



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 274 of 2014

IN THE MATTER OF THE ESTATE OF LATE WILLIAM MABISHI MITSUNGURU (DECEASED)

HENRY KENGA MABISHI.....APPLICANT

VERSUS

1. FENI WILLIAM SHAKE

2. MOI PETER MABISHI

3. FREDRICK MWANGOMBERESPONDENTS

RULING

1. The Application before me dated 17.12.18 is by Henry Kenga Mabishi (the Applicant) who seeks that reasonable provision be made for him from the estate of William Mabishi Mitsunguru (the Deceased) as a dependent of the Deceased. He further prays that Plot No. 5639/I/MN at Salama Estate (the property) belonging to the estate be sold and the proceeds thereof be divided equally between him and Feni William Shake, Moi Peter Mabishi and Fredrick Mwangombe, the Respondents.

2. The background of this matter is that the Deceased died on 11.6.13. A grant of letters of administration in respect of the estate of the Deceased was initially issued to the Applicant who claimed to be a son of the Deceased. By a summons dated 26.3.15, Annah Kamene Wambua (Annah) sought the revocation of that grant on the ground that she is a widow of the Deceased and was not involved in the process of obtaining the grant. The summons was compromised by way of consent dated 13.10.15 and Annah was included as a beneficiary of the estate together with the Applicant on equal basis.

3. Thereafter the Respondents sought by way of summons, the revocation of the grant. They claimed that as the mother and brothers of the Deceased, they were excluded in the process of obtaining the grant. Their case was that the Applicant and Annah are not related to the Deceased. The Court after considering the matter found that the grounds for revocation of the grant had been established and by a ruling of 16.11.18 revoked the same. The Court then proceeded to appoint Feni William Shake and Frederick Mwangombe as the administrators of the estate of the Deceased. This in a nutshell is what has provoked the Application now before me.

4. The Applicant contends that he is a son and therefore a dependent of the Deceased. His mother Joyce Henry Mwanjule and the Deceased had a love relationship which culminated in the birth of the Applicant on 7.6.78. The Deceased recognised him as his son as did the Respondents. To support his claim, he exhibited *inter alia* his birth and baptism certificates, the deceased's funeral programme as well as photographs. The deceased married Edda Petersen, a German lady with whom he lived in Germany until her demise whereupon the Deceased returned home. The Deceased was named a beneficiary of Eddah's estate in Germany and he listed the Applicant, the Respondents and his aunt Alice Gumo as his beneficiaries. The Applicant continues to receive money from Germany every 6 months on account Edda's will as one of the Deceased's beneficiaries. Correspondence to this effect was exhibited. The Applicant lived with the Deceased on the property and continues to reside thereon to date. The Applicant states that his previous advocates abandoned him and failed to attend Court. As such, he was unable to show to the Court that he was a child of the Deceased. He urged the Court to recognise him as a son of the Deceased as he risks being disinherited. Joyce Henry Mwanjule in her affidavit sworn on 17.12.18 reiterated the averments in the Applicant's affidavit.

5. In her replying affidavit sworn on 11.2.19 on behalf of the Respondents, Feni William Shake, the 1st Respondent contends that the Application is an afterthought. The documents exhibited by the Applicant are forgeries and ought to have been brought in the previous proceedings. The Applicant had been chased away by the Deceased for theft and other misdeeds and only returned after his demise. She faults the Applicant for not involving the Respondents in his application for the initial grant. She further accuses the Applicant and Annah of embezzling and interfering with the property of the Deceased including musical instruments and household and assorted goods. He has unlawfully retained the original title to the property and logbook for motor vehicle KAH 028M. According to her the Applicant is not entitled to the estate of the Deceased. In her view, what he gets from Eddah's estate is adequate for him and she has no objection to him continuing to receive the same. She further states the delivery of the earlier ruling rendered this Court *functus officio*.

6. Parties were to file submissions but failed to comply with the directions of this Court. The Applicant's submissions and further affidavit filed out of time were not admitted. The Court has considered the Application and the rival affidavits. The following 3 issues fall for determination:

- i) Whether this Court is *functus officio*
- ii) Whether the Applicant is a son of the deceased
- iii) Whether the property be sold and the proceeds be divided as proposed by the Applicant

Whether this Court is *functus officio*

7. The Respondents contend that the Court, having delivered its ruling in the application for revocation of the grant issued to the Applicant, became *functus officio*. The Court did consider the Respondents' application for revocation of grant issued to the Applicant. The Court found that the Applicant had not involved the Respondents who are the mother and brothers of the Deceased. The Court did not however make a pronouncement on whether the Applicant was a son of the deceased. What the Court observed was that it was strange that the Applicant did not attend Court to testify in a matter where the issue of his paternity and entitlement to the estate of a person whom he claims to be his father is at stake. This in my view does not render the Court *functus officio*. In any event the grant issued to the 1st and 3rd Respondents has not been confirmed. As such final judgment in this matter is yet to be rendered. I am duly guided by the Court of Appeal in Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR. The Court stated:

Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of CHANDLER vs ALBERTA ASSOCIATION OF ARCHITECTS [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);

“The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal In re St. Nazaire Co., (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered...”

8. It must be noted that a person who considers himself as a dependant as defined by Section 29 of the Law of Succession Act may apply for reasonable provision from the estate of a deceased person. Section 26 of the Act has conferred upon this Court the jurisdiction and discretion to consider an application by a dependant for reasonable provision. The jurisdiction is however not absolute. According to the provisions of Section 30 of the Act, this Court will be devoid of jurisdiction if such application is made after confirmation of the grant of representation. As stated before, the grant herein is yet to be confirmed. My finding therefore is that there is room for the Applicant to seek reasonable provision from the deceased's estate. The ruling of 16.11.18 did not render this Court *functus officio*.

Whether the Applicant is a son of the deceased

9. I have considered the documents exhibited by the Applicant. His birth and baptism certificates contain the name of the Deceased as the father of the Applicant. It is instructive to note that the birth certificate was issued on 14.6.94 while the baptism certificate was issued on 5.11.89 both during the lifetime of the Deceased. The funeral programme also states that the deceased was blessed with one son, Henry Mabishi. Additionally, I have considered the correspondence from the lawyers in Germany, Peter Beck and Uwe Grimm. There is a letter dated 22.5.15 from Peter Beck addressed to the 2nd Respondent informing him that the Deceased got a monthly fee as heritage from his wife Edda which following his demise shall be paid to his mother Feni William Shake, brothers Frederich M. Shake and Moi Mabishi, son, Henry Kenga and Aunt Alice Gumo. There is also another letter from Peter Beck dated 15.10.13 addressed to the Applicant informing him that his father, the Deceased owned bank deposits and bonds in Germany and asked for some form of certificate of inheritance confirming the heirs of the Deceased. Further there is correspondence confirming the amount paid into the Applicant's account for the various 6 months periods.

10. The Respondents claim that the documents exhibited by the Applicant are forgeries. However no evidence to support the claim was produced. They also stated that the Applicant was chased away from the property by the Deceased for misbehaviour and theft. Is this not an admission that the Deceased did live with the Applicant. If the Applicant was not his son, on what basis would the Deceased live with him in his house? Further, it is noteworthy that the Respondents state that they have no objection to the Applicant's continued receipt of payment from Germany. If the Applicant were not a son of the Deceased as the Respondents claim, why would they not object to his receiving money from the deceased's estate in Germany? This appears to me an admission that the Applicant was indeed a son of the Deceased. Who informed the lawyers in Germany that the Applicant was a son of the Deceased? Why would the funeral programme of the Deceased state that he was blessed with one son, the Applicant? The foregoing factors taken together lead me to the conclusion that the Applicant was indeed the son of the Deceased.

Whether the property be sold and the proceeds be divided as proposed by the Applicant

11. The Applicant prays that the property be sold and the proceeds thereof be distributed equally between him and the Respondents. The Court notes that the 1st and 3rd Respondents are yet to file the summons for confirmation of the grant issued to them on 16.11.18. To grant the order sought therefore will pre-empt the application for confirmation of the Grant. This prayer is therefore declined.

12. In the premises and in the in the interest of justice I make the following orders:

i) Feni William Shake and Frederick Mwangombe the administrators of the estate of William Mabishi Mitsunguru shall file a summons for confirmation of grant within 30 days from the date hereof.

ii) Feni William Shake and Frederick Mwangombe shall include the Applicant Henry Kenga Mabishi as one of the beneficiaries of the estate and make provision for him accordingly.

iii) Mention to confirm compliance on 1.7.19.

iv) This being a family matter, there shall be no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 31st day of May 2019

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondents**

..... **Court Assistant**