



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI LAW COURTS)

SUCCESSION CAUSE NO. 2119 OF 2014

BAIYA KAMAU APPELLANT/APPLICANT

VERSUS

HEZEKIAH WAITITU BAIYARESPONDENT

RULING

1. The application coming for consideration is the notice of motion dated 31/7/2014. The application is brought under Section 76 of the Law of Succession Act, rule 44(1) of the Probate and Administration Rules and Order 42 Rules 1, 2, 3, & 5, rules 1 and 10 of the Civil Procedure Rules. The applicant seeks the following orders;

i. Spent.

ii. That the applicant herein be joined in this succession cause as a beneficiary.

iii. That the grant of letters of administration for the estate of Baiya Warukira (deceased) issued on 26th August 2013 be revoked on the ground that both were obtained fraudulently and without disclosure of material facts.

iv. That an injunction do issue restraining the respondent by himself agents or servants or in any other manner whatsoever from dealing in any manner with that piece of land known as LR. No. Kabete/Kibichiko/762 and LR. No. Kabete/Kibichiko/168 or any subdivisions thereof.

v. That the costs of this application be provided for.

2. The application is based on the following grounds;

That the grant was obtained fraudulently; that the applicant is one of the beneficiaries of the deceased's property and was not informed about the proceedings herein and was kept in the dark; that the applicant is the beneficiary of the estate but was kept off the proceedings; that unless the application is granted the applicant stands to be disinherited from what is legally theirs as the respondents have already subdivided and sold part of the suit premises and will continue to do so unless stopped by the honourable court.

3. The application is supported by the supporting affidavit. He depones that the deceased was his grandfather who died on 26th March 1990 and letters of administration intestate were granted to his uncle Hezekiah Waititu Baiya. He avers that the said grant was obtained fraudulently by making and/or not

disclosing facts; that some beneficiaries were left out, that he was not notified of the filing of the petition and neither he nor his mother and brother were consulted on manner of filing the same. That the deceased was also survived by a widow Esther Wambui Watitu and 4 sons Antony Peter Kanundia, Hezekiel Waititu Baiya, James Kibiko Thairu and his late father John Kamau Baiya who was the 1st born son to the deceased. That the deceased left behind two prime properties LR. No. **Kabete/Kibichiko/762** and **LR No. Kabete/Kibichiko/168**. He is apprehensive that his uncle might only transfer the property to his siblings leaving him and his family out unless stopped by an order of the court. He seeks to have the grant revoked to facilitate a more open and equitable distribution of the deceased's estate.

4. The respondent filed his replying affidavit on 21st October 2014 opposing the said application. He avers that the application is only meant to delay and scuttle the process adding that the applicant is not a direct beneficiary to the deceased's estate adding that his late brother's estate was administered by the applicant's brother Simon Mburu Kamau adding that the family has been involved in the process. That the applicant's mother's objection to the making of the said grant was dismissed by the court and she was advised to object should the family be left out when the parties confirm the grant and this application is Magdaline's son attempt to seek an appeal through the back door.

5. Parties filed written submissions, which I have read and considered them; I have also gone through Succession Cause No. 67 of 2013 filed at the Kikuyu court. There was a consent from the deceased's widow and her two sons Antony Peter Kamondia and James Kibiku Thairu consenting to the respondent taking out the grant of letters of administrations for the administration of the deceased's estate. The affidavit in support of the petition for letters of administration names 4 **beneficiaries being Esther Wambui Watitu, Antony Peter Kamondia, Hezekiel Watitu Baiya and James Kibiku Thairu**. I note that the same does not make any mention of the **late John Kamau Baiya**, the applicant's father. The respondent must take note of the provisions of Section 51 of the Law of Succession Act Cap 160 which provides that ***"in an application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.....(g) in cases of total or partial 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"***;

6. However i noted that the grant has not been confirmed in the lower court, the applicant's mother the intended objector was advised by the Learned Magistrate that the grant had not been issued and that the best course would be to protest to the application for confirmation of grant if she will be left out. The petitioner was ordered to serve the applicants mother with the application for grant as and when filed. Having perused the said proceedings and confirmed from the court record that the grant has not been confirmed, I agree with the submissions of the respondent that the application before the court is premature. The respondent should proceed to apply for confirmation of the grant in the lower court. The application is dismissed. Since this is a family matter each party shall bear its own costs. The Deputy Registrar to forthwith return Succession Cause no. 67 of 2013 to Kikuyu courts to enable the respondent seek confirmation of the grant. It is so ordered

Dated, signed and delivered this 29th day of **January** 2016.

R. E. OUGO

JUDGE

In the presence of;

.....**For the Applicant**

.....**For the Respondent**

Ms. Charity Court Clerk