



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO. 2947 OF 2014

IN THE MATTER OF THE ESTATE OF EPHRAIM CHIULI WANYAMA (DECEASED)

MURUMBA CHIULI.....1ST APPLICANT

MARTINA WAVINYA WANYAMA.....2ND APPLICANT

VERSUS

ODILA BEATRICE ASIYORESPONDENT

AND

JULITA MWITHI MBEVA.....1ST INTERESTED PARTY

GABRIEL MUTHEKE MALONZA.....2ND INTERESTED PARTY

JUDGMENT

1. The deceased Ephraim Chiuli Wanyama died intestate on 9th August 2012 at Embakasi in Nairobi. On 3rd November 2014 the respondent Odilia Beatrice Asiyo petitioned this court for the grant of letters of administration intestate. In the affidavit she swore to support the petition she declared that she was the only widow of the deceased, and that she was the only beneficiary of the deceased. The grant was issued to her on 2nd June 2015.

2. Prior to his death, the deceased had sold part of his estate. He had sold LR No. 12715/2993 to Julita Mwithi Mbeva, LR No. 12715/2994 to Gabriel Mutheke Malonza and LR No. 12715/2992 to Anastacia Nthenya Kaunga. The parcels had not been transferred and registered in the names of the purchasers. On 8th September 2015 the respondent sought the confirmation of the grant before the expiry of the statutory six months so that she could transfer the parcels to the purchasers. On 26th April 2016 the respondent and the advocate for the purchasers entered into a consent in which the grant was confirmed. The purchasers each got his/her entitlement. The rest of the estate went to the respondent. The property that went to the respondent as per the certificate of confirmation was parcel No. 194 at Sultan Hamud Township, Lugulu/Ndivisi/634, Magemo/Ndivisi Plot No. 1 (Commercial), Current account No. 01030-117692-00 National Bank, Pension – AP/PC No. 59593, shares in Harambee Co-operative Society and Shares in Safaricom (A/C No. 1295291).

3. On 17th May 2016 the applicants made application under **section 76** of the **Law of Succession Act (Cap 160)** for the revocation of the grant. Their case was that when the respondent petitioned for the grant, and got it confirmed, she did not disclose that the deceased was survived by three widows (Joan Butsili Chiuli, Martina Wavinya Chiuli (2nd applicant) and Rose Mwikali and a total of 13 children (Including the 1st applicant). She did not inform them about the petition, and did not seek their consent during the process. This resulted in their being disinherited when they were beneficiaries.

4. The respondent filed a replying affidavit to deny that the petition was filed in secrecy or with intention to conceal the process from the rest of the family. She stated that she got the petition gazetted on 2nd April 2015 and that was information to the whole world. The respondent's case was that up to the death of the deceased she was the only wife; that the other wives and children only showed up during the funeral. She went on to state that the deceased left a written Will and it was on the basis of the Will that she distributed the estate. She annexed a copy of the said Will as "OBAW 3". She took issue with the fact that the applicants had not filed objection to the petition. Lastly, she offered to share equally with the applicants and the rest of the family the portion of the estate that she had inherited.

5. Julita Mwithi Mbeva and Gabriel Mutheke Malonza (1st and 2nd interested party) were purchasers of LR No. 12715/2993 and LR No. 12715/2994 from the deceased in respect of which they paid fully. The parcels had not been transferred and title issued by the time the deceased died. They asked that the application for revocation in their respect be dismissed as they were now legitimate owners of the parcels. Further, that the parcels they bought were no longer the free properties of the deceased that could be distributed to his beneficiaries.

6. The respondent produced a copy of the Will which she says the deceased left. The alleged Will was dated 6th June 2006. In it the three purchasers and the property they bought were indicated. The respondent was appointed the executor, and was given benefit. The rest of the estate was bequeathed to her. If the deceased left a Will, it was illegal for the respondent to petition the court for the grant of letters of administration intestate. This is because the respondent was saying that the deceased did not die intestate. On this account alone, the grant is revocable as the proceedings to obtain it were defective in substance under **section 76(a)** of the **Act**.

7. The respondent stated that she was the only wife of the deceased up to his death, but that at the funeral the other wives and their children emerged. The applicants produced the deceased's "eulogy" in which the deceased's entire family (four wives, including the respondent, and the thirteen children) was indicated. In it, the respondent was the last widow and had no child. It is also material that the respondent in her replying affidavit offered to share the estate with the applicants and the rest of the named family members. She could not offer to share the estate with them if she did not acknowledge them as part of the family of the deceased, and therefore beneficiaries.

8. **Section 52** of the **Act** (as read with **rule 7(1)(e)** of the **Probate and Administration Rules**) states that when petitioning for a grant, the petitioner should include in the petition the names and addresses of all surviving spouses and children of the deceased. In this petition the respondent did not include the names and addresses of his co-widows and their children. This non-inclusion amounted to concealment from the court of material facts and this will also lead to the revocation of the grant (**In the matter of the Estate of Sospeter Mbugua Munyui (deceased) HC Succ No. 2752 of 2007 at Milimani**).

9. Under **section 66** of the **Act** the 2nd applicant was ranked in the same degree to the respondent in terms of applying for grant in respect of the estate of the deceased. Under **rule 26(1)** of the **Rules** letters of administration ought not to be granted to any applicant without notice to every other person entitled in the same degree as, or in priority, to the applicant. There was no renunciation or written consents by the applicants in Forms 38 and 39 as provided for in **rule 26(2)**. The grant is entitled to be revoked. (**In the Matter of the Estate of Eutyclus Wanyoike Njau (Deceased) Nairobi Succession Cause No. 1633 of 2009**).

10. The interested parties argue that since the deceased had sold the two properties to them the revocation

should not affect them, as the properties were not the free properties of the deceased in terms of **section 3(1)** of the **Act**. What is clear, however, is that at the time the deceased died the properties were registered in his name. Further, the grant through which the properties have been given to them (interested parties) followed substantially defective proceedings.

11. In the final analysis, I find that the grant issued to the respondent on 21st June 1015 and confirmed on 26th April 2016 cannot be allowed to stand. The same is revoked with cots. If any property has been transferred following the confirmation the same is ordered to revert into the name of the deceased.

12. So that progress is made in respect of this cause, I order that a joint grant be issued in the names of Murumba Chiuli, Martina Wavinya Wanyama and Odilia Beatrice Asiyo. The administrators, or any of them, shall within 60 days, apply for the confirmation of the grant.

SIGNED at NAIROBI this 14TH day of SEPTEMBER 2017.

A.O. MUCHELULE

JUDGE

DATED and DELIVERED at NAIROBI this 18TH day of SEPTEMBER 2017.

W. MUSYOKA

JUDGE