



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. SUCCESSION APPLICATION NO. 407 OF 2015

IN THE MATTER OF THE ESTATE OF REUBEN MUSEMBI NZAU (DECEASED)

STEPHEN MUTUA KASEMBI.....APPLICANT

VERSUS

SAMUEL MAKAU KASEMBI.....1ST PETITIONER

DAVID MUSYOKI REUBEN.....1ST PETITIONER

RULING

The Summons

The Applicant herein is a son of the deceased Reuben Musembi Nzau (hereinafter referred to as “the deceased”) who died on 20th September 2013. The Applicant has filed a Summons for Revocation dated 29th June 2015 seeking a revocation of the grant of letters of administration intestate issued to Samuel Makau Kasembi and David Musyoki Reuben, the Petitioners herein. The Petitioners who are also sons of the deceased, were issued with the said grant with respect to the estate of the deceased on 17th March 2014 by the Kangundo Senior Resident Magistrate’s Court, in Succession Cause No. 1 of 2014. The Applicant also sought an order for stay of proceedings in the said Kangundo SRM Succession Cause No. 1 of 2014, pending the hearing and determination of his application, which order was granted by this Court on 1st July 2015.

The grounds for the Applicant’s application are set out in the body of the said summons. and in a supporting affidavit he swore on 29th June 2015 that was also filed in Court. The Applicant has three grounds. The first is that the Petitioners concealed material facts when obtaining the grant, which was obtained by means of untrue allegations. It was alleged in this respect that the deceased was survived by one wife and ten children, and that the Petitioners failed to include all the children of the deceased when petitioning for the grant, and that they were also not elected as Petitioners. The Applicant relied on a letter dated 20th June 2016 from Wellington Ndawa, the Chief of Matungulu Location, that listed ten children of the deceased which he annexed to his affidavit. He also annexed a copy of the Petition for grant made in Kangundo SRM Succession Cause No. 1 of 2014.

Further, that the Petitioners failed to inform or consult the beneficiaries of the estate as regards the petition, which was filed secretly with the ill motive of disinheriting the said beneficiaries. It was alleged that the Petitioner has since secretly sold the only asset of the deceased. The Applicant annexed copies of summons by the local administration and a demand letter sent to the Petitioners in this regard.

The second ground is that the Petitioners forged the Applicant's signature to obtain the grant of letters of administration, yet the Applicant never participated in, and was not aware of the Petition until he was served with an application dated 28th May 2015 alleging that he had interfered with the deceased's estate, which he annexed. He however did not annex any document to show that his signature was a forgery.

The last ground is that the properties listed in the summons for confirmation of grant do not form part of the deceased's estate. The said summons for confirmation of grant dated 14th October 2014 was filed in Kangundo SRM Succession Cause No. 1 of 2014 on 16th October 2014, and a copy was annexed by the Applicant.

The Petitioners did not file any response to the Applicant's application, despite being served with the application. Affidavits of service were filed in Court in this regard.

This Court directed that the said application be heard and determined by way of affidavit evidence, and the learned counsel for the Applicant relied on the pleadings filed. The Court also called for the original file for Kangundo SRM Succession Cause No. 1 of 2014 for perusal.

The Issues and Determination

I have read and carefully considered the pleadings filed by the Objectors. The issues to be decided are firstly, whether the Petitioners are culpable of non-disclosure of material facts, untrue statements and forgery as alleged; and secondly whether the Petitioners' grant of letters of administration should be revoked.

Section 76 of the Law of Succession Act (Chapter 160 of the Laws of Kenya) which provides as follows in this regard:

“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) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

The Applicant provided evidence of a letter dated 20th June 2015 from the Chief of Matungulu location listing ten children of the deceased, five of whom are deceased. I have perused the Petition for grant of letters of administration and affidavit in support filed in Kangundo SRM Succession Cause No. 1 of 2014 on 13th January 2014, and note that another letter from the Assistant Chief of Wambusu Sub-Location dated 28th December 2013 was filed therein that listed four sons of the deceased, including the Applicant. A perusal of the summons for confirmation of grant dated 2nd October 2012 filed in the said succession cause also shows that the said four sons were the only ones included as beneficiaries of the deceased's estate.

The Petitioners have not contested or disputed the averments by the Applicant, and in this event it is then the position that one married daughter of the deceased was excluded from the succession proceedings in Kangundo SRM Succession Cause No. 1 of 2014, as were the survivors of the dead sons and daughters of the deceased. It is thus my finding that there was material disclosure on the part of the Petitioners in failing to disclose the existence of other beneficiaries legally entitled to inherit the deceased estate. The grant issued to the Petitioners is thus liable to revocation.

As regards the ground that the Applicant's signature is a forgery, this is an allegation that must be strictly proved by forensic evidence from a document examiner, particularly since the allegation borders on an accusation of commission of a criminal offence, as was held in Re Micheal Mwangi Githinji (Deceased), (2009) e KLR and In Re the Estate of P.W.M. (Deceased), (2013) e KLR. No such forensic evidence was tendered by the Applicant.

Lastly, the Applicant did not tender any evidence to show that the properties in the summons for confirmation of grant dated 14th October 2014 that was filed in Kangundo SRM Succession Cause No. 1 of 2014 on 16th October 2014 do not belong to the deceased. In any event this is an issue to be addressed during confirmation proceedings by way of affidavit of protests, as provided for by Rule 41 (6) and (7) of the Probate and Administration Rules, which is the appropriate procedure when one is contesting distribution proposals made in a summons for confirmation of grant.

The outstanding prayer in the Applicant's Summons for Revocation of Grant dated 15th July 2013 is therefore allowed for the reason of material non-disclosure about the beneficiaries of the deceased, and it is accordingly ordered as follows:

1. The grant of letters of administration intestate issued to Samuel Makau Kasembi and David Musyoki Reuben on 17th March 2014 in Kangundo SRM Succession Cause No. 1 of 2014 with respect to the estate of Reuben Musembi Nzau (Deceased) be and is hereby revoked.
2. The Applicant and Petitioners are at liberty to commence fresh administration proceedings with regards to the estate of Reuben Musembi Nzau (Deceased).
3. There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 27th day of July 2016.

P. NYAMWEYA

JUDGE