



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.16 OF 1999

IN THE MATTER OF THE ESTATE OF HEZRON MWANJE SHISANYA (DECEASED)

ISAAC MAHERI MWANJE..... APPLICANT

VERSUS

VERSUSLABAN MWANJE..... RESPONDENT/DEFENDANT

HEZRON MWANJE..... RESPONDENT/DEFENDANT

RULING

1. This is a ruling on summons for revocation of Grant of representation. On 13th January 1999, Laban Musonye Hezron Mwanje, (the petitioner), petitioned this court for grant of letters of administration intestate for the estate of the late Hezron Mwanje Shisanya, (the deceased) who died on 4th October, 1989. A grant of representation intestate was made to the petitioner pursuant to that petition on 9th March, 2012 and issued on 13th March 2012. In the petition for grant of representation, the petitioner had indicated that he was the sole surviving beneficiary to the estate.

2. By summons dated 5th December, 2012 and filed in court on 7th December, 2012, Isaac Maheri Mwanje, sought revocation and annulment of the Grant of representation made to the petitioner, on the grounds that the Grant was obtained fraudulently, in that the petitioner failed to disclose to the court that there were other beneficiaries to the estate, and that consent of the other beneficiaries was not sought or obtained. The petitioner was also accused of using the Grant made to him to have the land registered in his name and thereafter failing to distribute the estate to the beneficiaries.

3. Upon being served, the petitioner filed a replying affidavit sworn on 14th May, 2013, and filed in court on the same day. The petitioner admitted that the applicant and one Nathan Shisanya Shiruzi are his brothers, that the land in question, namely, Parcel Number Idakho/Iguhu/1601 belonged to the deceased, and that their deceased was the father. However, the petitioner deposed that both the applicant herein and Nathan Shisanya Shiruzi, had been given land by their father during his lifetime namely Kakamega/Iguhu/1389 and Kakamega/Iguku/1388 respectively, while the petitioner was given Parcel number Idakho/Iguhu/1601, hence his brothers have no claim over that parcel of land. According to the petitioner's affidavit, he did not include his other brothers in the succession cause because they had no interest in the land the subject of the cause.

4. In a short response to the petitioner's replying affidavit, the applicant an affidavit sworn on 13th September, 2013, deposed that the petitioner was also given his own parcel of land known as Kakamega/Iguhu/1602, and denied the petitioner's assertion that he had been given Parcel No.1601. He attached an extract of the register to Parcel No.1602 to confirm this.

5. In another affidavit sworn on 5th August 2014 and filed in court on the same day, the petitioner deposed that indeed he is registered as proprietor of Parcel No. Kakamega/Iguhu/1602. He also deposed that during their father's lifetime, he informally subdivided Parcel No.1602 into two portions of 2.5 acres and 0.5 acres; giving the applicant 2.5 acres while the petitioner was given 0.5 acres of that land. As a result, the applicant has 2.5 acres from 1602 and 2 acres from Parcel No.1389.

6. Although no directions were given to that effect, summons for revocation of Grant proceeded by way of oral evidence. Both the applicant and the petitioner gave their testimonies and called witnesses. It was clear from their evidence and that of other witnesses, and documents availed to court that there were other beneficiaries left behind by the deceased. It was also a fact that the deceased left behind some property registered in his name, namely, Parcel Number Kakamega/Iguhu/1601.

7. I have to state here that what is before court is summons for revocation of Grant brought under **section 76** of the law of Succession (Cap 160 laws of Kenya) and not summons for confirmation of Grant followed by a protest. The duty of the court therefore is to determine whether the application meets the threshold for revocation of the Grant under **section 76** of the Act. I also note that there is no other prayer in the summons before court for consideration hence the court has to consider and determine the summons before it on the basis of the only prayer sought that is revocation and/or nullification of the grant issued herein.

8. **Section 76** under which the summons is premised provides:-

“A grant of representation, whether or not confirmed, may at anytime 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 as made in ignorance or inadvertently,

(d) that the person 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 order or allow:

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.”

9. **Section 76** gives the court power to revoke a grant of representation at any time so long as the circumstances enumerated under that section exist – see **Matheka & Another v Matheka** [2005] KLR 445. The complaint by the applicant is that the grant was obtained fraudulently, and that the applicant did not obtain consent from his brothers when making the petition for grant of representation. This complaint falls under **section 76(b)** where a grant is obtained fraudulently by the making of a false statement or by

the concealment from the court something material to the case, during the filing of the petition for grant of representation.

10. I have perused the petition for Grant of representation filed by the petitioner on 13th January 1999. In his affidavit in support of the petition, (form P&A 5), at paragraph 4, the petitioner has indicated that he was the only person left surviving the deceased. The applicant has however stated in his affidavit in support of the summons for revocation of Grant, that the deceased left behind three sons and five daughters. The petitioner has admitted this fact in his replying affidavit. The admission by the petitioner is a confirmation that he obtained the grant fraudulently by concealing from the court the fact that the deceased had other surviving children. **Section 51** of the Act provides where relevant as follows:-

Section 51 provides:-

“Every application shall have information as to –

a ---

b ---

c ---

d ---

e ---

f ---

(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 or his or hers, then deceased.”

The petitioner petitioned a grant of representation intestate which means the deceased died intestate, that is, without leaving behind a will.

11. That being the case the petitioner was under duty when presenting a petition for grant of representation to disclose to the court all the children left behind by the deceased. He was also required to obtain consent from the surviving beneficiaries allowing him to petition for the grant. Failure to do so he was concealing relevant material from the court and a grant of representation obtained under such circumstances, was obtained fraudulently.

In any case paragraph (4) form P&A 5) (affidavit in support of the petition), uses the words “**the deceased died intestate and left the following surviving him/her**”, not the deceased died intestate and left the following ‘beneficiaries’ One may be left surviving the deceased but may not be a direct beneficiary of the estate. The issue of entitlement to the estate is determined at the time of confirmation of the grant when each beneficiary’s share is determined. The law is also clear that any gift intervivors to the beneficiaries will be taken into account during distribution. That property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house. (**see section 42**)

12. The petitioner has tried to justify his omission of his other siblings from this cause saying that they were given land by the deceased hence they were not entitled to benefit from the estate in this cause. However, disclosing those left behind by the deceased does not mean they will automatically benefit from the estate at that stage. It is to enable the court to know those who may have something to say about the estate.

13. It is an undisputed fact that the deceased made **gift intervivors** to the petitioner as well as his two

brothers. From the record, the three parcels of land were registered in their names on the same date. Those gifts were to be considered during distribution of the estate and the petitioner had no excuse to leave out his brothers when petitioning for a grant of representation yet he had also benefited from their father during their father's lifetime.

14. The applicant has also complained that the petitioner had the land registered into his name as soon as he had the grant of representation intestate made to him. A grant of representation does not confer proprietorship to the administrators. A grant is made to him on the undertaking that he will faithfully administer the estate and render true account when called upon to do so. He is in a fiduciary position until the estate is distributed upon confirmation of the grant and the estate wound up.

15. Registration of the estate into his name did not vest ownership to him. He was under duty to apply to have the Grant confirmation within six (6) months after the making of the grant. It would appear that the petitioner thought he had acquired interest in the estate once the land was registered in his name. He was mistaken..

On the whole, I find that the application is well founded and must succeed. This property known as Parcel Number Kakamega/Iguhu/1601 formed the estate of the deceased and the applicant and his brother were erroneously omitted from the petition as children left behind surviving the deceased.

16. For the above reasons, I make, the following orders:-

1) The Grant of representation intestate made to Laban Musonye Hezron Mwanje, the petitioner herein on 9th March, 2012 and issued on 13th March, 2012 is hereby revoked and annulled.

2) The registration of Title Number Idakho/Iguhu/1601 in the name Laban Musonye Hezrone Mwanje on 23rd March, 2012 is hereby cancelled and ownership reverts into the name of Hezron Mwanje – Deceased.

3) A new Grant of representation intestate is hereby made in the joint names of Laban Musonye Hezron Mwanje and Isaac Maheri Mwanje.

4) The two administrators do file summons for confirmation of Grant without delay, and in any event, not later than sixty (60) days from the date of this ruling.

Dated and delivered at Kakamega this 20th day of July, 2016.

E.C. MWITA

JUDGE