



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

SUCC NO. NO. 446 OF 2017

IN THE MATTER OF THE ESTATE OF MALAI ALIAS LILI (DECEASED)

MARTIN KYENGO.....APPLICANT

-VERSUS-

JAMES KIENDI MALAI.....1ST RESPONDENT

JOHN MWANIA MALAI.....2ND RESPONDENT

JUDGEMENT

INTRODUCTION

1. The Application for determination is dated 01/03/2018 and is brought under sections 47 and 76 of the Law of Succession Act. It seeks the following orders;

- a) That this honorable Court be pleased to set aside the orders issued on 19/12/2017.
- b) That this honorable Court be pleased to revoke the grant issued on 08/11/2013 to James Kiendi Malai and John Mwanja Malai.
- c) That costs do abide the outcome of the Application.

2. The Application is premised on the grounds on the face thereof and a Supporting Affidavit sworn by the Applicant on 01/03/2018.

3. The Application is opposed through the Replying Affidavit of the 1st Respondent sworn on 08/05/2018.

4. Directions were given that the Application be canvassed by way of Written Submissions. Only the Applicant complied.

THE SUBMISSIONS

5. The Applicant submits that the proceedings leading to the issuance of the grant were defective in substance and the grant issued is useless and inoperative.

6. Further, he submits that none of the properties listed is registered in the name of the deceased and that from the replying affidavit; the Respondents admit that the deceased had four wives. The Applicant however contends that only two wives were involved.

7. The Applicant also submits that from the Replying Affidavit, there is an admission that none of the listed properties is registered in the deceased's name. That the Respondents' allegation of fraud was neither particularized nor proved.

8. He also submits that the Respondents failed to disclose the existence of other civil cases where the disputed properties were determined and from which there were no appeals. Accordingly, he contends that there was concealment of material facts with regard to the estate under distribution and as such, the grant should be revoked and subsequent orders vacated.

9. The Replying Affidavit is quite brief and in the absence of submissions from the Respondents, I think it is imperative to reproduce some of the paragraphs.

10. The Respondents depose that the deceased had four wives and had ordered that all his estate be registered in the names of all wives,
11. "That any property such as plot No. 676 and 3896 if not registered in the name of the deceased, then it is fraud and forgery and whoever be registered as owner is holding the same in trust for the four families.
12. That plot No. 676 registered in the name of Kanukwa Kyengo, who was a daughter-in-law of the deceased was a mistake that we have just realized. When the late Malai died, he had a pending case over the same land. His son Kyengo took over the case but also died before it was over. Kyengo's wife took over the case and when it was over, she cunningly and secretly registered herself."
13. Further, the Respondents deny that there was misrepresentation and non-disclosure and contends that all the beneficiaries were informed and listed.
14. Having looked at the application, the Replying Affidavit, the Applicant's submissions as well as the entire record, it is my considered view that the only issue for determination is whether the confirmed grant should be revoked.

WHETHER THE GRANT SHOULD BE REVOKED

15. Section 76 of the Law of Succession Act provides 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 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 grant within one year from the date thereof or such longer period as the Court may 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 an inoperative through subsequent circumstances."

16. It is trite that only the free property of a deceased person is available for distribution to his rightful heirs.

17. The certificate of confirmation indicates that the listed properties were to be distributed equally among six beneficiaries i.e. James Kiendi Malai, Kamuya Malai, David .K. Malai, King'oo Malai, John Malai and Martin Kyengo. The properties are Kisekini 412, Nthaani 676 and Mboani 3850.

18. With regard to Kisekini 412, the annexure marked MK-3 is a letter dated 06/02/2017 indicating that it is owned by four people i.e. Kanukwa Kyengo Malai, James Kiendi Lili, David Malai Lili and Mwina Malai. Clearly, the ownership does not reflect the confirmed grant.

19. In light of the fact that the succession cause was filed in the year 2012, it is my considered view that even at the time of filing, the ownership of Kisekini 412 was as indicated in MK-3. This leads to the irresistible conclusion that it was not part of the deceased's estate.

20. With regard to Nthaani 676, there was no evidence tabled before the Court to show who the registered owner is. However, the Respondents deposed that the same is registered in the name of Kanukwa Kyengo but went ahead to contend that the said registration was a mistake which they had just realized.

21. In my view, the important thing is that there is consensus among the parties that Nthaani 676 was not registered in the deceased's name. Accordingly, the said property could not be listed as an asset of the deceased in his succession cause.

22. With regard to Mboani 3850 which I believe has been erroneously referred to as 3896 in the Replying Affidavit, the Respondents do not even seem to be sure as to whom the registered owner is and there is no material before Court to clarify the position.

23. In my view, demonstrating that none of the listed properties was owned by the deceased when the succession cause was filed is enough

reason to revoke the grant. The Applicant has successfully demonstrated as much with regard to Kisekini 412 but there is doubt with regard to Mboani 3850.

24. As to whether all the beneficiaries were involved, the consent (Form 38) shows that all the four wives were listed but were deceased. The Applicant contended that two of the wives were left out.

25. In my view, he was duty bound to demonstrate that the two wives were alive at the time the succession cause was commenced. This duty was not discharged and as such, his complaint has no basis.

CONCLUSION

26. The assets set out in the petition as part of estate of deceased properties were parcels no Kisekini 412, Nthaani 676, and Mboani 3896(3850).

27. Applicant depones that none of the above is in deceased names thus not available for distribution. The Respondent/Petitioner concedes the fact that the same are not registered in the deceased names.

28. Thus the grants cannot stand and therefore the court makes the following orders:-

i. Application dated 01/03/2018 is granted in terms of prayers 1 and 2.

ii. No orders as to costs.

SIGNED, DATED AND DELIVERED THIS 24TH DAY OF JANUARY, 2019 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE