



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO. 458 OF 2011

IN THE MATTER OF THE ESTATE OF JONATHAN MUSYOKI MUTISYA (DECEASED)

ANN NJERI MUSYOKI.....PETITIONER/RESPONDENT

VERSUS

1. JOYCE MWIKALI MUSYOKI

2. SUSAN MUSYOKI

3. CAROLINE MUSYOKI

4. LILIAN MUSYOKI

5. NAOMI MUSYOKI

6. SADRA MUSYOKI

7. SAMMY MUSYOKI

8. SAMMY MUSYOKI

9. JANE MWELU MUSYOKI

10. ROBERT KILONZO.....APPLICANTS

RULING

1. This ruling relates to the application dated 12th September, 2013 brought by the applicants. The prayers sought are:

(a) That the grant confirmed on 13th July 2012 be revoked on account of concealment of the Applicants interest in the estate of the deceased

(b) That the costs of this application be awarded to the Applicants.

2. The application is grounded on the sworn affidavit of Joyce Mwikali Musyoki and on grounds:

i. THAT the Applicants are children of the deceased of the 1st wife who is also deceased

ii. That the petitioner concealed this material fact when obtaining the grant.

iii. That the grant was obtained by means of deliberate and untrue allegations

iv. That the petitioner failed to include the Applicants who are the dependents of the estate when obtaining grant.

3. The gist of the grounds and the supporting affidavit is that all the applicants are the surviving beneficiaries of the estate of the deceased who died on 13.11.2010 and was married to two wives and dependents consisting of children of the 1st and the 2nd wife. That the petitioner has been aware of the interests of the applicants on the estate of the deceased and failed to indicate them in the petition and thus the confirmation of grant ought to be revoked for she has denied the said applicants their share in the estate of the deceased.

4. The application is not opposed. The petitioner acts in person after this honorable court granted an order to the previous advocates to cease acting.

The applicants filed written submissions on 27th September, 2016.

SUBMISSIONS

5. It is submitted for the applicants that the applicant has not been served with a replying affidavit or any evidence to dispute anything in the application.

6. The firm of Priscillar and Company Advocates submitted that the deceased is the Applicants father and they rely on the chief's letter and the death certificate marked as annexure JMM1 and JMM2 respectively in the affidavit of the deponent. Counsel states that the said letter confirms that the applicants are indeed dependents of the deceased, in virtue whereof the petitioner herein failed to disclose this information to the honorable court in contravention of the provisions of Section 76(b) and (c) of the Succession Act.

7. Counsel further submits that the applicants had served a citation on the petitioner and thereafter learnt that the petitioner had already filed a petition hence this application for revocation of grant. The said citation was filed in the Senior Principal Magistrates Court at Kangundo on 2nd July, 2013 and is marked annexure JMM3 in the applicant's affidavit in support.

ANALYSIS

8. From the material before me, the issues for determination are:

a. Whether petitioner was served with the application dated 12th September, 2013 and the consequential hearing notices.

b. Whether the applicants have achieved the threshold for grant of the orders sought.

c. Whether the petitioner has a good defence/case on the merit against the application dated 12th September, 2013

d. Who bears the costs of this suit.

9. Service of the application has a bearing on whether or not I shall grant the orders sought. A look at the record shows that there is a notice of appointment dated 2nd May, 2014 and duly filed in the court on the same day. The application was fixed for mention on 8th September, 2016 and there is an affidavit of service deponed by Joseph Mutinda to the effect that the petitioner's advocate on record was served, and he has attached a copy of the duly stamped hearing notice. On record is an application to cease acting by the said advocate, which was filed on 13th October, 2016. As of 26th April, 2017, the petitioner was acting in person. The instant application was fixed for mention on 25th May, 2017 and there is a return of service on record. The application was fixed for hearing on 17th July, 2018 wherein the petitioner was served in person and there is a return of service on record, however because court was not sitting thus the matter was given a hearing date of 25th October, 2018. On the said date, the petitioner was absent and there is also a return of service on record.

10. Once the Applicants were directed on which firm of Advocates to effect service on, and later effect personal service upon the petitioner, their task ended when the process server, Joseph Mutinda Munyasia effected service on the Petitioner and filed a return of service on the various occasions. The court record attests to this fact and the said process server was not sought to be cross-examined by the petitioner to shake his evidence of service and neither did the petitioner appear in court.

11. I am persuaded there was proper service on the petitioner. The inaction by their counsel and by them and any resultant undesirable outcome cannot be visited on the Applicants. As stated by Judge Muli in Nairobi Civil Suit No.209 of 1974, **Ruth Kavindu V. Josiah Mbaya and Another** (1976) eKLR :

“A court should not be used or called upon to aid the indolent to cause injustice and hardship to blameless applicants”

That finding itself would determine this application but I find it necessary to delve into the merits of the grounds relied on in support of the application.

12. Have the applicants achieved the threshold for grant of the orders sought? Does the petitioner have a good defence on the merits to the application herein? The ready answer is that on the material before me the petitioner has no defence. The application dated 12th September, 2013 had sought the revocation of the confirmed grant of letters of administration issued to the petitioner herein.

13. The applicants' grouse was that they have not been included as forming part of dependents of the deceased. Indeed, there is a chief's letter on record, which is undisputed. Section 76 of Law of Succession Act (Cap 160) provides grounds for revocation of grant which include if the grant was obtained fraudulently by the making of false statements or by the concealment from the court of things material to

the case. It is this court's view that the applicant felt that the grant was fraudulently obtained or was obtained by concealment from the court of things material to the case, they exercised the option of filing for revocation of the said grant and the grounds in support of the same is not opposed. In the case of **In re Estate of S T M [2017] eKLR**, Judge Muigai in allowing an application for revocation of grant of Letter of Administration observed that the omission of a number of beneficiaries by the petitioner amounts to concealment of material facts from court. I am satisfied that the applicants have demonstrated the requirements for revocation of grant.

DETERMINATION

14. The cumulative effect of the above is that the application herein must succeed. I find for the applicants and proceed to allow the application dated 12th September, 2013 with an order that the grant confirmed on 13/07/2012 is revoked. The family of the deceased is granted 30 days to nominate administrators who shall not exceed four (4) failing which this court will proceed to appoint the administrators. As parties are members of one family there will be no order as to costs.

Dated, Signed and Delivered at Machakos this 20th day of December, 2018

D. K. KEMEI

JUDGE