



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2229 OF 2010

IN THE MATTER OF THE ESTATE OF ELIZABETH WANJIKU MUNGE (DECEASED)

RULING

1. This matter relates to the estate of Wanjiku Munge alias Elizabeth Wanjiku Munge who died intestate on 12th June 2002.
2. A petition for representation to her estate was lodged in court on 4th November 2010 by Paul Kuria Sankale, who described himself as a son of the deceased. A copy of the affidavit sworn in support of the petition is not in the court file, but there is a letter from the Office of the Assistant Chief of Olkeri Sub-Location, Ngong Hills, dated 13th April 2010, which lists the survivors of the deceased as John Mbaiyani Munge, Paul Kuria Sankale, Timothy Supeyo Munge, Jane Nairandoi Munge and Margaret Naisinya Munge, who are described as sons and daughters, respectively. A grant of letters of administration intestate was accordingly made to Paul Kuria Sankale on 7th April 2011.
3. On 30th April 2012, the administrator filed a summons of even date, seeking confirmation of the grant made on 7th April 2011. He proposed distribution of the property LR No. Ngong/Ngong/4781 in the following manner:-
 - (a) to a buyer – Beth Waruguru Mbatia – 0.5 acre;
 - (b) to Jane Naraindoi – 1 acre
 - (c) to a buyer – Willian Osoro Onsarigo – 1 acre
 - (d) to John Mbaiyani Munge, Paul Kuria Sankale and Timothy Supeyo Munge – the balance in equal shares.
4. It is a little curious that the size of the property being distributed was not disclosed, and reasons were no offered as to why the sons got seemingly large shares than the daughters. It is also not explained when and from whom the alleged buyers acquired an interest in the estate.
5. Nevertheless, the matter was placed before Njagi J. on 6th June 2012 and the grant was duly confirmed in the terms proposed in the application dated 30th June, 2012. A certificate of confirmation of grant was issued on 6th June 2012.
6. Thereafter, Anne Munge Kiminda belatedly lodged on affidavit at the registry on 11th September 2012, sworn on 10th September 2012, protesting at the confirmation of the grant. She appeared to be saying that she was not consulted in the process of distribution.

7. On 20th September 2012, Anne Munge Kimendah and Virginia Wanjiru Kiarie filed a summons for revocation of the grant. The application is dated 9th September 2012. The applicants claim to be children of the deceased and allege that they were left out of the cause. They state that the deceased had eight (8) children and not the five (5) disclosed in the petition. The children who were not disclosed were the two applicants and Lucy Narumu. They assert that they were not consulted nor informed nor involved in the process of distributing the grant.

8. On 27th May 2014, Virginia Wanjiru Kiarie filed another summons for revocation of the grant of 7th April 2011. It was founded on the same grounds as the application dated 30th June 2012, save that she alleged that the administrator had since subdivided the land and obtained new numbers.

9. The administrator replied to only one of the two applications that is to say the one dated 27th May 2014. His affidavit in reply was sworn on 24th July 2014. He concedes in the affidavit that the applicant is his sister, and that she and other sisters had been left out of the distribution in the cause. He explains that there was a family meeting where the wishes of the deceased were communicated to them by three women friends of their mother. The property was to be shared amongst all the children, save for the daughters who were married but dowry had not been paid for them. He alleges that all the children accepted those wishes, but later on the applicant changed position and began to demand land.

10. Attached to that affidavit are two documents. There is a letter from the administrator, dated 2nd March 2013, addressed to Mburu Machua, Advocate. It informs the advocate of a family meeting slated for 13th April 2013 to settle the dispute which arose following the filing of the application dated 30th June 2012. The second document are minutes of a meeting purportedly held on 13th April 2013 attended by some nineteen (19) persons, including the children of the deceased. The two applicants in the application dated 30th June 2012 did not attend the meeting. It was alleged that the deceased had made an oral will on an undisclosed date where she gave directions on how her estate was to be distributed. It was resolved in the end that the two applicants be given half acre each.

11. It would appear from the record before me that the applicant swore a further affidavit on 31st July 2014 and filed it in court. Unfortunately, a copy of that affidavit is not in the file of papers before me.

12. The administrator swore a supplementary affidavit on 22nd August 2014, filed herein on 24th August 2014. He states that he did not include all his sisters in the petition for letters of administration intestate because he was complying with his mother's wishes as expressed in her oral will. He explains that meetings were held to resolve the matter after the deceased's death but the applicant declined to cooperate.

13. The sentiments of the administrator are echoed in the affidavit of Anne Munge Kimendah sworn on 22nd August 2014. She states that the deceased had made an oral will where she directed that all her married daughters were not to inherit her property, but gave her sons discretion to give them any amount of land they wished. Lucy Narumu's affidavit sworn on 22nd August 2014 is word for word that of Anne Munge Kimendah of even date.

14. I directed on 28th October 2014, that the application dated 27th May 2014 was to be disposed of by way of written submissions. The applicant filed her submissions on 10th November 2014, while the administrator filed his on 5th December 2014. The administrator asserts that there was an oral will by the deceased which ought to be recognised under Section 9 of the Law of Succession Act.

15. The deceased died long after the Law of Succession Act come into force on 1st July 1981. The estate of the deceased therefore fell for disposal in terms of the provisions of the Law of Succession Act.

16. The administrator petitioned for a grant of letters of administration intestate and a grant of letters of administration intestate was made to him. If this then meant that the deceased had died intestate, her

estate was to be distributed accordingly to Part V of the Law of Succession Act which governs intestate succession to the estate of a person who died after 1st July 1981.

17. When the court was moved for revocation of the grant, the administrator turned around to say that the deceased had died testate for she had made an oral will before named witnesses. The date of the making of the oral will was however not disclosed.

18. Section 9 of the Law of Succession Act provides for the making of oral wills. The relevant part of that provision, for the purposes of this ruling, is Section 9 (1) which provides as follows:-

“No oral will shall be valid unless:-

(a) It is made before two or more competent witnesses; and

(b) The testator dies within a period of three months from the date of making the will:

Provided that ...”

19. Where it is alleged that the deceased died testate and that there existed a valid will, the person named in the will as executor petitions for a grant of probate. Rule 13 of the Probate and Administration Rules governs applications for grant of probate where the deceased left an oral will. The said provision states as follows:-

“(1) An application for proof of an oral will or letters of administration with a written record of the terms of an oral will annexed shall be by a petition in Form 78 or 92 and be supported by such evidence on affidavit in Form 4 or 6 as the applicant can adduce as to the matters referred to in rule 7, so far as relevant, together with evidence as to-

(a) The making and date of the will;

(b) The terms of the will;

(c) The names and addresses of any executors appointed;

(d) The names and addresses of all the alleged witnesses before whom the will was made;

(e) ...

(f) ...”

20. It is clear from the wording of both Section 9 of the Law of Succession Act and Rule 13 of the Probate and Administration Rules that the date of the making of an oral will is critical. The life of an oral will is only three (3) months, unless it is made by a mariner. The maker of the will should die within three months of its making for it to be valid.

21. From the material before me, the date when the alleged oral will was made is not disclosed in any of the affidavits on record or even in any other document. The persons alleged to have been present when the will was made did not swear affidavits. Neither is the date mentioned in the minutes of 13th April 2013 when the alleged witnesses are said to have given evidence before the elders. There is no telling therefore whether the deceased died within three months of the making of the oral will. The validity of the alleged will cannot therefore be ascertained.

22. As there is no proof that there was a valid oral will, I shall presume that the deceased died intestate. I shall therefore determine the application before me on the understanding that the deceased died without leaving a valid oral will.

23. I have already indicated that Part V of the Law of Succession Act governs intestate succession. In this matter the deceased was survived by children but not a spouse. Her estate should be subject to Section 38 of the Act, which states that-

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of Sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”

24. The plain reading of Section 38 is that where a deceased spouse is survived by a child or children his estate devolves exclusively upon the child or children. If there is only one child, he or she takes everything, the entire estate. If there be more than one child then the estate is divided equally between all the children.

25. The provisions of Part V of the Act refer to “child” or “children.” They make no distinction as between sons and daughters or male and female children. No distinction is made on their marital status. The effect of this is that the estate ought to be shared equally among all the children of the deceased without considering their gender or their marital status. It should be shared equally between sons and daughters, where reference to daughters includes those that are married. This is the position so long as the deceased died after 1st July 1981 and the Law of Succession Act applied to the estate.

26. The effect of what I have said above is that as the deceased died after 1981 and the Act applied to her estate her property fell for distribution to all her children, without discriminating that they were male or female, married or unmarried. She had eight (8) children, the estate ought to have been distributed amongst all the eight (8) children.

27. It should be noted, however, that a beneficiary under a will or a survivor in intestacy cannot be compelled to take a share in the estate against their wish. In other words, it is not mandatory that a beneficiary takes his bequest or legacy under the will of the deceased or that a survivor in intestacy takes the share allotted to them. In both cases, there is liberty to renounce or disclaim the right to the share. The usual practice is for such beneficiary or survivor or heir to file a deed or instrument of renunciation disclaiming such right.

28. From what is before me, it is clear that some of the survivors who were left out of distribution are taking the position that they need not take their due or entitlement. Ideally, what they should do is to file deeds of renunciation. They cannot, however, compel the applicant to renounce her entitlement in the estate if she does not wish to do so.

29. The application dated 27th May 2014 is premised on Section 76 of the Law of Succession Act. Section 76 makes provision for revocation of grants of representation on various grounds. The relevant grounds for our purposes are set out in Section 76(a), (b) and (c) of the Act, which states as follows-

“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 just the grant notwithstanding that the allegation was made in ignorance or inadvertently ...”

30. The applicant’s case is that the administrator when applying the grant did not disclose to the court that she and two others were children of the deceased. This suggests that the application to obtain the grant

was defective to the extent that it suppressed the names of the applicant and the other two. Put differently it was defective to the extent of presenting to court incomplete information. It could also suggest that that it was fraudulently obtained to the extent that there was a false statement that the deceased was survived by five (5) children instead of eight (8) children, or to the extent that the administrator concealed from the court the fact that the deceased had eight children, which fact was material. It could also be suggested that the grant was obtained on an untrue allegation of an important fact – that the deceased had five not eight children.

31. Applications for grants of representation are dealt with in Section 51 of the Law of Succession Act. Subsection (2) thereof states the information that should be included. What is relevant for our purposes is Section 51(2)(g) which says:-

“51(2). An application shall include 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 of his or hers then deceased;

(h) ...

(i) ...”

32. Section 51 should be read together with Rule 7(1) (e) of the Probate and Administration Rules, which states that-

“... where an applicant seeks a grant of representation to the estate of a deceased person ... the application shall be by a petition ... supported by an affidavit ... containing ... the following particulars-

(a) ...

(b) ...

(c) ...

(d) ...

(e) In cases of total or partial intestacy-

(i) the names, addresses, marital status and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving spouse or child, the particulars of such person or persons as would succeed in accordance with Section 39(1) of the Act ...

(ii) ...

(iii) ...”

33. Section 51(2) (g) and Rule 7(1) (e) are in mandatory terms. The information mentioned in the two provisions must be provided. Both require the disclosure of the names and addresses of all the surviving children of the deceased. The administrator was therefore obliged to comply with these requirements. He had no option. That he did not disclose the names of three of the children of the deceased meant that he violated or contravened or did not comply with the said provisions. To that extent therefore the process of obtaining the grant in this cause was defective and fraudulent. The facts of this case place it squarely within the requirements of Section 76 of the Law of Succession Act. The grant made on 7th April 2011 is available for revocation and ought to be revoked.

34. I note, however, that the power granted under Section 76 of the Act for revocation of grants is discretionary. Where a case is made out for revocation of a grant under Section 76, the court has the option to either revoke the grant or make other orders as may meet the ends of justice.

35. The deceased in this cause died in 2002. The revocation of the grant may set the parties back several years, yet the applicant apparently is dissatisfied with her omission and that of other persons from the schedule of the survivors of the deceased. That can be cured by having her name, and that of the other two survivors omitted from that list, inserted in the schedule. That having been done, the distribution of the estate by the orders made on 6th June 2012 should be reversed to pave way for a redistribution of the estate that will take into account the interests of the applicant and of Anne Munge Kimendah and Lucy Narumu.

36. In the end, the orders that I am persuaded to make in the circumstances are as follows:-

(a) That the names of Virginia Wanjiru Kiarie, Anne Munge Kimendah and Lucy Narumu shall be entered in the list of the surviving children of the deceased;

(b) That the orders made on 6th June 2012 confirming the grant herein are hereby set aside and/or vacated;

(c) That if the property Ngong/Ngong/4781 has been subdivided and fresh titles issued from the said subdivisions, the Land Registrar responsible for the Kajiado County is hereby directed to cancel the said subdivisions and the subtitles issued thereon and to revert the property back to the original title Ngong/Ngong/4781;

(d) That after the original title has been reverted to or restored, the administrator shall apply afresh for the distribution of the estate of the deceased taking into account Sections 38 and 41 of the Law of Succession Act;

(e) That any of the heirs or survivors who does not wish to take up their entitlements in the estate or who wish to accept a share lesser than what they are entitled to shall file a deed of renunciation once the fresh application for confirmation of grant is filed; and

(f) That this being a family matter there shall be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 25TH DAY OF SEPTEMBER, 2015.

W. MUSYOKA

JUDGE