



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

SUCCESSION CAUSE NO. 2340 OF 2012

IN THE MATTER OF THE ESTATE OF AMAR KAUR MATHARU– DECEASED

KAMALJEET SINGH MATHARU.....1ST APPLICANT

TARLOCHAN SINGH MATHARU.....2ND APPLICANT

VERSUS

SURINDER KAUR DEVGUN..... RESPONDENT

RULING

1. On 9th May 2014 the applicants filed the present application under **section 76(a) and (b)** of the **Law of Succession Act (Cap 160) and rule 44(1)** of the **Probate and Administration Rules** to have the grant of letters of administration intestate issued to the respondent on 31st January 2014 revoked on the grounds that the same had been fraudulently obtained; the consents of the dependants had not been sought or obtained prior to the filing of the petition; they had not been informed prior to the filing of the petition; the respondent had failed to disclose that the deceased had left a written will; and that all the assets of the deceased had not been indicated. The affidavit in support of the application was sworn by the 2nd applicant.
2. The deceased AMAR KAUR MATHARU died on 5th April 2012. There is no dispute that she left eight beneficiaries who include the applicants and the respondent. The other beneficiaries are Charanjit Kaur Deogun, Mohinder Kaur Gahir, Ajeet Kaur, Sukhdev Singh Matharu and Paramjeet Singh Matharu. All the beneficiaries were disclosed in the letter of chief dated 12th September 2012 that was filed along with the petition on 1st October 2012. It is also true that when the respondent swore the affidavit in support of the petition she named all these beneficiaries. The deceased was a widow left by the late JAGAT SINGH SADA RAM who died on 25th June 2008 leaving a written will in which she was the sole executor. She was granted probate of written will on 11th May 2009. The beneficiaries are the children she left when she died on 5th April 2012.
3. When the respondent filed this petition she obtained the consents of the beneficiaries, except those of the applicants. She got the applicants to be cited as a result of which they filed an objection to her being issued with a grant. That objection that was filed on 20th April 2013 was together with the affidavits in support struck out on 31st January 2014 by Justice Musyoka for being filed out of time. It was at that point that the Judge ordered that the respondent be granted letters of

administration.

4. **In the Matter of the Estate of Ngaii Gatumbi alias James Ngaii Gatumbi (deceased) Nairobi HC Succession Cause No. 783 of 1993** it was held that proceedings to obtain a grant are considered defective in substance where the grant of letters of administration are issued when beneficiaries who were equally entitled to apply for the grant were not notified of the petitioner's intention to apply for the grant; their consent to the petitioner applying alone was not obtained; and no citation was served upon them. The record is clear that the respondent wrote to court on 22nd April 2013 complaining that the applicants were uncooperative and were unwilling to provide their consent. This is when the court asked that they be cited, and that was done. The proceedings would not therefore, under **section 76(a)**, be defective as there was demonstrated effort on the part of the respondent to get her brothers on board. This is borne out by the replying affidavit that was sworn by the respondent in supporting this application.
5. There is the allegation that the deceased left a written will, and therefore that what should have been sought was a grant of probate and not a grant of letters of administration intestate. The respondent's response was that the deceased left a will but that it was not in respect of the property mentioned in the petition. On record, there is an affidavit sworn by the respondent in response to the application filed on 7th August 2014 by the applicants seeking to have summoned her advocate Mr. K.S. Bhullar to produce the will. In the affidavit sworn on 10th September 2014 she stated in paragraph 7 that:-

“7. THAT my deceased mother namely Amar Kaur Matharu told me she had a Will which was drafted by a lawyer in India regarding House No. 8 Parchowal Road, District of Ludhiana, Punjab India however I had never seen the said Will at the time of filing the Petition for letters of Administration intestate but upon subsequent visit to India I managed to get an English translated version of the said Will which is annexed herewith and marked SKD 2.”

6. I have looked at paragraph 6 of the affidavit sworn by respondent on 28th September 2012 in support of the petition. In the list of assets this house in India is not included. It was not the subject of the petition. The petition is therefore procedurally not defective. The same for the grant that was issued to the respondent.
7. The applicants claimed that the respondent was guilty of fraud because she had annexed consent (Form 38) dated 28th September 2012 that had allegedly been signed by Mohinder Kaur Gihir, Ajeet Kaur and Paramjeet Singh Matharu in the presence of K.S. Bhullar Advocate, which was not true. Then that, the consent to the making of a will (Form 38) annexed to the application by the respondent to support the petition was said to have been signed by Charanjit Kaur Deogun, Mohinder Kaur Gihir, Ajeet Kaur, Sukhdev Singh Matharu and Paramjeet Singh Matharu between 10th October 2012 and 25th October 2012 when the petition was filed in court on 1st October 2012. In answer, the respondent swore as follows:-

“10. THAT thereafter I filed the petition for Grant of letters of Administration on 1st October 2012. All procedures for petitioning were adhered to and the same was approved and a notification was published in the Kenya Gazette Vol. CXV No. 22 of 15th February 2013 (attached and marked SKD is a copy of the Gazette Notice). The consents of all the Beneficiaries in Form 38 were genuinely obtained from them.

11. THAT the petition was filed earlier on 1st October, 2012 because I was the only one required to sign it before it could be filed in Court and I was readily available since I reside in Kenya unlike the consents of Form 38 which took us long to obtain as most of the beneficiaries are residents of the United Kingdom hence the delay which resulted in them being filed in court on 22nd April 2013.”

8. Ideally, the consents of all the beneficiaries ought to have been filed at the time of the petition. According to the respondent, and this is the complaint of the applicants, the consent came subsequently. The respondent has explained why this happened. The beneficiaries who gave their

consents are not claiming that they did not in fact consent, or that the signatures attributed to them are a forgery. I find that, in substance, all beneficiaries, except the applicants, consented to the filing of the petition, and therefore no fraud has been proved against the respondent.

9. The applicants claimed that the respondent deliberately omitted a number of properties from the list of assets of the deceased, and that the omission was done to deceive the court as to the true extent and value of the estate of the deceased. The omitted assets were:-

- a. L.R. No. 209/5373 Mukapati Road, South C;
- b. House No. 8 Parchowal Road, District of Ludhiana, Punjab, India; and
- c. Rent on LR No. 209/8605, Lungalunga road, Nairobi.

I have found that House No. 8 Parchowal Road, District of Ludhiana, Punjab, India was the subject of a written will. It was therefore rightly omitted from this intestate succession. The respondent's affidavit in reply stated that the assets she listed were the ones that were known to her at the time she was filing the petition, and that when any other property is brought to her attention she will include it in the application for confirmation. I note that L.R. 209/18605 is in the list of assets in the petition. That leaves only LR 209/5373 Mukapati Road, South C. Under section 71(2) of the **Act**, during confirmation, the parties will have to tender evidence regarding all the assets of the deceased and all the beneficiaries. The Court will determine the share of each beneficiary in the estate. I find that it has not been proved that the omission to name all the properties in the estate was deliberate, or intended to deceive or defraud. Nonetheless, I direct the respondent to amend the application for confirmation that was filed on 6th June 2014 to include all the property of the deceased.

10. In conclusion, I find no merit in the application by the applicants and dismiss it. It is clear that the sharing of the estate is what is the real bone of contention, and that will be resolved during the hearing of the application for confirmation. In this regard I ask that within 30 days from today the applicants do file affidavit(s) indicating how they want the estate of the deceased shared among the beneficiaries. Parties will then list the matter for directions.

11. This is a family dispute. Each side shall bear own costs.

DATED and DELIVERED at NAIROBI this 28th April 2015.

A.O. MUCHELULE

JUDGE