



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 485 OF 2011

IN THE MATTER OF THE ESTATE OF SAMUEL SIMEKHA CHALINGO (DECEASED)

1. SAMUEL ETALE ETETWE

2. MOSES MASIGA

3. PETER CHALINGO.....APPLICANTS

VERSUS

ROSE LOUISE NGOYA ODHIAMBO.....RESPONDENT

RULING

1. On 23.9.02 Samuel Simekha Chalingo, (“the Deceased”), a retired fitter/turner died at Jalaram Hospital in Kisumu. On 24.11.11 Rose Louise Ngoya Odhiambo, the Respondent herein filed a petition in this Court seeking a grant of letters of administration for the estate of the Deceased, in her capacity as his daughter. In her affidavit in support of the Petition, the Respondent stated that the Deceased was survived by the following:

Naomi Toya Simekha	widow
Philip Amuttabi Chalingo	son
Rose Louise Ngoya Odhiambo	daughter
Ruth Osengo Chalingo	daughter
Sheila Diane Toya	granddaughter
Samuel Simekha Chalingo	grandson
Moses Masiga Chalingo	grandson
Kelvin Samuel Chalingo	grandson

2. The record shows that the estate of the Deceased consists of the following properties:

E/Bunyore/Ebulonga/455

E/Bunyore/Ebulonga/1267

E/Bunyore/Ebulonga/500

W/Bunyore/Ebusikhale/2042

E/Bunyore/Ebulonga/458

E/Bunyore/Ebulonga/1285

E/Bunyore/Ebulonga/474

E/Bunyore/Ebulonga/402

3. Grant of letters of administration (“the Grant”) was issued to the Respondent on 30.8.12 and confirmed on 6.9.13. The distribution of the estate of the Deceased is as contained in the Certificate of Confirmation of Grant.

4. By a Summons dated 23.11.15 and amended on 30.3.16 (“the Application”) Samuel Etale Etetwe, Moses Masiga and Peter Chalingo the Applicants herein seek the revocation of the Grant. The Applicants also seek the inclusion of both the 1st and 3rd Applicants as beneficiaries of the estate of the Deceased. In his Affidavit sworn on 23.11.15, the 1st Applicant avers that the Grant was obtained by non-disclosure and concealment of the fact that the Applicants are grandsons of the Deceased. The Applicant claims that the Applicants were dependent upon the Deceased and were under his care as their father had predeceased the Deceased. They had already been allocated Plot No. W/Bunyore/Ebusikhale/2042 by the Deceased prior to his demise and were beneficial owners of the same and have been living thereon since. The Respondent who is their aunt excluded them when she obtained the Grant though she included their brother the 2nd Applicant. The Respondent proceeded to have Plot No. W/Bunyore/Ebusikhale/2042 allocated to Sheila Diane Toya to their exclusion. The Applicants prayed that they be included as beneficiaries and that the Grant be revoked.

5. In her Replying Affidavit sworn on 24.2.16, the Respondent avers that upon the demise of the Deceased, she called a family meeting at which she was chosen to be the administrator of the estate. She then filed the petition for a grant in this cause in 2011. On 30.6.12, the widow of the Deceased called a family meeting of all the Deceased’s children and grandchildren to discuss the distribution of the estate. The Applicant was to get a portion of Plot No. E/Bunyore/Busikhale/458. The Respondent denies that the Deceased had gifted Plot No. W/Bunyore/Ebusikhale/2042 to the Applicants states that they have been living thereon out of good will. The Applicant was allocated Plot No. E/Bunyore/Busikhale/458 where he has built his house and where his late father was interred. The Respondent further avers that Plot No. W/Bunyore/Ebusikhale/2042 was not part of ancestral land but was in fact purchased by Christine Okoto Chalingo (deceased) a daughter of the Deceased and is thus an inheritance to her children. According to the Respondent, the Application is intended to cause chaos in the entire family.

6. The Respondent further avers that the Applicants are sons of the late Dishon Etetwe, a son of the Deceased. The three were supported by the children of the Deceased and were not dependent on the Deceased. The Applicant further avers that the Applicant’s mother resides on Plot No. E/Bunyore/Busikhale/458 but had been allowed to operate a small hotel business on Plot No. W/Bunyore/Ebusikhale/2042. That the beneficiaries entitled to Plot No. W/Bunyore/Ebusikhale/2042 are Sheila Diane Toya together with Kissinger Atetwe Chalingo, Peter Simekha Chalingo and Carol Laura Eliula Kitonga. The reason why the Applicant and Peter were excluded herein is because having been asked by the Respondent to supply their particulars and identification documents, only their brother Moses complied and hence his inclusion. According to the Respondent, the Applicant’s claim relates to Plot Number Plot No. W/Bunyore/Ebusikhale/2042 and he therefore ought to file an independent action against the estate and not seek revocation of the Grant.

7. At the hearing of the Application, the 1st Applicant testified that he has made the Application on behalf of his father’s family. His father predeceased the Deceased as he died in 1993 when the Applicant and his

siblings were still young. He stated that they were not involved in the process of obtaining the Grant. He further states that he disagreed with the discussions at the family meeting held after the demise of the Deceased. He refused to sign the minutes as the proposed distribution of the estate had been pre-determined. Their mother who is still alive was not involved. He disagreed with the distribution of the estate set out in the Certificate of Confirmation of Grant.

8. The 1st Applicant further stated that he carries out his restaurant business on Plot No. W/Bunyore/Ebusikhale/2042. He does not pay rent to anyone but other tenants pay rent to him. In the past, his mother collected rent and took it to the Deceased. He lays a claim of his late father's entitlement to the estate of the Deceased. His grandfather told the 1st Applicant's family to live on the said plot. He did not put it in writing. The 1st Applicant has built his house on Plot No. E/Bunyore/Ebulonga/458. The Applicant stated that he and the 3rd Applicant are not the stated beneficiaries of Plot No. E/Bunyore/Ebulonga/458. The beneficiaries are Kevin, Ruth, Phillip and the 2nd Applicant though the 2nd Applicant is not aware. The 1st Applicant is a grandchild of the Deceased and he wishes to have a share in the estate herein.

9. In her testimony, Naomi Toya, the widow of the Deceased denied that the Deceased gave any property to the Applicants. Had the Deceased wished to give land to the Applicants, he would have called her and neighbours to do so in their presence. She further denied ever calling a meeting of her children and grandchildren regarding division of property. The Respondent takes care of her and of all matters and is like the son in the home.

10. On her part, the Respondent testified that the Deceased did not leave a will. The Deceased had 8 children but only 3 are surviving but they left children. One child of the Deceased however died in infancy. The Applicants are children of their late brother. The Respondent confirmed that the children and grandchildren of the Deceased were beneficiaries of the estate. The Deceased together with his wife had distributed pieces of land to his children prior to his demise and all the children of the Deceased were aware of this. Her mother called a family meeting to confirm the distribution. Every child of the Deceased was represented at the meeting except the Respondent and some grandchildren who did not attend. The Respondent stated that all beneficiaries were asked to bring their documents for purposes of this cause but those who did not do so were left out. Only the 2nd Applicant did and that is why he is in the Certificate Confirmation of Grant. The 1st and 3rd Applicants refused to submit their documents. Nelson, a family friend and relative was asked to procure the consent of the Applicants. The Respondent states that she is not in a position to tell whether the Applicants actually appended their signature on the consent. The Respondent further states that there was no intention to disinherit the Applicants. None of the other beneficiaries have complained about the distribution.

11. The Respondent stated that Plot No. E/Bunyore/Ebulonga/458 has the family house. The Deceased's widow and one of the daughters live in that house together with Kelvin Chalingo, a son of the Deceased's last born son who is also deceased. On that property also stands the Applicants' mother's house as well as the 1st Applicant's house. There is also a place for Phillip Chalingo. The Applicants have been living on Plot No. W/Bunyore/Ebusikhale/2042. The house in Jericho, Nairobi is a City Council house and is still in the name of the Deceased. It was the wish of the Deceased that any Chalingo in the city could live in that house. The widow of the Deceased is not included in the list of beneficiaries on account of her advanced age as per the legal advice the Respondent got. All family members at the meeting agreed to the proposed distribution. She was advised that as long as every family was represented the title deeds would read all their names.

12. The Respondent further stated that the Applicants' parents initially lived in Mombasa. Their father used to drink a lot. The family later moved to Kisumu after the Applicant's father was transferred there. After a while the Applicant's mother moved with the children back to Mombasa. Upon the Applicants' father's death, the Respondent moved the family to Bunyore. The Deceased allowed the Applicants' mother to do business on Plot No. W/Bunyore/Ebusikhale/2042 to enable her take care of the Applicants. This plot though registered in the name of the deceased was actually purchased by a daughter of the Deceased Christine, who is now deceased but left 4 children. The Deceased had put up a 1 bedroomed

permanent house and a *mabati* structure on the property. The Applicants' mother lived in the *mabati* structure. Upon the death of the Deceased, the Applicants' mother and the 1st Applicant each built a house on Plot No. E/Bunyore/Ebulonga/458.

13. Parties filed written submissions as directed by the Court. For the Applicant, it was submitted that the Grant should be revoked for the reason that they were not involved in the process of obtaining the Grant and they dispute the 2nd Applicant's signature on the consent. Further, that the widow of the Deceased was not included as a beneficiary of the estate and there were other discrepancies in the list of beneficiaries. The Applicants further seek revocation of the Grant for the reason of non-disclosure that Plot No. W/Bunyore/Ebusikhale/2042 was allocated to them during the lifetime of the Deceased and that the Applicants are in possession of the same. The Respondent has not demonstrated that Plot No. W/Bunyore/Ebusikhale/2042 belonged to Christine Chalingo (deceased) and the Applicants seek allocation of the said to themselves.

14. For the Respondent, it was submitted that the Applicants' claim as dependants of the Deceased though Section 29 has not been invoked. Their claim must therefore fail on account of being brought after the confirmation of grant. It was further submitted that the Applicants are not entitled to the estate of the Deceased as their father predeceased the Deceased and would only be entitled to properties already vested in their father. It was further submitted that no evidence was adduced of any bequest in respect of Plot No. W/Bunyore/Ebusikhale/2042 to anyone. Even if the land had been given to the Applicants then they would have to lodge a distinct action claiming ownership and prove it. It was further argued that if the Applicants' claim that the said property belonged to their father then they ought to file a separate action before the land Court.

15. It was submitted for the Respondent, that the deceased's widow testified that she was unaware of the said property being given to the Applicants by her husband. All the beneficiaries have been taken care of including grandchildren. The Applicants must not be allowed to upset the administration of the estate by making overbearing demands. Not even their mother has supported the Applicants in these demands. It was argued that taking all the evidence together, the revocation of the Grant would be unjustified and the Court was urged to direct that the vesting process, which has been agreed upon by all, be completed. The extended family are mere beneficiaries of the magnanimity of the true beneficiaries.

The law relating to revocation of grants is set out in Section 76(b) of the Law of Succession Act which provides:

“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) ...”

16. The grounds upon which the Applicants seek the revocation of the Grant are that the Respondent did not involve them in the entire process of obtaining the Grant and confirmation thereof. Law of Succession provides the information that shall be included in an application for a grant of representation. Section 51(2)(g) provides 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;”

17. The record shows that the Deceased was survived by his widow, 1 son, 2 daughters 1 granddaughter and 3 grandsons. What has emerged however is that the Applicants are children of a son of the Deceased who had predeceased him. The Respondent did not in her application for grant include the 1st and 3rd Applicants and only included the 2nd Applicant. She acknowledged as much in her testimony. To that extent, the Grant was obtained by the concealment from the Court of something material to the case. What I do not see from the material placed before me is any evidence of fraud in the said exclusion.

18. Further, contrary to the submissions on behalf of the Respondent, the Applicants are entitled under the principle of representation *vide* Section 41 of the Act to take their deceased father’s share in the estate of the deceased. Section 41 of the Law of Succession Act provides for the principle of representation where there is substitution of a grandchild for his or her parent in all cases of intestacy where the parent dies before the intestate as in the instant case. In re the Estate of Joseph Gichuki Riunge (Deceased) [2016] eKLR, Musyoka, J stated:

“However, should the child be survived by their own children, who would then be grandchildren of the dead parent, then it should be the children of the dead child, the grandchildren of the dead parent, who would be considered as the survivors of the parent of their own parent. That is the effect of section 41 of the Law of Succession Act. It is called the principle of representation: the surviving child of a dead child taking the share of their dead parent from estate of the dead child’s parent”.

19. The Applicants have stated that the 2nd Applicant did not sign the consent for confirmation of Grant as he was outside the country at the time he is said to have signed the same. The explanation given by the Respondent is that when the Applicants failed to attend the family meeting, she gave the consent to one Nelson Akwaka to procure the Applicants’ signatures. She was not in a position to tell whether the Applicants appended their signatures but stated that Nelson could be called to testify.

20. Rule 26(2) of the Probate and Administration Rules provides that

“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.”

21. From the foregoing provision, the Respondent was required to obtain the consent of all persons entitled to the estate of the Deceased in equality with of priority to her, at the time of filing the petition for grant. The Applicants being grandchildren of the Deceased are not beneficiaries entitled in priority to or equality with the Respondent who is a daughter of the Deceased. Consequently, their consent was in actual fact not required.

22. On the ground that the widow of the Deceased was not included as a beneficiary of the estate and that there were other discrepancies in the list of beneficiaries, I do note that in her testimony, the widow of the Deceased made no mention of her not being included in the distribution leading the Court to conclude that she was content with the distribution. Further, from the testimony of the 1st Applicant, it is not clear who besides the applicants are the beneficiaries who have been left out in the distribution. The exclusion of the widow of the Deceased in the distribution is not a ground for revocation of the Grant.

23. The Applicants claim that there was non-disclosure that Plot No. W/Bunyore/Ebusikhale/2042 was allocated to them during the lifetime of the Deceased and that the Applicants are in possession of the same. This appears to be the actual reason behind the Application. It is the Applicants’ claim that the Deceased gave this property to them in his lifetime. On the other hand, the Respondent denies that this was so and claims that this property was in fact purchased by Christine the late daughter of the Deceased but that she had the same registered in the name of the Deceased. No evidence was however produced to sustain the claim The widow of the Deceased also denied the claims by the Applicants. She stated that

had the Deceased wished to give land to the Applicants, he would have called her and neighbours to do so in their presence. Although the 1st Applicant states that he claims the property on behalf of his father's family, none of the other Applicants testified. Not even his mother who is alive swore an affidavit to support the claims by the 1st Applicants. In the circumstances, from the material placed before me I am not persuaded that the deceased gave Plot No. W/Bunyore/Ebusikhale/2042 to the Applicants as claimed. As regards Plot No. E/Bunyore/Busikhale/458, it is noted that both the 1st Applicant and his mother have built their houses thereon and moreover that is where the Applicants' father was buried and this is not denied by the Applicants.

24. Having evaluated all the evidence before me, I do find that the Grant was obtained by non-disclosure of material facts namely that the 1st and 3rd Applicants are beneficiaries of the estate of the Deceased. This non-disclosure would be adequate ground for revoking the grant under Section 76 of the Act. Section 76 however is not couched in mandatory terms. The Court may or may not exercise its discretionary power to revoke a grant where it is demonstrated that there were defects in the process of obtaining the grant. In the present case, I am not persuaded to revoke the Grant as I have seen no fraud on the part of the Respondent. Given that the 1st and 3rd Applicants have been excluded in the distribution, the justice of the case requires that they be included in the distribution of the estate of the Deceased. I do hereby set aside the Certificate of Confirmation of Grant and direct that a fresh Certificate of Confirmation of Grant do issue to include the 1st and 2nd Applicants as beneficiaries of Plot No. E/Bunyore/Busikhale/458. Each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 24th November 2017

M. THANDE

JUDGE

In the presence of: -

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

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

.....**Court Assistant**