REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 570 OF 2015

IN THE MATTER OF THE ESTATE OF JEREMIAH SECHERO (DECEASED)

JUDGMENT

1. This matter relates to the estate of Jeremiah Sechero, who died on 8th May 1985. According to the letter from the Assistant Chief of Mugomari Sub-Location, dated 14th August 2015, the deceased had married twice, and had children with his two wives. His first wife was said to be the late Elizabeth Achitsa Sechelo, who was the mother of their nine children, being Samson Willy Segero, Idasi Segero, Netty Segero, Smitty Segero, Sinia Segero, Elijah Ingosi Segero, Daudi Segero, Busolo Segero and Janet Segero. His second and only surviving spouse was said to be Daina Nekesa, the mother of Timina Segero, Rosemary Nanyama Segero, Samuel Segero, Enock Tatu Segero, Rose Segero, Geoffrey Segero, Pamela Segero, Anita Segero and Tonny Segero. The deceased was said to have died possessed of Kakamega/Mugomari/1518.

2. Representation to his estate was sought vide a petition lodged herein on 25th May 2015 by Daina Segero, in her capacity as widow of the deceased. She expressed the deceased to have had died possessed of Kakamega/Mugomari/1518 and to have been survived by Daina Segero, the other individuals mentioned in the Assistant Chief's letter were left out. Letters of administration intestate were made to her on 9th January 2017, and a grant was duly issued, dated, rather curiously, 29th December 2016. I shall consequently refer to her as the administratrix. The said grant is yet to be confirmed.

3. A summons for revocation of the said grant, dated 11th April 2017, was lodged herein on even date, by Rockefeller Muhanji Segero, to be hereinafter referred to as the applicant. The grounds upon which the application was premised are set out on the face of the application, while the factual background is given in the affidavit in support of the application, sworn by the applicant on 11th April 2017. He sought that the grant made to the administrator be revoked and that he be made a co-administrator. He complained that the grant was obtained by concealment of material facts, misrepresentation of facts, through stealth, and that he was disinherited. He averred that the administrator was the second wife of the deceased, and he a grandson of the deceased through one of his sons, the late Elijah Ingosi Segero. He stated that his father died before the deceased had subdivided Kakamega/Mugomari/1518. He averred further that his grandmother was the first wife, she had died and left behind eight children; while the administrator had nine children. He complained that the administrator had filed the petition herein without first seeking his consent, neither was he aware of the gazettement of the cause. He said that the administrator was trying to use tricks to have him disinherited. He prays that the grant made to the administrator be revoked and that a fresh grant be made to her and him jointly.

4. The administrator responded to the application through an affidavit that she swore on 25th October 2018. She averred that the deceased was her husband, while the applicant was her step grandson. She stated that she married the deceased after his first wife, the grandmother of the applicant, died. She asserted that Kakamega/Mugomari/1518 was a property that she and the deceased bought, and that was where she established her matrimonial home with the deceased. She said that the late grandmother of the applicant had her own matrimonial home situated within the ancestral land, but she did not give the land registration details of the said property. She said that the first house sold that land which was due to them. She further averred that the alleged matrimonial home was occupied by some of the beneficiaries from the first house, who she said should move out to pave way for some of the grandchildren of the deceased by his first wife. She said that the applicant had lands within the ancestral land. She denied misrepresenting facts, saying that she had disclosed all the beneficiaries of the estate. She asserted that she had a greater right to administration over the applicant, who could only lay claim to the estate through his father. She said that the estate was still intact. She further argued that a case had not been made out for revocation of the grant.

5. The application was disposed of orally. The oral hearing happened on 26th June 2019.

6. The applicant was the first on the witness stand. He described himself as a grandson of the deceased, while the administrator was the second wife of the deceased. He talked about the estate having been the subject of court proceedings between the deceased and others, the estate was to be distributed between the administrator, the applicant's father and the administrator's father. When the applicant's father died, the administrator was said to have removed his name so that she became the sole beneficiary. He asserted that his biological grandmother and the deceased were buried on Kakamega/Mugomari/1518; saying that when the administrator got married after his grandmother died she found her remains buried on the land, and therefore it could not be true that she bought the land. During cross-examination, he said that when the administratrix sought representation she had listed herself, his father and her son as survivors. H denied taking her title deed. He alleged that there was a time that she wanted to sell the land to Europeans. He said that he was pursuing the matter on behalf of his late father, saying that he was only interested in the share that ought to have gone to his father.

7. The administrator took the witness stand next. She described herself as widow of the deceased, and the applicant as a member of the family of the deceased. She stated that the deceased had given the title deed to the subject property to her before he died, and not to the father of the applicant. She claimed that the deceased left behind two pieces of land, a large one at Musaka which was number 369 and a smaller one at Mugomari which was number 1518. She asserted that 1518 was the land that she and the deceased bought. She said that the applicant should access the land that his grandmother was entitled to, insisting that that was the land that the applicant ought to be pursuing. She said that he should not claim land from her, but the share of the land that his grandmother was using. During cross-examination, she said that the applicant should have placed his claim before her instead of taking her to court. She told the court that she would not give the applicant a piece of land, and that he should go and buy his own. She said that she did not know where the grandmother of the applicant was buried. She asserted that she was the widow of the deceased, and therefore she was the best suited person to distribute the estate.

8. The application for determination seeks revocation of a grant representation. The deceased died in 1985, which after the Law of Succession Act, Cap 160, Laws of Kenya, had come into operation in 1981. His estate, therefore, falls for administration and distribution in accordance with the provisions of the said Act.

9. The Law of Succession Act provides for revocation of grants under section 76, which provides as follows:

> *"76. Revocation or annulment of grant*
>
> *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 the 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 the grant within one year from the date thereof, or such longer period as the court 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 and inoperative through subsequent circumstances."*

10. Under section 76 of the Act, a grant of representation is liable to revocation on three general grounds. The first ground would be where the process of obtaining the grant was attended by glaring difficulties, such as where the process of obtaining the grant was defective, say because the person who obtained representation was not qualified to be appointed as personal representative, or the procedural requirements were not met for some reason or other. It could also be because the petitioner used fraud or misrepresentation or concealed important information in order to obtain the grant. The second general ground is where the grant is obtained procedurally, but the administrator subsequently runs into difficulties during the process of administration of the estate. Such difficulties include his failure or omission to apply for confirmation of his grant within the period allowed in law, or where he fails to exercise diligence in administration of the estate, such as where he omits to collect or get in an asset, where he fails to render accounts as and when he is required to do so by the law. the third general ground is where the grant has become useless or inoperative

11. In the instance case, the applicant appears to anchor his case on the first general ground, that is that there were issues with the manner the grant was obtained. He has raised some arguments about the administrator using trickery to deny him his share of the estate, but from the material before me he has not presented any coherent case to suggest that the administrator has been guilty of maladministration. Neither is there any argument that the grant herein has become useless and inoperative. My understanding of his case is that the process of obtaining the grant was defective and the administrator used fraud, misrepresentation and concealed matter from the court. His principle argument is that his consent was not obtained before the grant herein was sought.

12. The framework for applications for grants of representation is set out in section 51 of the Law of Succession Act. The most relevant portions are in subsection (2)(g)(h), which state as follows:

> *"Application for Grant*
>
> *51. (1) Every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.*
>
> *(2) Every application shall include information as to—*

(a) the full names of the deceased;

(b) the date and place of his death;

(c) his last known place of residence;

(d) the relationship (if any) of the applicant to the deceased;

(e) whether or not the deceased left a valid will;

(f) the present addresses of any executors appointed by any such valid will;

(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;

(h) a full inventory of all the assets and liabilities of the deceased..."

13. My understanding of section 51(2)(g) is that the petitioner is required to disclose all the surviving spouses and children of the deceased. The provision is in mandatory terms. The administrator herein only disclosed herself, but not the children of the deceased from both houses. She created an impression to the court that she was the sole survivor of the deceased, yet the children had sired eight children with his first wife and nine with her. The letter she provided from the Assistant Chief had listed all the children. She should have likewise listed the same children in her petition. Therefore, there was no compliance with section 51(2)(g). Section 51(2)(h) requires a full inventory of all the assets of the deceased. The administrator knew the assets of the deceased that were available for distribution, but she chose to disclose only that one asset that she was interested in. She claimed that the deceased had two assets, one where the family of the first wife resided, and the second where her own family resided. She was under an obligation to disclose both, as this is about the estate of the deceased, and not about the property that she is supposed to inherit alone. Again, she did not comply with the mandatory requirements of section 51(2) (h) of the Law of Succession Act.

14. The above is an indication that there were procedural defects in the manner the grant was obtained to the extent that the administrator did not comply fully with the requirements of section 51(2)(g)(h). There was fraud and misrepresentation to the extent that the administrator only disclosed herself as the sole survivor of the deceased. She sought to mislead the court into believing that the deceased did not have any children, and that she was the only person available to succeed him. There was concealment of important matter from the court, to the extent that she did not disclose the seventeen children that the deceased had had with her and his first wife. That meant that a huge constituency, for succession purposes, was locked out of the succession process. The motive of that act is unknown but one supposes that it was to defraud those whose existence was not disclosed.

15. The applicant complained that he was not consulted before administration was sought, or, put differently, that his consent was not obtained before representation was sought by the administrator.

16. The law on who qualifies to apply for representation in intestacy is section 66 of the Act, which sets out the order of preference with regard to who ought to apply and be appointed administrator in intestacy. Priority is given to surviving spouses, followed by the children of the deceased. Rule 7(7) of the Probate and Administration Rules requires that a person with a lesser right to administration ought to obtain the consent of the person or persons with a greater priority to administration, or get that person or persons to renounce their right to administration or cause citations to issue on them requiring them to either apply for representation in the estate or to renounce their right to so apply.

17. For avoidance of doubt, these provisions state as follows:

"66. Preference to be given to certain persons to administer where deceased died intestate When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors …"

and

"7 (7). Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has –

(a) renounced his right generally to apply for grant; or

(b) consented in writing to the making of the grant to the applicant; or

(c) *been issued with a citation calling upon him to renounce such right or to apply for a grant.*

18. In the case before me, the deceased was survived by several children and grandchildren, including the applicant herein, and also one widow, the administrator herein. According to section 66 of the Law of Succession Act, the widow had priority to administration over the children and grandchildren of the deceased herein, including the applicant herein. By virtue of Rule 7(7), the administrator was not obliged to obtain the consent of the children and the grandchildren before she applied for representation, or even to consult them. The applicant did not have a prior right to administration over the administrator, and, therefore, the question of the administrator obtaining his consent or complying with Rule 7(7) did not arise at all.

19. The applicant complained about tricks that the administrator was using to deny him his share of the estate. I note that the grant has not been confirmed. The property is, therefore, still intact. The applicant has not demonstrated any trickery on the part of the administrator to deny him his share. He could only have a valid argument if the grant were to be confirmed and the estate distributed without his input.

20. In the course of the oral hearing, the administratrix mentioned that the deceased had two parcels of land, one which was occupied by the first house and the other occupied by her and her children. Curiously, she never gave details of that other property that she alleged was owned by the deceased, yet it is her duty under section 82 of the Law of Succession Act to get in and gather the estate. In the petition, the administrator disclosed only one property, and that appears to be the property that she has an interest in, yet she was obliged by the Law of Succession Act, at section 51, as I have stated above, to disclose everything in this cause that the deceased died possessed of. Administration of the estate of an intestate should not be conducted piecemeal, in instalments, in separate proceedings or causes. The law envisages only one cause, where all the property of the deceased is brought on board, regardless of whether the administrator is interested in it or not. Under section 79 of the Law of Succession Act, the entire estate ought to be vested in the administrator to facilitate settlement of debts and liabilities, and finally distribution of all the assets amongst all those entitled to them. It is selfish and contrary to the law for the administrator to have only listed the assets that were allegedly due to her.

21. From what I have stated above, it should be clear that a case has been made out for revocation of the grant made herein to the administrator. She cannot be trusted, having concealed the existence of the children of the deceased from the court, to faithfully administer the estate alone. I shall consider appointment of more than one administrator, and the applicant shall be available for consideration given that he has shown interest in having the estate administered in a fair and just manner. More crucially, the deceased died a polygamist. It would be democratic to have both sides of the family, the two houses of the deceased, represented in the administration of the estate.

22. I noted from the filings regarding the application and at the oral hearing that the parties dwelt at large on distribution of the estate, in terms of who is entitled to what property out of the estate. Issues arose even on a property that the administrator alleges to have had bought with the deceased. Those issues are not for determination at this stage of the proceedings. They ought to arise at the confirmation of the grant, where all the assets that the deceased died possessed of ought to be brought to the distribution table, including any that he might have sold during his lifetime, or even distributed amongst some of the family members before he died. This is geared to ensuring that there is a fair distribution of the estate as envisaged in Part V of the Law of Succession Act.

23. In the end, the final orders that I shall make in this matter are as follows:

(a) That I hereby revoke the letters of administration in both that were made herein on 9th January 2017 to the administrator herein, Daina Segero, and cancel the grant that was issued to her dated 29th December 2016;

(b) That I hereby appoint Daina Nekesa Segero and Rockefeller Muhanji Segero administrators of the estate of the deceased herein, and a grant of letters of administration shall issue to them accordingly;

(c) That I hereby direct the administrators appointed in (b) above to apply, jointly or severally, for confirmation of the grant made to them in (b) above within the next forty-five (45) days of the date of this judgment;

(d) That in the confirmation application the subject of (c) shall the administrators identify all the assets that the deceased died possessed of and all the children that the deceased had, including disclosing all the grandchildren whose own parents are dead;

(e) That the said application shall comply with Part V and section 71 of the Law of Succession Act, and the exercise shall involve all the children of the deceased and the grandchildren of the deceased whose own parents are dead;

(f) That any person, whether administrator or child or grandchild, who shall be dissatisfied with the proposals made in the application to be filed under (c) above, shall be at liberty to file their affidavits of protest stating their case and making their own proposals on distribution;

(g) That the matter shall thereafter be mentioned, on a date to be assigned at the delivery of this judgment, for compliance and further directions;

(h) That each party shall bear their own costs; and

(i) That any party aggrieved by the orders that I have made herein shall have the liberty, within twenty-eight (28) days, to

move the Court of Appeal appropriately.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26th DAY OF September 2019

W. MUSYOKA

JUDGE