



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
SUCCESSION CAUSE NO. 416 OF 2009
IN THE MATTER OF THE ESTATE OF
JAMES MOGIRE (DECEASED)

JULIUS OGETO MOGIRE PETITIONERS

HERCULAS NYAMWEYA MOGIRE

VERSUS

ISAAC NYAMBATI MOGIREOBJECTOR

RULING

1. The summons for revocation of grant dated 11th January 2011, were taken out by **Isaac Nyambati Mogire** (herein, objector) against **Julius Ogeto Mogire** and **Arculus Nyamweya Mogire** (herein, petitioners) for orders that the grant of letters of Administration issued to the petitioners and confirmed on the 16th July 2009 be revoked and/or annulled and that a fresh grant of letters of administration be issued to the objector.

The grounds for the application are contained in the body of the necessary chamber summons and amplified by the averments in the supporting affidavit dated 11th January 2011, deposited by the objector.

The petitioners opposed the application on the basis of the averments contained in their replying affidavit dated 24th February 2011, deposited by the second petitioner, Arculus of Herculus Nyamweya Mogire.

2. The application proceeded by way of “viva-voce” evidence and in that regard the objector/applicant testified in support of his case and called two witnesses i.e. **Johnson Masese Umbui (PW 2)** and **Vitalis Tinega Kiraita (PW 3)**.

Basically, the objector’s case was that the deceased herein, James Mogire, was his father while his mother was Yunes Moige who was one of the deceased’s two wives. The other wife was called Sabina and was the mother of the petitioners. She (Sabina) was therefore his stepmother and the petitioners, his step-brothers. He thus contended that he was a son of the deceased hence a beneficiary of his estate a fact which was concealed by the petitioners while petitioning for grant of the disputed letters of administration.

3. The objector's witnesses (PW 2 & PW 3) confirmed that the objector's mother (Yunis or Yunes or Eunice) was the first wife of the deceased and that the objector was their son. They also confirmed that the petitioners are also sons of the deceased with his second wife. However, the petitioners deny that the objector is a son of the deceased and therefore their step-brother. Their case is that the objector's mother was indeed married to the deceased but the marriage was dissolved in 1956 after the objector's mother failed to bear a child with the deceased and filed a divorce cause at the Resident Magistrate's Court at Kisii being Divorce Cause No. 2 of 1956 in which she claimed that the deceased was impotent.

The petitioners therefore contend that the objector is not a son of the deceased as his mother divorced their father before he was born. It was after the divorce that their father married their mother, Sabina.

4. From all the foregoing evidence as well as the submissions tendered by both parties through their respective advocates, it is apparent that the issue of the objector's paternity is the key to determining whether or not the grant issued to the petitioners should be revoked and/or annulled. Under S.76 of the Law of Succession Act, a grant may be revoked if it was obtained by concealment from the court of a material fact. Herein, the fact alleged to have been concealed by the petitioners is the objector's paternal lineage which thereby excluded him as a beneficiary of the estate of the deceased.

5. If indeed the objector is the son of the deceased and was excluded as a beneficiary of his estate, the grant obtained by the petitioners would invariably stand out for revocation and/or annulment.

The burden to establish the objector's paternity lay with the objector in view of the claim by the petitioners that he was not a son of the deceased and was only taken in as an orphan by the deceased and treated as an employee of the deceased. The petitioners concede that the objector's mother was once married to the deceased but contend that the two were unable to bear a child and that is why the objector's mother divorced the deceased for allegedly being impotent and therefore unable to consummate their marriage.

6. The evidence led by the objector and his witnesses was incapable of establishing even on a balance of probabilities that the objector was sired by the deceased which fact was put into doubt by the court proceedings annexed to the petitioner's replying affidavit and marked as exhibit "HNM 1". The said proceedings clearly indicate that the deceased did not sire any child with the objector's mother during their marriage. The proceedings also indicate that the objector was sired by somebody else after his mother divorced the deceased. This being the position, it was farfetched to expect that the petitioners would include the objector as a beneficiary of their late father's estate. His exclusion did not in the circumstances amount to a concealment of a material fact by the petitioners.

7. The most effective way of establishing paternity is through a blood or DNA test but it would appear that the parties were not keen on that and decided to give it a backseat.

Be that as it may, evidence was adduced herein by the petitioners suggesting that although the objector was not a son of the deceased he was nevertheless taken in as an orphan by the deceased and treated as a worker.

Being an orphan, the objector must have depended on the deceased when he was taken in. Rather than apply for revocation of the grant issued to the petitioners and have it re-issued in his name, he should have applied for reasonable provision from the estate of the deceased pursuant to S.26 of the Law of Succession Act.

8. For all the foregoing reasons, the present application is lacking in merit and is hereby dismissed with each party bearing their own costs.

Ordered accordingly.

J.R. Karanjah

Judge

[Read and signed this 14th day of June 2016]