



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT MALINDI
SUCCESSION CAUSE CASE NO. 99 OF 2016
(FORMERLY KILIFI SRM COURT SUCCESSION CAUSE NO. 20 OF 2011)
IN THE MATTER OF THE ESTATE OF GARAMA CHARO MKARE-DECEASED

CHARLES CHENGO CHARO.....1ST APPLICANT

JACKSON CHIKO MLEWA.....2ND APPLICANT

VERSUS

TSUMA MWAMUYE KOGO.....1ST RESPONDENT

SAIDI RASI.....2ND RESPONDENT

MARY TUNJE.....3RD RESPONDENT

JUDGEMENT

1. Through the summons for revocation of grant dated 27th June, 2016 Charles Chengo Charo and Jackson Chiko Mlewa seek to revoke the grant issued in Kilifi SRM Court Succession Cause No. 20 of 2011 to the 1st Respondent, Tsuma Mwamuye Kogo on 16th February, 2012 and confirmed on 3rd December, 2012 in respect of the estate of the Garama Charo Mkare-deceased. Said Rasi and Mary Tunje are named as the 2nd Respondent and 3rd Respondent respectively.
2. The application is premised on the ground that the 1st Respondent who has no kinship with the deceased misled the court by stating that he was a grandson and or an uncle to the deceased.
3. The 1st Respondent opposed the application through a replying affidavit sworn on 21st October, 2016. He confirmed that he is indeed the administrator of the estate of the deceased and accused the applicants of failing to disclose that Kaingu Charo who is also deceased and a member of the family of the deceased herein was among the beneficiaries of the estate of the deceased.
4. The 1st Respondent also averred that the deceased sold his plot No. Kilifi/Kijipwa/300 to Michael Gachinga Kanore and Esther Wangari Kanore. The 1st Respondent averred that upon selling the parcel of land the deceased dismantled his structures and vacated the parcel of land and was indeed buried elsewhere.
5. The 1st Respondent stated that the applicants have never lived on the said land. Further, that the applicants have conveniently failed to name other family members being Jumwa Chiko Charo, Shida Chengo Charo, Kadzo Chengo Charo, Charles Chengo Charo, Kazungu Kaingu Charo, Abdalla Kaingu Charo and Raphael Kaingu Charo in their application.
6. The 1st Respondent's case is that the applicants did not raise any objection to the grant of letters of administration when the gazetteement was done.
7. The matter proceeded through *viva voce* evidence. PW1 Jackson Chiko Mlewa, PW2 Charles Chengo Charo and PW3 Jilani Mongo Madzayo testified in support of the case of the applicants/plaintiffs. The respondents/defendants did not call any witness.
8. The evidence that emerged at the conclusion of the trial is to the effect that the deceased and his wife both died childless. The deceased's brothers, apart from Kazungu Kaingu, who is said to suffer from the disease of the mind are all deceased. The deceased's sister Sidi Charo predeceased him. Nyevu Charo is the only sister surviving the deceased. The evidence also disclosed that the 1st Respondent, Saidi Rasi

(the 2nd Respondent) and Mary Tunje (the 3rd Respondent) who were named as the beneficiaries of the estate of the deceased in the petition for letters of administration had no relationship with the deceased recognizable by the law of succession. Only the late Kaingu Charo, who was named in the succession cause as one of the beneficiaries was the brother of the deceased.

9. In an affidavit (Form P&A 5) sworn in support of the petition for letters of administration, the 1st Respondent averred that he together with Kaingu Charo, Saidi Rasi and Mary Tunje were uncles to the deceased. In an affidavit (Form 9) sworn in support of the summons for confirmation of grant the deceased averred that Kaingu Charo, Saidi Rasi and Mary Tunje were children of the deceased.

10. The averments by the 1st Respondent were not true and by virtue of Section 76(b) of the Law of Succession Act, Cap. 160 the grant must be revoked as it was obtained fraudulently by the making of a false statement and by concealment of something material to the cause. The grant is also one for revocation based on Section 76(c) of the same Act as it was obtained by means of an untrue allegation essential in point of law to justify the grant and it is immaterial that the allegation was made in ignorance or inadvertently.

11. In an application for grant of letters of administration in respect of the estate of a person who dies intestate, without leaving a surviving spouse or children, the estate can only be devolved upon the kindred of the deceased in the order provided by Section 39(1) of the Law of Succession Act, Cap. 160 as follows:-

“(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased’s half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.”

12. Failing survival by any of the persons mentioned in Section 39(1)(a)-(e) of the Act, the estate of the deceased shall devolve upon the State and be paid into the Consolidated Fund. The estate never devolves upon neighbours or any other person not related to the deceased. An estate of a deceased person who dies intestate, unlike one who dies testate, can only devolve upon the kindred of the deceased as defined by Section 39(1) of the Law of Succession Act and in the order of priority stated therein.

13. In this case, the 1st Respondent and two of the other three persons named as the beneficiaries of the deceased were not the kindred of the deceased. Only Kaingu Charo was entitled to benefit from the estate of the deceased. There is no evidence that consents were obtained from the nephews and nieces of the deceased before the petition for letters of administration was filed.

14. There is the allegation by the respondents that the parcel of land in question was sold by the deceased prior to his demise. If this is so then what was the purpose of obtaining letters of administration in respect of an estate whose sole property had been sold? I also note that the proceedings before the magistrate’s court do not disclose that anybody stepped forward to claim that the parcel of land had been sold to them.

15. In any case, the applicants have not prayed for the revocation of the title deed for the deceased’s parcel of land, assuming that the same has indeed passed into the hands of third parties. Nobody is therefore going to be prejudiced because the applicants will still need to take further legal proceedings if the parcel of land is no longer in the name of the deceased. Only then will any party likely to be affected be brought on board.

16. The application for revocation of grant succeeds and the grant issued to the 1st Respondent on 16th February, 2012 and confirmed on 3rd December, 2012 is hereby revoked. Ordinarily, costs should not be awarded in matters of this nature as the litigants are usually members of the same family. However, in this case a stranger took out letters in respect of the estate of the deceased. It is observed that the 2nd and 3rd respondents did not participate in these proceedings. In the circumstances, I condemn the 1st Respondent alone to meet the costs of the proceedings in respect of the summons for revocation of the grant.

Dated and Signed at Nairobi this 8th day of May, 2019

W. Korir,

Judge of the High Court

Dated, Countersigned and Delivered at Malindi this 20th day of June, 2019

R. Nyakundi,

Judge of the High Court