



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

SUCCESSION CAUSE NO. 66 OF 2016

(Formerly SRMC SUCCESSION CAUSE 51 of 2009)

IN THE MATTER OF THE ESTATE OF MGIRI MUSA NYANGE alias MGIRI MSHAA NYANGE (Deceased)

JUDGMENT

1. The Court has before it an application for the confirmation of grant for the Estate of Mgiri Musha Nyange alias Ngiri Mshaa Nyange (the Deceased) and as a consequence the subsequent distribution of the entire Estate to one of the children of the Deceased namely BOMBO MGIRI MSHA. The Deceased passed away on 2nd November 1997 aged 70 years according to Death Certificate Serial Number 37488 C.A. No 0710 of 13th November 1997.

2. On 10th November 2009 a ZIGHE MGIRI MSHA of P.O. Box 86 NG'AMBWA filed a Petition for the grant of letters of administration of the Estate of the Deceased. She signed the Petition with a thumb print. She said she was the Widow of the Deceased. In Form 38; Consent to the Making of Grant of Administration Form the persons who were said to also survive the Deceased were listed as:

- a. Bombo Mgiri Msha ID No 2140220
- b. Mwangi Mgiri Msha ID No 4660704
- c. Rose MachochMgiri ID No 8384777
- d. Jenifer MawondoMgiri ID No 10395368

3. The Petition listed two sureties a Wilson Mwajuleghwa and TimothyMui both of P.O. Box 534 Voi. Neither the Petition nor the Affidavit in Support sets out the value of the Estate. The Affidavit in Support lists the surviving family members as:

- a. ZigheMgiri Msha ID No 2279288s
- b. BomboMgiri Msha ID No 2140220
- c. MwangiMgiri Msha ID No 4660704
- d. Rose MachochMgiri ID No 8384777
- e. Jenifer Mawondo Mgiri ID No 10395368

Attached to the Petition is a letter from the Chief of Mwachabo Location (Bernard K Iredge) lists the family members as:

- f. Zighe Mgiri Msha Applicant/Wife
- g. Bombo Mgiri Msha Son
- h. MwangiMgiriMsha Son
- i. Rose Machoch Mgiri daughter

j. Jenifer Mawondo Mgiri daughter

4. The Petition lists the Assets as follows:

1. Parcel of Land Title No Bura/Mwatate/447
2. Share in Parcel of Land Title No Bura/Mwatate/583

From the attached Official Search Results it appears that the first parcel of land was owned by the Deceased as a title absolute and it was 3.20 hectares in size. That amounts to about 7.009 acres. The second piece of land is owned jointly with Mwakazo Mwaisaka, Mwasighadi Ngure Shoti and Mwason Mwangombe Mwalumba as owners in common in equal shares. The Affidavit in Support does not explain how these shares are defined or mapped out. The land is 0.08 hectares or 0.1976 acres. There is no value attributed to the land.

5. Thereafter the Senior Resident Magistrate on duty in Voi issued a Public Notice relating to the Petition. Unfortunately he inserted the date of death incorrectly. In other words he stated that the date of death was 10th November 2009 instead of 2nd November 1997. In the circumstances, the public notice was fundamentally flawed and no further process could emanate from that. The File does not contain any record of a gazette notice having been filed. The attached index card bearing the same date notes the date of death correctly. In the circumstances, there was no grant of representation for the Estate granted and that is recored in the certificate issued by the Principal Registrar of the High Court in Nairobi on 23rd April 2010.

6. Thereafter, the File contains a Chambers Summons Application said to be drawn u[p] by Zighe Mgiri Msha who was unable to even sign her own name. The Application but not the Supporting Affidavit states that the letters of Administration was gazette in Gazette Notice No. 945 dated 29th January 2010. The Gazette Notice is not exhibited. However, there is a copy of a gazette notice dated 22nd January 2010 signed by P.N. Ndwiga, District Registrar relating to the estate of a person who died on 10th November 2009 bearing the same names as the Deceased in this case.

7. Notwithstanding that the Letters of Administration were never issued, the Applicant sought confirmation of the grant of probate made to Zighe Mgiri Msha on 10th November 2009 by a "Consent" filed on 12th October 2010. That Grant does not exist. The Deceased died intestate according to the Petition. In any event there is no record of an application being filed in the proper way seeking confirmation of grant. The Signatures of the dependants is certified by a Charles K. Muthusi of P.O. Box 534 Voi (which is the same address as the Sureties').

8. The file was then sent up to the High Court, for reasons that are not clear from the Record. That Court also issued a Notice to Show Cause to Zighe Mgiri Msha c/o Chief Mwachabo Location on 4th April 2016. The Notice was served upon a person called Julianah Samba Mghongo of ID No 30588630 on 5th July 2016. The Return of Service describes that person as a member of the family pointed out by the mzee wa kijiji. . In fact the Applicant passed away on 18th November 2016. The Death Certificate Serial Number 0756483 states that the Applicant died as a peasant farmer residing in Godoma.

9. On 19th June 2017, Bombo Mgiri Mshafiled an Application by Chamber Summons under **Section 76** of the **Law of Succession Act** and **Rule 44** of the **Probate and Administration Rules** seeking an order to be substitute for the Petitioner. Although the Application states that all the other beneficiaries consent to the substitution of the Applicant, there is nothing to signify their consent. On 20th June 2017, the same Applicant filed a Further Affidavit disclosing for the first time that there was another beneficiary to the Estate that had not been disclosed, neither by the family nor the Chief of Mwochombo. From that it can be assumed that the Original Petitioner probably did not have a full understanding of what transpired in her name. The Deceased had another Child called Salome Shako Mkoji who survived the Deceased and passed away on 18th January 2006 at Wesu Hospital aged 33 years.

10. On 22nd June 2017, the High Court, differently constituted, issued letters of Administration Intestate for the Estate of Mgiri Musha Nyange (Deceased). The Letter of Administration make no reference to the alias by which the Deceased was known. On 15th July 2019, Bombo Mgiri Msha filed Summons for Confirmation of Grant. The Application seeks confirmation of the Grant to Bombo Mgiri Msha which was never gazetted. It seeks distribution of the Estate only in relation to the Bura/Mwatate/447 (7 acres) to be shared between himself and the Children of his brother Mwangi. There is no reference to the other property Bura/Mwatate/583 which was also owned by the Deceased. It is said in the Affidavit that the land is shared between the sisters, yet there is no application relating to the land. There is no reference to the Share of Salome and what would happen to that is she was survived by dependants. Further, there is no mention of any Letters of Administration relating to the Estate of the Deceased Brother Mwangi Mgiri Msha nor for Zighe Mgiri Msha.

11. The Application contains numerous mis-statements of fact. Firstly, the dependants surviving the Deceased omits from the list the widow and the daughter called Salome. The list of assets omits the second property. The shares given to the grandchildren of the Deceased deny the rights of his own children. Further, the Children of Mwangi include minors and therefore their shares must be held in trust. The suggested trustees are the older siblings of those children. The effect of the distribution as suggested would be for Bombo Mgiri Msha to inherit the entirety of his Father's Estate to the exclusion of his siblings. That is not an equitable outcome.

12. In the circumstances, and in particular that the whole process is tainted with mis-statements of fact and procedural irregularity, this Court has no option but to set aside the Letters of Administration issued to Bombo Mgiri Msha. Those are set aside forthwith. Further this Court deems that Bombo Mgiri Msha is a person not fit to act as an administrator of the Estates of his Parents, nor of his siblings. Therefore, this Court appoints the Public Trustee to be the Administrator of the Estate with immediate effect.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED ON THIS the 19th day of December 2019.

In The Presence of :

Court Assistant: Josephat Mavu

Applicant: Bombo Mhiri

Also Present: Jenifar Mawondo

Rose Machocho

Damaris

Ishmael Kambo