant issued on 11.12.2018 be and is hereby allowed on grounds that the grant was obtained fraudulently by making of a false statement and or concealment from the Court of facts material to the making of the grant. The beneficiaries to the Estate of the deceased **Harrison Mramba Thoya** in pursuit of the legal protocols under the Law of Succession do petition for letters of administration.

In the alternative, the Public Trustee in this regard do proceed to petition for fresh grant of letters of administration based on the correct inventory and the observance of Section 29 of the Law of Succession Act on dependency and survivorship.

On the balance of things, this Court directs that a conservatory or prohibition order do issue in respect over the property identified as to be owned by the deceased as premised under Section 3 of the Act pending the hearing and determination of the confirmation hearings on the mode of distribution of the estate in question. The applicants shall bear the costs of the summons.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF DECEMBER 2020

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R. NYAKUNDI

JUDGE

NB: This Judgment has been dispatched electronically to the respective emails of the advocates in the matter.