



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
SUCCESSION CAUSE NO. 2 OF 2007

In the matter of the Estate of JUSTUS MUGO CHOMBA (Deceased)

JAMES MUNENE MUGO.....PETITIONER

VERSUS

JOHN CHOMBA.....1ST RESPONDENT

STEPHEN NJIRU.....2ND RESPONDENT

J U D G M E N T

This cause was filed by James Munene Mugo on 5/1/2007 in respect of the estate of Justus Mugo Chomba who died on the 19th January 1994. The petitioner named eight children as survivors of the deceased including himself and the protester all aged between 39 to 54 years at the time of filing the cause. There are three sons and four daughters. The only asset of the deceased was LR. NO. GICHUGU/SETTLEMENT SCHEME 278 measuring 17.80 acres.

The petitioner was issued with letters of administration intestate on 19th November 2009. On 30/1/2008, he filed summons for confirmation of grant. In his supporting affidavit sworn on 28/1/2008 the administrator proposed distribution of the estate.

GICHUGU/SETTLEMENT/SCHEME/278 as follows:-

James Munene Mugo	5.90 acres
John Chomba Mugo	6.00 acres
Stephen Njiru Mugo	5.90 acres

The two beneficiaries lined up with the administrator in his affidavit John Chomba Mugo and Stephen Njiru Mugo jointly filed summons for revocation of grant citing the following reasons:-

- (a) That the grant was obtained fraudulently and by concealment of something material to the cause;
- (b) That the respondent used forged documents to obtain the grant;
- (c) That the signatures and identity card numbers of the beneficiaries were forged.

In their oral evidence and in the supporting affidavit, the applicants said that the administrator is not a son of the deceased as he described himself. That the death certificate and particulars of beneficiaries in

the rights of an adopted child in relation to the adopting parents. This is the issue that this court has to decide later in this judgment.

It is alleged that the administrator failed to disclose material particulars to the court when he obtained the grant. In Form P&A 5 the administrator named all the children of the deceased including himself. However, he gave the wrong identity card numbers of the beneficiaries which was confirmed in evidence. There is evidence to the effect that the administrator went to the chief and to the District officer of the area after the death of the deceased. The chief of the area was summoned to court by the judge so that he could confirm the heirs of the deceased. He said the applicants were the biological sons of the deceased while the administrator was the adopted son. The chief further testified that he met the family of the deceased and recommended that the 1st applicant John Chomba Mugo should take the role of the administrator in the proposed succession proceedings. The chief included the administrator as a beneficiary in the deceased's estate in his letter dated 27th November 2006.

It appears the administrator was in a hurry to file the succession cause in fear of losing his interest which led him to give wrong information in regard to the identity card numbers of the beneficiaries. There is a possibility that his action was influenced by hostility at home in regard to his rights of inheritance. All the other particulars were correct except the identity card numbers of the beneficiaries. Forgery is the act of fraudulently making a false document or altering a real one to be used as if genuine. The act of the administrator amounted to giving the wrong information of the identity card numbers of the beneficiaries but he did not commit any forgery.

What information did the administrator conceal? The applicant's claim that he ought to have disclosed that he was an adopted son and not a biological son of the deceased. An adopted child is a child of the deceased. The definition of children for purposes of succession is to be found in Section 3(2) of the Law of Succession Act

Section 3(2)

“references in this Act to “child” or “children” shall include a child conceived but not yet born(as long as that child is subsequently born alive) and, in relation to a female person, a child born to her out of wedlock, and, in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.”

The petitioner was accepted by the deceased as a child of his own upon whom he assumed permanent responsibility. He is a male child as provided by the said provision. From the evidence of the applicants, he was adopted by their father in 1974 at the tender age of 7 years. His mother was alive and it is said she left the child and went to stay in Embu never to return again. The deceased took the young boy to school and met all his education and other expenses. The deceased stayed with the child until the death of the deceased which was 20 years after adoption in 1994. At that time the petitioner was about 37 years. He had been shown a place to live and to cultivate. It was not disputed that upon the death of the deceased, his three sons including the petitioner shared his livestock and other movable assets equally.

I come to the conclusion that the petitioner being an adopted child is a child of the deceased herein for purposes of succession as provided by the law.

The applicants have accepted him as a beneficiary and given him a share of the estate in their affidavit of protest. The chief recognized him as a beneficiary in his letter. As to the share he should get in the estate, that is a matter of the family to decide.

The applicant's alleged that the death certificate was forged but no evidence was adduced to support this allegation.

The petitioner was accused of filing this succession cause without the consent of the other beneficiaries. In his evidence he was not able to convince the court to the contrary. The issue is whether this act

amounts to fraud or to concealing material particulars under Section 76 of the Act. The two sons of the deceased were named as beneficiaries in for P&A5 by the petitioner. This demonstrates that he had no intention to disinherit them. In his affidavit in support of summons for confirmation of grant, the petitioner has given the applicants and himself equal shares in the deceased's estate.

However the names of the daughters of the deceased who were said to be all married were conspicuously missing in both the list of beneficiaries and in the list of distribution. The law requires that all the survivors of the deceased and all the beneficiaries be included in the succession cause. The inclusion is intended to reflect the correct position of the estate of the deceased in so far as beneficiaries are concerned. The petitioner knew that the deceased had daughters whom he had grown up with in the same home and family. Even if the daughters are not interested in shares in the estate, it is a requirement of the law that their names be included.

Section 76 of the Act provides for ground upon which a grant may be revoked as follows:-

- (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;*

I find that this cause was filed without the consent of all the beneficiaries. It is correct to construe this conduct to mean that the petitioner intended to conceal the existence of the process from the other beneficiaries with the intention of taking advantage over them. The omission of the names of some of the beneficiaries and filing the cause without informing other beneficiaries amounts to obtaining the grant on concealment of something material to the cause which is covered by Section 76 of the Act.

For the foregoing reasons I allow the summons for revocation in the following terms:-

1. *That the grant issued to James Munene Mugo on 19th November 2007 is hereby revoked.*
2. *That a fresh grant to issue in the joint names of the three sons of the deceased; namely*
 - (a) *John Chomba Mugo*
 - (b) *Stephen Njiru Mugo*
 - (c) *James Munene Mugo*
3. *That the administrators to file an application for confirmation of grant for distribution of the estate of the deceased within a period of sixty (60) days.*
4. *That this being a succession cause, each to bear their own costs.*

DELIVERED, DATED AND SIGNED AT EMBU THIS 25TH DAY OF FEBRUARY, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Mr. Okwaro for Ken Githinji for petitioner

Respondents in person

All parties present in court

F. MUCHEMI

J U D G E