



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 64 of 2015

IN THE MATTER OF THE ESTATE OF BINTI HASSAN SALIMU NZINGO (DECEASED)

OMARI ALI JUMA

SALIM ALI MWAKIDATO

KIDATO KASSIM MWAKIDATO.....APPLICANTS

VERSUS

ASHA KIDATO MWAKIDATO.....RESPONDENT

RULING

1. Before me is an application by Omari Ali Juma, Salim Ali Mwakidato and Kidato Kassim Mwakidato (“the Applicants”) dated 10.11.15 by way of Summons for Revocation of the Limited Grant of Letters of Administration *Ad Litem* (“the Grant”) in respect of the estate of Binti Hassan Salimu Nzingo (the Deceased). The Grant was issued on 11.5.15 to Asha Kidato Mwakidato (the Respondent”). The Grant was limited for the purpose of filing suit.

2. The record shows that the Deceased who had no children of her own, died on 26.5.13 at Ng’ombeni Mombasa. Her estate comprised of House without land on Plot No. 224/VI/MN. The Respondent obtained the Grant in her capacity as niece of the Deceased.

3. The Application is premised on grounds therein and the facts set out in the Affidavit of the Applicants sworn on 10.11.15. The grounds are that the Applicants are the brothers of the Deceased while the Respondent is her niece and a daughter of the 3rd Applicant. The Grant was obtained fraudulently by making a false statement and concealing from the Court material facts to the case *to wit* the existence Kwale Kadhi Succession Cause No. 381 of 2014 in respect of the estate of the Deceased, facts which were within the knowledge of the Respondent. The 1st Applicant was made administrator of the estate of the Deceased by an order of 10.11.14. It is further alleged that the Respondent has used the Grant to file CMCC No. 2227 of 2014 which has interfered with the running of the estate of the Deceased.

4. In her Replying Affidavit sworn on 27.2.18 the Respondent denies that the Applicants are brothers but are cousins of the Deceased. She was informally adopted by the Deceased with consent of her mother and father the 3rd Applicant. Both her parents separated and remarried when she was 5 years old and for that reason she lived with the Deceased and nursed her during her illness until the date of her demise in 2013. The Deceased considered her a daughter and she considered the Deceased her mother. At her death bed, the Deceased called the 3rd Applicant and informed him that he wanted to leave all her properties to the Respondent and the 3rd Applicant had no objection. The Deceased handed all her original documents relating to her properties to the Respondent which the Applicants cunningly obtained from her. They also obtained a false death certificate which indicated the date of death as 2.5.13 instead of 26.5.13. The Respondent states that she was not made aware of the Succession Cause in the Kadhi’s Court a move intended to block her from the estate of the Deceased. She alleges that the Applicants sold Plot No. 2241/VI/MN at a throw away price contrary to the wishes of the Deceased. The Applicants were neither close to nor assisted the Deceased in her lifetime and were in fact in bad terms with her. The orders in the Kadhi’s Court were obtained through false documents, false pretence and deceit.

5. The parties’ counsel made oral submissions before me and reiterated the contents of the rival affidavits. The Law of Succession Act at Section 76 makes provision for revocation of grants: as follows:

“76 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 has ordered or allowed; 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.”

6. In an application for revocation of a grant of representation, the Applicant must satisfy the Court that any one of the above grounds apply in the circumstances. In the present case, the Applicants have based its application on the grounds set out in Section 76(b) and (c) of the Law of Succession Act. The Applicants accuse the Respondent of not disclosing to the Court that the Deceased was survived by her brothers, the Applicants and further that she did not involve them on the process of obtaining the Grant nor obtain their consent.

7. The Act provides the information that shall be included in an application for a grant of representation. Section 51(2)(g) stipulates that such an application shall include:

“in cases of total or impartial 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;”

8. The record shows that the affidavit sworn by the Respondent on 2.2.15 in support of the petition for the Grant did not indicate that the Deceased was survived by anyone other than herself as a niece. There was material non-disclosure on the part of the Respondent. The Court finds that he Grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case.

9. Rule 26 of the Probate and Administration Rules provides:

(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

10. It is common ground that the deceased died intestate and was not survived by any spouse or children. The Respondent is a niece to the Deceased. It was conceded in submissions for the Respondent that the Applicants are indeed brothers of the Deceased but from different fathers. Further, the Respondent is a child of the 3rd Applicant. This being the case, who between the Applicants the brothers of the Deceased and the Respondent a niece had priority in applying for a grant.

11. Section 66 of the Act lists the order of preference of persons to whom a grant of letters of administration in respect of a deceased intestate's estate shall be issued as follows:

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;

12. The order of priority of beneficiaries entitled on intestacy in respect of an intestate who left no surviving spouse or children is provided for in Section 39 of the Act as follows:

(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the

intestate in the following order of priority—

(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 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.

13. The Applicants as brothers of the Deceased ranked in priority to the Respondent a niece, to apply for the Grant. Her claim that she was taken in and brought up by the Deceased who treated her as her own does not obliterate the fact that the Deceased had brothers or indeed the fact that those brothers rank in higher priority to the Respondent. The consent of the Applicants was therefore required in the application for the Grant. Failure by the Respondent to involve and obtain the consent of the Applicants who include her own father renders the process of obtaining the Grant defective in substance.

14. In the result and in view of the foregoing this Court finds that Grant herein cannot stand. The Limited Grant of Letters of Administration issued to Asha Kidato Mwakidato on 11.5.15 is hereby revoked.

DATED, SIGNED and DELIVERED in MOMBASA this 14th day of August 2018

M. THANDE

JUDGE

In the presence of: -

.....**for the Applicants**

.....**for the Respondent**

.....**Court Assistant**