



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 122 OF 2000

IN THE MATTER OF THE ESTATE OF PAUL MTEMA BOLLY (DECEASED)

DAVID MTEMA BOLLY.....1ST APPLICANT/ADMINISTRATOR

FLORA TABU BOLI.....2ND APPLICANT/ADMINISTRATOR

VERSUS

CAROL MTEMA..... RESPONDENT/OBJECTOR

RULING

1. The deceased died on 19th April 1992. On 27th January 2000, Flora Tabu Bali and David Mtema Bolly (the 1st and 2nd applicants) petitioned the court for the grant of letters of administration intestate in their capacities as widow and son of the deceased, respectively. A grant of letters of administration intestate was made to them on 19th April 2000.
2. On 6th July 2001 the respondent filed summons for revocation of grant dated 4th July 2001 on the grounds that the grant was obtained fraudulently by making false statement and concealing from the court of something material to the case. It was her case that she was the second wife of the deceased with whom she had three adult children and yet the grant had been obtained in exclusion of her and her children, and that the applicants had started subdividing the estate of the deceased without involving her or her children. The application was opposed by the 2nd applicant through her affidavit dated 10th September 2001 on the grounds that the deceased had only one wife (herself) who was entitled to the grant. She swore that the process of obtaining the grant was regular.
3. On 8th November 2011 the court dismissed the application dated 4th July 2001 with costs on the grounds that the objector had not bothered to prosecute her application.
4. On 12th June 2014 the respondent filed an application dated 11th June 2014 under certificate of urgency seeking a temporary injunction against the applicants restraining them from evicting her and her children from house number L.R 209/5389/64 pending the hearing and determination of the objection proceedings. The application was opposed by the 2nd applicant through her affidavit dated 8th December 2014 on the grounds that the application for revocation of grant dated 4th July 2001 had been dismissed by the court on 8th November 2011.
5. On 16th September 2014, the applicants filed summons for the confirmation of grant. The grant was confirmed on 27th October 2015 in terms of the affidavit in support of the application.
6. On 13th September 2016 the respondent filed an application dated 9th September 2016 under certificate of urgency seeking the revocation of the grant made to the applicants on 12th April 2000 and confirmed 27th October 2015 and seeking temporary orders restraining the applicants from evicting her, her family and tenants from the houses on plot numbers 209/5389/64 Bahati Nairobi also known as LR No. 16327/1 and LR No. 1956/383. The application was based on the grounds that the respondent being a legal wife of the deceased was left out of the succession process together with her children. The application was opposed by the applicants through their joint affidavit dated 9th October 2016. They reiterated and adopted their affidavits sworn on 10th September 2001 and 8th October 2014. The application was withdrawn in court on 2nd November 2016 at the request of Mr. Nyang'au for the respondent. The respondent was granted leave to file and serve a fresh application upon the respondents.
7. On 4th November 2016 the respondent filed an application seeking review its orders dismissing the objector's application dated 4th July

2001 and reinstatement of the said application; and the application dated 12th June 2014 be heard concurrently with the application dated 4th July 2001. The application was based on the grounds that the objection proceedings were dismissed by the court without granting the respondent an opportunity to be heard or to participate in the proceedings, and that the matters raised in the application dated 4th July 2001 were pertinent, credible and related to the rights that this court has been specially constituted to extol and protect. The application was supported by the affidavit of T.O Nyang'au dated 4th November 2016. The application was opposed by the applicants through their joint affidavit dated 14th November 2016 and filed on 15th November 2016 on the grounds that respondent had abandoned her application dated 4th July 2001 with the result that it was their advocates who moved the court to prosecute the matter. It was their case that on 19th April 2011 the application dated 4th July 2001 had been fixed for hearing for 8th November 2011 and a hearing notice served through registered post on the last known address of the advocates for the respondent; that an affidavit of service of Benjamin Mutua had been sworn on 7th November 2011 and filed on 8th November 2011; that the court being satisfied that the respondent had been served with the hearing notice and being satisfied that the respondent had failed to prosecute her application went ahead to dismiss the application dated 4th July 2001.

8. On 14th November 2017 the court made orders allowing the application dated 4th November 2016 on the grounds that there was no response to the said application. Later on the same day at around 10.30 am, counsel for the applicants Mr. Macharia holding brief for Mr.J.I Mwangi informed the court that he had been involved in an accident hence his lateness in attending court, and that he had seen the orders allowing the application dated 4th November 2016 on the grounds that the same was not opposed, when in fact the applicants had filed their affidavit and submission to oppose the said application. The court directed counsel for the applicants to file an appropriate application in view of his sentiments.

9. On 27th February 2018 the 1st applicant filed summons dated 27th February 2018 seeking the setting aside of orders issued on 14th November 2017 allowing the application dated 4th November 2016. The application was based on the grounds that:

- a) the application dated 4th November 2016 was allowed on gross-misrepresentation by the firm of T.O. Nyang'au Kemunto & Co. Advocates that the same was un-opposed by the parties;
- b) based on the said misrepresentation orders were issued allowing the application unopposed and therefore the applicant was not given an opportunity to be heard, despite all the necessary court documents having been filed on time;
- c) the court noted that there was a replying affidavit dated 9th October 2016 and filed on 13th October 2016 and submissions by the petitioner filed on 6th October 2017 dated 6th October 2017 all opposing the said application; and
- d) the court proceeded to grant leave to the petitioner to file appropriate application to set aside the orders issued on 14th November 2017.

The application was supported by the affidavit of the applicant dated 26th February 2018.

10. The application was opposed by the respondent through her replying affidavit dated 20th July 2018. It was her case that the replying affidavit dated 9th October 2016 and filed on 13th October 2016 was for the application dated 9th September 2016 and not 4th November 2016; that the court record clearly showed that the application dated 4th November 2016 was unopposed as there was no response to the same; that the court's orders of 14th November 2017 were given on the premise that there was no response filed.

11. I have looked at the file in its entirety. I note that the application dated 4th November 2016 was opposed by the applicants through their joint affidavit dated 14th November 2016 and filed on 15th November 2016 and through their written submissions dated 5th October 2017 and filed on 6th October 2017. I find that counsel for the respondent misdirected and misinformed the court that the application was unopposed when the same was opposed. For that reason, I allow the present application and set aside this court's orders made on 14th November 2017 allowing the application dated 4th November 2016. The applicants were entitled to be heard on their responses before allowing the application.

12. I direct that the application dated 4th November 2016 be set down afresh for hearing. Parties shall simultaneously file and serve any further affidavits and submissions in response or to oppose the application dated 4th November 2016 within the next 14 days. The matter shall be mentioned on **11th December 2018** to confirm compliance of the above orders and for further directions.

13. Costs shall be in the cause.

DATED and DELIVERED at NAIROBI this 27TH NOVEMBER 2018

A.O. MUCHELULE

JUDGE