

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

SUCCESSION CASE NO 13 OF 2016

IN THE ESTATE OF TIRIMA OLE KUYA (DECEASED)

NKOBULA OLE KUYA.....PETITIONER

VERSUS

FRANCIS MASIKONDE.....RESPONDENT/PROTESTOR

RULING

1. The petitioner through his counsel, Mr. Agina has raised a preliminary objection on points of law in respect of the summons for revocation dated 4th April 2014 of the grant in favour of the petitioner. He prays that the summons be struck out on the following major grounds. First, the protestor lacks *locus standi* to apply for the revocation of the grant. Second, the allegation that the petitioner is a person of unsound mind is not supported by verifiable medical evidence from a psychiatrist or a neurosurgeon. Third, the grant of a power of attorney to the protestor by the father of the petitioner is inconsequential and its validity is doubtful. Fourth, the *ex parte* order made in the High Court at Nakuru in the Probate and Administration Cause No 140 of 2009 was obtained fraudulently and without the protestor giving the true facts to the court and is in any event spent.

2. In addition to the foregoing, counsel for the petitioner filed written submissions in support of the preliminary objection.

3. Counsel for the protestor, Ms Mogere did not file any response to the preliminary objection raised by the petitioner, despite having been given ample opportunity to do so. Mr Agina in his submissions framed the following three issues for determination. First, whether the protestor has the *locus standi* to move the court. Second, whether the power of attorney issued to the protestor is valid. Third, whether the petitioner is a person of unsound mind. I will consider each of these three issues as follows.

4. The answer to the first issue in respect of whether the protestor has the *locus standi* lies in the provisions of section 66 of the Law of Succession Act (Cap 160) Laws of Kenya. The provisions of this section set out the persons who are entitled to apply for the grant of letters of administration. These are in order of preference; the surviving spouse or spouses, the beneficiaries, the Public Trustee and creditors. However, there is a proviso that where there is partial intestacy, letters of administration in respect of the intestate shall be granted to any executor or executors who prove the will. Mr Agina cited *Alfred Njau and Others v City Council of Nairobi [1982-88] 1 KAR 229*, in which the court stated that if a person has no *locus standi* he cannot be heard, even on whether or not he has a case worth listening to. Again Mr. Agina cited *Rajeshi Pranjivan Chudasama v. Sailesh Pranjivan Chudasama [2014] Eklr*, in which the court stated that *locus standi* in succession matters is well settled that a litigant is clothed with *locus standi* upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. Finally, counsel cited section 38 of the Law of Succession, which provides that: “*where an intestate has left a surviving child or children and but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.*”

5. In view of the foregoing provisions of the law, counsel has submitted that the petitioner being the only son of the deceased is entitled to administer his father’s estate and not the protestor, who is a nephew to the deceased. Furthermore, counsel submitted that the grant of letters of administration ad litem to the protestor was in respect of Narok SRMCC No. 172 of 2018 and does not apply to the entire estate. He therefore lacks the *locus standi* to apply for the revocation of the grant.

6. The second issue is whether the power of attorney issued to the protestor is valid. In this regard counsel submits that if the power of attorney granted was genuine, it expired when the deceased died on 23rd February 2009. Counsel therefore submits that the power of attorney is therefore null and void.

7. Finally, the issue as to whether the petitioner is of unsound is a matter that should have been determined under the provisions of section 2 of the Mental Health Act [Cap 248] Laws of Kenya, which defines a person suffering from a mental disorder as a person who has been found to be so suffering. Counsel submits that the medical report submitted was too old to be relied upon. Counsel cited *J L L and Another v. Walnut Enterprises Ltd, High Court at Nyeri, Petition No. 15 of 2014*, in which that court appointed the petitioners as guardians of VML and managers of the affairs of the estate of a person who that court found was suffering from a mental disorder.

8. On the authority of *Rajeshi Prinjivan Chudasama v Sailesh Prinjivan Chudasama, supra*, I find that the protestor has no *locus standi* to apply for the revocation of the grant of letters of administration issued to the petitioner by the High Court in succession cause No. 24 of 2014, between Nkobulu Ole Kuya (applicant) v. S.P. Masikonde (respondent). I further find that the power of attorney donated to him expired when the deceased died. Finally, I find that no court has made a determination that the petitioner is a person of unsound mind in regard to which there ought to have been an application made to the court under the Mental Health Act seeking such a declaration. Once a court has made a declaration that the mentally challenged person is of unsound mind, guardians and managers of his affairs will be appointed to manage his person and affairs. This is absolutely necessary in the interests of orderliness in the administration of estates of intestates.

9. The upshot of the foregoing is that I hereby uphold the preliminary objection with the result that the application for summons for the

revocation of the grant is hereby dismissed with no order as to costs.

Ruling dated and signed at Narok this 24th day of January 2019 in the presence of Mr. Kajo holding brief for Mr. Agina for the petitioner and in the absence of Ms Mogere for the protestor.

J. M. BWONWONGA

JUDGE

24/1/2019