



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D.S. MAJANJA J.

SUCCESSION CAUSE NO. 98 OF 2011

IN THE MATTER OF THE ESTATE OF OMBUNA MATONGO (DECEASED)

BETWEEN

FLORENCE KERUBO

ONG'ONG'A MAKUNDA.....APPLICANT

AND

SAMMY OMBUNA JOEL.....PETITIONER/RESPONDENT

RULING

1. This cause concerns the estate of Ombuna Matongo (“the deceased”) who died on 9th February 2005. The petition for letters of administration intestate was filed by his son, Sammy Ombuna Joel (“Sammy”). The deceased’s only asset was Land Parcel NYARIBARI CHACHE/KEUMBI /112 (“Plot 112”). The grant of letters of administration intestate was issued to Sammy on 9th November 2011 and was confirmed on 15th June 2012. The three named survivors; Sammy, the deceased’s wife, Loice Nyansiaboka Ombuna and son, Robinson Motanya Ombuna inherited Plot 112 in equal shares.

2. In due course the applicant, Florence Kerubo Ong’ong’a Makunda (“Florence”), filed a summons for revocation grant dated 18th November 2014 seeking to revoke the grant issued to Sammy on the ground that the grant was obtained fraudulently by concealing material facts. The thrust of the application was that Sammy failed to disclose the fact that the deceased had other beneficiaries whom he did not disclose when he filed the petition. In her supporting deposition, Florence stated that the deceased was survived by the following;

Loice Nyansiaboka Ombuna – Widow

Florence Kerubo Ong’ong’a Makunda – Daughter

Robinson Motanya Ombuna – Daughter

Sammy Ombuna Joel – Son

Bathsheba Kemunto Machogu – Daughter

Jane Moraa Ombuna – Daughter

Yusariah Nyanduko Ombuna – Daughter

3. Florence further deponed that the deceased’s daughter, Esther Masese Ombuna, who had died before the deceased had left three sons; Alfred Onyancga Ombuna, Geoffrey Nyaome Ombuna and Alex Nyaega Ombuna, who were not disclosed in the petition. He case was that all beneficiaries are entitled to a share of the deceased’s property.

4. Sammy did not deny that the deceased was survived by sons and daughters named by Florence. In his deposition dated 17th June 2015, he

deponed that while Esther died before the deceased, her children were not maintained by the deceased. He stated that Esther's children had, "disconnected, relocated and or been incorporated elsewhere on their own volition or choice." He also contended that the proceedings leading to confirmation of the grant were regular and that Florence did not raise any objection when the petition was gazetted.

5. The court directed that this cause be disposed by oral testimony. The matter was heard by Okwany J., who heard the testimony of Florence (PW 1), the deceased's sister, Paulina Mokeira Nyairo (PW 2), Bathsheba Kemunto Machoge (PW 4) and a son of Esther, Alfred Onyancha Ombuna (PW 4) and Sammy (DW 1). When I took over the matter, I also heard Sammy's testimony.

6. After reviewing the depositions and testimony of the witnesses, the only issue for determination is whether the petitioner disclosed all the survivors of the deceased when he applied for the grant of letters of administration. Under **Section 76(a)** of the **Law of Succession Act (Chapter 160 of the Laws of Kenya)** ("the LSA") the court may revoke a grant of representation, whether or not confirmed, at any time if the court decides, either on application by any interested party or of its own motion that, "(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."

7. The petitioner has a duty to disclose all material facts. In the case of intestacy, the information that must be disclosed is to be found at **section 51(2)(g)** of the LSA 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 surviving spouses children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased.

8. The aforesaid provision is reinforced by **Rule 7(1)(e)(i)** of the **Probate and Administration Rules** which reads, in part, as follows:

7(1) ... the application shall be by petition... supported by affidavit... containing so far as they may be within the knowledge of the applicant, the following particulars –

(e) in cases of total or partial intestacy –

(i) the names, addresses mental state and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving child, like particulars of such person or persons who would succeed in accordance with Section 39(2) of the Act.

9. In his testimony, Sammy admitted that he did not name his sisters as beneficiaries yet the deceased daughters; married or unmarried are by law required to be disclosed. The letter of the Chief of Nyaware sub-location dated 15th October 2010 stated that the deceased was survived by two sons; Sammy and Robinson Motanya Ombuna and the deceased wife. Likewise, in the petition (Form P & A 5), the petition only named the three survivors. I therefore find and hold that the Sammy failed to make material disclosures and on that ground I revoke the grant.

10. Since the deceased died intestate, his estate is to be distributed in accordance with **section 38** of the LSA which provides that where an intestate has left a surviving child or children, but no spouse, the net estate shall, subject to the provisions of **sections 41** and **42**, devolve upon the surviving child if there be only one or equally divided among the surviving children including the deceased daughters. Whether the deceased daughters, married or unmarried are entitled to inherit her property is beyond dispute. The equality principle was enunciated by the Court of Appeal in **Rono v Rono & Another [2008] 1 KLR (G&F) 803**. Further, **Article 27** of the Constitution does not admit any form of discrimination on the basis of sex or marital status in case of inheritance. Thus the deceased's daughters; married or unmarried would be entitled to a share of the estate.

11. The thrust of the evidence of the applicants and indeed the heart of the dispute is that the children of Esther have not been provided for and were indeed chased away by the Sammy. The law regarding the deceased's grandchildren is straightforward and is provided for under **section 42** of the LSA. Although they are not direct beneficiaries, they are entitled to take the shares of their parents. In **Christine Wangari Gachigi v Elizabeth Wanjira Evans and 11 Others NKU CA Civil Appeal No. 221 of 2007 [2014]eKLR**, the Court of Appeal stated as follows:

Although Sections 35 and 38 of the Laws of Succession Act is silent on the fate of surviving grandchildren whose parents' pre-deceased the deceased, the rule of substitution of a grandchild for his/her parent in all cases of intestate known as the principle of representation is applicable. The law on this is section 41. If a child of the intestate has pre-deceased the intestate then that child's issue alive or en ventre sa mere or that date of the intestate's death will take in equal shares per stirpes contingent on attaining the age of majority. Per stirpes means that the issue of a deceased child of the intestate takes between them the share their parents would have taken had the parent been alive at the intestate's death.

The Court went further and held that:

We affirm the learned trial Judges decision that the beneficiaries of the estate of the deceased herein comprised all the deceased's children surviving as at the time of distribution and the grandchildren of the deceased children of the deceased who had either predeceased her or died shortly after presentation of the Succession Proceedings to court.

12. I therefore find and hold that the deceased's daughters and grandchildren are entitled to benefit from the estate. Having found that the petitioner failed to make material disclosure at the time he lodged the petition, I revoke the grant issued to him. In order to enable parties' make or renounce their claims, I shall not confirm the grant. In conclusion I now make the following orders:

(a) The grant of letters of administration intestate issued to Sammy Ombuna Joel dated 9th November 2011 and confirmed on 15th June 2012 are hereby revoked.

(b) The grant of letters of administration issued to Sammy Ombuna Joel and Florence Kerubo Ong'ong'a Makunda.

(c) The administrators or any of them shall apply for confirmation of the grant within **thirty (30) days** from the date hereof.

(d) This being a family matter there will be no order as to costs.

DATED and DELIVERED at KISII this 21st day of February 2019.

D. S. MAJANJA

JUDGE

Mr Aunga instructed by Momanyi Aunga and Company Advocates for the applicant.

Mr Sagwe instructed by S. M. Sagwe and Company Advocates for the petitioner/respondent.