



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 737 OF 2009

IN THE MATTER OF THE ESTATE OF ANEMBA MUCHENDA (DECEASED)

JUDGMENT

1. The certificate of death serial number 980075, dated 24th November 2006, indicates that the deceased to whose estate this cause relates, was known as Anemba Muchenda, who died on 11th March 2004. There is a letter on record from the office of the Chief of Wekhome Location, Emuhaya, dated 27th November 2011. It indicates that the deceased had been survived by a daughter, Jane Ongoche Ayubu, who was said to have had sold a piece of the estate property, East Bunyore/Iboona/666, to Samwel Muyela Amakhang'a. I shall hereafter refer to Jane Ongoche Ayubu as the administratrix.
2. Representation to the estate was sought by the said Jane Ongoche Ayubu, vide a petition she filed on 30th November 2006 in Vihiga SRMCSC No. 98 of 2006, in her purported capacity as daughter of the deceased. She expressed herself as the sole survivor of the deceased, who she described as having died possessed of two assets, being East Bunyore/Iboona/666 and 677. She indicated Samuel Muyela Amakhang'a as a liability of the estate with respect to East Bunyore/Iboona/666. A grant of letters of administration intestate was made to her accordingly on 5th March 2007. The grant was confirmed on 20th September 2007. East Bunyore/Iboona/666 devolved wholly upon Samuel Muyela Amakhang'a and Bunyore/Iboona/677 wholly upon the administratrix. A certificate of confirmation of grant issued in those terms.
3. It was after the said confirmation of grant that the stage moved to the High Court. A summons for revocation of the grant made in Vihiga SRMCSC No. 98 of 2006 was filed herein on 22nd October 2014, of even date. The application was brought at the instance of Jacktone Otinga Osiolo, who I shall refer hereafter as the applicant. The grounds upon which he seeks the revocation are set out on the face of the application, while the factual background is given in his supporting affidavit which he swore on 22nd October 2014. He avers that the grant was obtained in a defective process as the provisions of section 58 of the Law of Succession Act, Cap 160, Laws of Kenya, were not complied with, that there was fraud as the administratrix had claimed to be the sole survivor of the deceased and that there had been concealment of matter from the court. He avers that the administratrix was a granddaughter of the deceased, while he was son of the deceased. He complains that his name was concealed while he had priority over the administratrix with respect to right to administration. He avers that his consent ought to have been sought.
4. There are various affidavits of service filed in the matters with respect to service of various processes on the administratrix. I have scoured through the filings in the file of papers before me but I have not seen any reply to the application by the administratrix. I shall take it that the application is not opposed.
5. Directions were taken on 23rd February 2016 that the said summons be disposed of by way of oral evidence.
6. The oral hearing happened on 18th July 2019. The applicant was the first on the witness stand. He testified that the deceased was his father, while the administratrix was his sister. He stated that the administratrix sold East Bunyore/Iboona/666 to Samuel Muyera. The property was said to have been transferred on 2nd November 2007. East Bunyore/Iboona/677 was said to have been transferred to the name of the administratrix. He stated that the administratrix was never on the land, and that he was the one in occupation. He stated that the deceased used to live in Nairobi, and when he relocated back to the village, he lived with him on the land.
7. He called a witness, Frederick Amukusa, holder of national identity card number [...]. He testified that the applicant was a son of a person he described as Osiolo, while the administratrix was a daughter of Anemba Muchenda, the deceased. He said that the deceased had two parcels of land, whose numbers he could not remember. He described the deceased as a brother of Osiolo, the father of the applicant. He alleged that the two parcels of land previously belonged to their father, and therefore the deceased held the two in trust for the family of Osiolo. He stated that it was the applicant who was tilling the lands during the lifetime of the deceased, and when the deceased relocated back to the rural area from Nairobi, he lived with the applicant. He said that the administratrix was married and was not concerned about the land, but when her father died she came and sold the land.
8. A revocation application is grounded on and its determination pegged on the three general grounds set out in section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. The first general ground is, captured in section 76(a) (b) (c) of the Law of Succession Act focuses on the process of obtaining a grant. If the process is found to be tainted by defects or improprieties, fraud, misrepresentation and concealment

of material facts from the court, then the grant would be liable to revocation. Representation ought to be obtained in a clean and open process that is defined by integrity and propriety. The office of administrator is an office of trust. It is an office in equity. It should be underpinned by fairness and confidence. The process of appointing any person to that office must itself not be undermined by lack of integrity and fairness. Where these qualities lack at these very initial steps of obtaining appointment to office then the trust and confidence that the persons beneficially entitled to the assets to be managed by the person seeking that office would be lost.

9. The second general ground, captured in section 76(d) of the Law of Succession Act, moves away from the process of obtaining the grant and focuses on the administration of the estate. At this point the court would be dealing with a situation where the process of obtaining the grant is adjudged to have been proper and above board, but the administrator faced challenges with the administration process itself. Such would be the case where an administrator fails to apply for confirmation of their grant within the period prescribed by the law, see sections 71(1), 73 and 76(d) (i). The law envisages that confirmation ought to be sought six months after the grant is made, and at any rate within the year of its making. Anything beyond that period would invite revocation. Distribution of the estate, which comes with confirmation of the grant, is a critical responsibility of the administrator. Indeed, it is the only duty, after collection and preservation of the estate and payment of debts and liabilities. An administrator who fails to apply for confirmation of their grant would have totally failed in his duties as administrator. The other case would be where the administrator fails to proceed diligently administration of the estate, see section 76(d) (ii) of the Law of Succession Act. The duties cast on administrators are set out in section 83 of the Law of Succession Act. Failure to discharge any of those duties effectively would amount to a failure to proceed diligently with administration. It includes the failure to get in all the free property of the deceased including pursuing debts owing to the estate and moneys payable to the estate by reason of the deceased's death, failure to ascertain the debts and liabilities of the estate, failure to render accounts, and failure to complete administration of the estate within the timeframes set out by the Law of Succession Act. The *raison detre* of being an administrator is to discharge these duties. The other situation would be where accounts are not rendered as and when required in law. The office of a personal representative is one of trust. The personal representative holds the property of the estate on behalf of others, be they survivors, beneficiaries, heirs, dependants or creditors. He stands in a fiduciary position with regard to the assets and the persons beneficially entitled. He owes them a duty to account for his administration and the management of the assets that he holds on their behalf. The duty is also owed to the court by reason of the court having appointed the personal representatives through the grants of representation.

10. That third general ground is where the grant has become useless or inoperative on account of subsequent events. Such circumstances would arise where a sole personal representative has died. There would be no person to carry on administration under his grant, rendering the document useless and inoperative. It would also be the case where the administrator suffers disability, whether physically or mentally, rendering him incapable of discharging his duties, such as where he becomes senile or of unsound mind or lapses into a coma from which he does not recover or suffers such debilitating physical injuries that make it practically impossible for him to do anything for himself. An administrator who is adjudged bankrupt would also fall under this net for he would lose capacity, by virtue of section 56 of the Law of Succession Act, and he cannot possibly act as administrator, and the grant he holds would become a useless piece of paper.

11. For avoidance of doubt, section 76 of the Law of Succession Act 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.”

12. In the instant case, the applicant pegs his application for revocation of grant on section 76(a) (b) (c) of the Law of Succession Act, on grounds that the process of obtaining the grant was attended by procedural flaws, fraud and concealment of matter from the court. His principal claim is that his existence was concealed from the court as he was a son of the deceased. The administratrix did not respond to the application, and, therefore, there is no material on her reaction to the claim that the applicant was a son of the deceased and, therefore, she was his sister.

13. The applicant's documents, and even his oral evidence in court, are incredibly unclear on the correct facts. In the affidavit in support of his summons for revocation of grant, he did not state categorically how the deceased was related to administratrix. Whereas he asserted that

he was a son of the deceased, he did not unequivocally state how the deceased and the administratrix were related. He merely complained that she had claimed to be a granddaughter of the deceased, which was in fact not true. In her petition for letters she described herself as a daughter of the deceased, just as she was described in the Chief's letter. In his oral testimony, he still insisted that the deceased was his father, while the administratrix was his sister. He at one point talked as if his father and the deceased were separate person, he never categorically stated who his real father was and how he related to the deceased. His witness, on the other hand, painted a different picture, by stating that the deceased and the father of the applicant were brothers, and that the property in dispute ad been registered in the name of the deceased in trust for the father of the applicant.

14. The applicant is apparently accusing the administratrix of fraud and dishonesty, yet he himself appears to be devious. It would appear to me that the deceased was not his father and that the administratrix was not is sister nor niece as he alleges. The deceased appeared to have been the father of the administratrix and an uncle of the applicant. Looking at the petition and the supporting documents as against the material from the applicant, I am not persuaded that there was any defect in the process, neither did the administratrix practice fraud nor conceal matter from the court. If anything it is the applicant who is not forthright in his application. I am not satisfied that he has proved what he set out to prove. Under section 38 of the Law of Succession Act, where a deceased person is survived by a child or children but no spouse, his estate should go to his children. In this case, the administratrix appears to be the sole survivor of the deceased, being his only child.

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

- (a) That I hereby decline to grant the orders sought in the application dated 22nd October 2014 and I hereby dismiss the same;**
- (b) That I direct that the instant file be closed;**
- (c) That I direct that the file in respect of Vihiga SRMCSC No. 98 of 2006 shall be returned to the registry it emanated from;**
- (d) That each party shall bear their own costs; and**
- (e) That any party aggrieved by the orders that I have made herein has the liberty, within twenty-eight (28) days, to move the Court of Appeal appropriately.**

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 31st DAY OF October 2019

W. MUSYOKA

JUDGE