



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
SUCCESSION CAUSE NO.158 OF 2010

IN THE MATTER OF: THE ESTATE OF GATI KEGOCHA DECEASED

AND

**IN THE MATTER OF: REVOCATION AND/OR ANNULMENT OF GRANT OF LETTERS OF
ADMINISTRATION**

AND

IN THE MATTER OF: SECTION 76 OF THE LAW OF SUCCESSION ACT, CAP 160

BETWEEN

JOHN MUTONGORIA HABUBAOBJECTOR/APPLICANT

VERSUS

THOMAS KEGOCHA MOSABI PETITIONER/RESPONDENT

JUDGMENT

1. The applicant herein John Mutongoria Habuba filed a chamber summons under **Section 76 (a), (b) and (c)** of the **Law of Succession Act** dated 17th June 2010 seeking:-

1. *Spent*

2. *Spent*

3. *That this court be pleased to make a declaration that Kehancha SRM Court has no jurisdiction to determine a succession cause whose subject is more than Kshs.100,000/=.*

4. *That this honourable court be pleased to revoke the Grant of Letters of Administration granted to the Respondent Thomas Kegocha Mosabi on the 25th March 2010 vide Kehancha SRM Succession Cause No.7 of 2010.*

5. *That the Grant of Letters of Administration be issued jointly with John Mutongoria Habuba.*

6. *That costs of this application be borne by the Respondent.*

7. *That such further and/or orders be made as the Court may deem fit and expedient.*

1. The application was supported by an affidavit sworn by the applicant herein in which he states that the deceased was his step mother who died sometime on 26th June 1986; the deceased having left no surviving son, the respondent moved to court and filed a succession cause at Kehancha Law Courts and subsequently obtained Grant of Letters of Administration intestate to the estate of the deceased. That in the petition for the grant, the respondent alleged that he was the only administrator of deceased's estate, a fact that is not true as the deceased left behind three other beneficiaries apart from the respondent. That the allegation by respondent that he was the only beneficiary to the estate of deceased was a deliberate and conscious fraud and by failing to disclose to the court the true state of affairs in respect of the lawful beneficiaries, the grant issued to the Respondent was obtained through fraud.

2. Furthermore, the respondent being his cousin, did not even seek the applicant's consent to take out letters of administration in respect of deceased's estate. The applicant states that his consent was necessary in respect of such proceedings in so far as he is a bona fide beneficiary of the said estate. The applicant further states that he and the Respondent are not related, and there was no reason for the Respondent to solely apply for and obtain Grant of Letters of Administration to the estate of the deceased.

3. The applicant also avers that the Respondent lied when he stated in the suit papers filed before the Kehancha SRM's Court that the estate of the deceased, whose total acreage was 25.5 acres, was only Kshs.100,000/=. In this regard, the applicant avers that the SRM's court at Kehancha had no pecuniary jurisdiction to deal with the deceased's estate whose value was far way above Kshs.100,000/=. The applicant also states that the whole purpose why the respondent petitioned for the grant at the SRM's court Kehancha was to sideline the applicant so that he (Respondent) gets the opportunity to dispose of and/or sell the suit land without the knowledge and/or consent of the applicant.

4. The respondent opposed the application vide a replying affidavit dated 9th July 2010 stating that:-

- *The deceased was his grandmother.*
- *The petitioner had failed to disclose that he had also filed a succession cause in the same court which I had objected to and the objection proceedings were coming up for directions on 17th August 2010 and he has not moved to the High Court to revoke the same since the subject land parcel is the same.*
- *The suit land was owned jointly by petitioner who is still alive and his grandmother (deceased) in equal share, therefore in line of consanguinity he is the only survivor as the other purported beneficiaries are the deceased's maternal brothers. Thus the applicant cannot pretend to inherit what does not rightfully belong to him as the assistant chief's letter is misleading and he had no authority whatsoever to write the same.*
- *The Respondent is the rightful beneficiary of the suit land and not the petitioner and further the Respondent and his brother are very much alive hence nobody can purport to administer their estate while they are alive.*
- *The Respondent's name is derived directly from the deceased's name, the grandson of the deceased and he has lived on the suit land the whole of his life.*
- *The value of the estate is more than Kshs.100,000/=.*

1. The respondent also filed a supplementary affidavit dated 23rd August 2010 in which he depones to the following matters:-

- *The suit land is currently jointly registered in equal shares in the names of the deceased (his grandmother) and Muchuma Habuba the applicant's elder brother.*

• *The applicant's elder brother that is Muchuma Habuba holds the half share of the suit land in trust for the applicant.*

1. In reply to the Respondent's affidavits, the Applicant filed a further affidavit dated 18th October 2010 and stated that:-

• *Kehancha SRM's Court has no pecuniary jurisdiction to confirm the present grant since the value of the subject matter admittedly exceeds Kshs.100,000/=.*

• *The respondent did not indicate in P&A 5 Form that he was doing succession in respect of ½ share of the deceased's estate but the entire suit land.*

• *The respondent has sold part of the estate of deceased before confirmation of grant which action is contrary to the law.*

• *He and his other brothers cultivate, rear cattle and continue to cultivate on the estate of the deceased as provided under **Cap 160**.*

• *Dependants under the **Law of Succession Act** does not mean those related by blood as none of them will qualify but those who depended on the estate before her death.*

1. As per directions given by Musinga J (as he then was) on 17th September 2010, the matter was to proceed to hearing by way of viva voce evidence.

2. When the matter came before court on 7th July 2011, the applicant John Mutongori Habuba (PW1) told the court that the deceased herein Gati Kegocha died on 20th August 1980 as per certificate of death which was produced and marked as **P. Exhibit 1**. He also explained that the deceased was his stepmother though she bore no children with his father; that the deceased co-owned the suit land with his father. At the time of his father's death, the land was registered in the names of Charles Muchuma and the deceased. He referred to the official search dated 27th January 2010 and confirmed that suit plot was shared equally between Charles Muchuma and deceased. The certificate of official search was marked as **PMF1-2**.

3. Before deceased died they used to cultivate suit land which was her share as she had no children of her own but according to custom, she married and brought home one Cecilia Borure a daughter in-law. The said Cecilia bore the respondent herein Thomas Kegocha Mosabi. The respondent set up a home in the suit land but does not stay there permanently. He contended that he was among the people who showed respondent where to build a house.

4. Further he contended that when the respondent filed the case he did not indicate that they were all heirs of deceased property. Forms P&A 4 and P&A 5 in Kehancha Succession Cause No.7 of 2010 were marked as **PMF1-3 & 4**.

5. He concluded his evidence in chief by stating that he never got any letter from the chief confirming that he was not deceased heir. Furthermore, that the disputed land is worth between Kshs. 3,000,000/= - 4,000,000/=. He told the court he wants to be included as an heir of the suit land.

6. On cross-examination, PW1 stated that he was a Dependant of deceased in the sense that they ploughed the suit land and he had a witness who would come and confirm the same. He had no documentary evidence to confirm the price of the suit land.

7. On re-examination, he confirmed that apart from ploughing the suit land, he also lived on the suit land together with his brother.

8. PW2 was Charles Muchuma Habuba PW1's elder brother. He corroborated PW1's evidence

that the deceased was their step mother; he co-owned the suit land with the deceased and the suit land measured 64 acres and the deceased married another woman under Kuria Custom that is Cecilia Borure.

9. That before deceased died, she was assisting the applicant as well as Thomas Chacha and Samwel in matters of farming and when the three grew older they began to look after the deceased. The four were tilling and continue tilling the suit land and also live on it.

10. He concluded his evidence in chief by stating that in his view, the land in question should be succeeded by all the four people since they all have a claim to Gati; the deceased herein.

11. On being cross examined by the court, PW2 revealed that the suit land was registered in deceased's and his name and that the registration had been like that since long time ago after his father died.

12. On cross-examination by respondent's advocates PW2 stated the following:-

- *The whole piece of the suit land initially belonged to their deceased father and it was only after the demise of their father that the land was divided into 2 portions.*
- *He petitioned for a grant before the Kehancha court over the same suit land but the applicant did not know about it.*
- *He got one grant but the other was stopped.*
- *He confirmed that respondent is only entitled to share of deceased's property.*

1. On 6th March 2012 counsel representing both parties agreed that witnesses statements so far filed by both parties be adopted as evidence. Several adjournments followed thereafter and on 21st February 2013 when the matter came before court for hearing, Mr. Oguttu Mboya learned counsel for the applicant indicated that the applicant fully subscribes to the written statements together with viva voce evidence tendered in court on 7th July 2011.

2. At the close of the applicant's case, Thomas Kegocho Mosabi, the respondent herein proceeded to testify as DW1 herein. He confirmed that the deceased died on 26th June 1989; she was his grand mother as he was the son of Cecilia Borure married to the family of the deceased as the deceased had no sons. That he was recognized by deceased's family as a grand child.

3. That after deceased died, he took out grant of Letters of Administration through Kehancha SRM's Court and had applied for grant in his capacity as grandson of deceased. The property he wanted to inherit was a portion of the suit land.

4. He confirmed that the said suit land was registered in the joint names of PW2 and deceased. He clarified that he only wanted a share of deceased's portion and had no intention of taking the whole parcel. He confirmed that apart from the applicant and PW2, there was also another brother known as Samuel Magaigwa Habuba.

5. DW1 also confirmed that there was no blood relationship between the applicant and deceased, they are only neighbours and the succession cause at Kehancha was succession cause No.7 of 2010; that apart from this succession cause there was also succession cause No.8 of 2010 filed at Kehancha SRM's court. The latter case was filed by PW2. He confirmed that PW1 actually got the grant. He referred to a case concerning suit land he did with PW2 before the chief then went to the tribunal and later the chief wrote a letter on whose strength he went to court. He referred to a letter dated 11th January 2010 wherein the chief confirms that he was the one entitled to take out letters of administration of the deceased's estate as grandson of the deceased.

6. On examination by the court DW1 confirmed that the suit land was registered in the joint names of PW2 and deceased though he did not know what relationship was between the two.

7. He explained how he became a member of deceased family. That deceased had 2 daughters; but after the daughters got married, she was left alone. She (deceased) in turn married a wife under Kuria customary law known as Cecilia Borure Mosabi who is the respondent's mother. Therefore his mother was under tradition a wife to the deceased.

8. On cross examination, he stated:-

- *That he did not indicate in his suit papers before the SRM's Court, Kehancha that the suit land belonged to 2 persons and insisted that he only wanted to inherit half share of suit land.*

- *He stated that he was the administrator but the truth is that he was a grandson to the deceased.*

- *The suit land is 24.5 hectares, it is situated 23 km from Kehancha Town, he did not own any other land and an acre of land costs about Kshs.50,000 - 60,000 acre.*

- *That the suit land is about 60 acres which would go for about Kshs.3 million depending on agreed price.*

1. At the close of oral evidence by both parties, counsel appearing agreed to file and exchange written submissions. The submissions were duly filed and exchanged. I have carefully read though the two sets of submissions. After considering the pleadings, viva voce evidence and the submissions this court only needs to determine 2 issues:-

- *From whom does a child of a Kuria Woman to Woman Union inherit ?*

- *Has the applicant placed before this court any evidence warranting the cancellation of grant issued to the respondent?*

1. With regard to the first issue, according to **Eugene Cotran's Restatement of African Law, the law of Marriage and Divorce Vol.1 Chapter 7 at page 74:-**

“Woman to Woman Marriage (Ogotetwa bosino): A woman who is barren or who has female children only, may marry a girl and pay 44 ikihongo for her in the normal way. This can be done during her husband's lifetime or after his death. The woman appoints a man from her husband's clan to have sexual intercourse with the girl and any children born will belong to the woman who paid the ikihongo.”

2. In the instant case both the pleading and viva voce evidence adduced by both the applicant and the respondent, show that indeed the deceased had married one Cecilia Borure in a Kuria Customary Woman to Woman marriage. Borure was the respondent's mother and as a consequence a grandchild to the deceased. It was also undisputed that the suit land was registered in the names of both PW2 and the deceased. Since the respondent has proved that there was a woman to woman union between the deceased and respondent's mother, he was thus entitled to inherit from the estate of the deceased.

3. Regarding the second issue on whether or not the applicant has laid before this court evidence warranting a revocation of the grant of the letters of administration issued to the respondent, **Section 76 of the Law of Succession Act Cap 160** 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 was made in ignorance or inadvertently.”
- d)
- e)”

1. In the instant case the following issues are undisputed:-

- *That the suit land was registered in the names of PW2 and the deceased with each holding a half share of the suit land;*
- *PW2 is a brother to the applicant herein and therefore the applicant is entitled to a portion of the half share registered in the names of PW2;*
- *The respondent herein Thomas Kegocha Mosabi is a grandson to the late Gati Kegocha (deceased) who until her death was the rightful owner/proprietor of ½ share of suit land.*

1. The respondent in filing the suit papers before the SRM's Court at Kehancha, and specifically form P&A 5 listed himself as the only surviving person surviving the deceased for the entire suit land in Succession Cause No.7 of 2010. Subsequently, he obtained the Grant of Letters of administration on 25th March 2010.

2. PW2 on the other hand took succession proceeding at Kehancha in Succession Cause No.8 of 2010 where in P&A 5 he listed the following as survivors of the deceased on the entire suit land:

- *Charles Muchuma Habuba (Adult/Administrator)*
- *Samwel Magaigwa Habuba – Adult*
- *John Motongori Habuba - Adult*

1. Grant of Letters of Administration were subsequently issued to PW2 on 12th May 2010.

2. In the matter of the **Estate of Sigara Mangana (Deceased) and Thomas Ongondo -vs- Nyasoro Mangana & 4 others – High Court at Kisii Succession cause No.43 of 2009** (unreported) Makhandia, J (as he was then) observed:-

“..... Perhaps that case will settle the issue of proprietorship of the suit premises between the deceased and the applicant at the time the deceased passed on. It is not for this court to do so in these proceedings. Either way however, the rights of the applicant as a joint owner or proprietor in common had to be taken into account and recognized by the respondent when he petitioned for the grant. That he failed to do so deliberately though he had information in his possession to that effect not only smacks of fraud but also concealment from court of material facts.”

3. In the instant case both the applicant and respondent admit to the fact that the suit land was owned by two people that is PW2 and the deceased in equal shares. The respondent has adduced evidence that he is the only heir to the deceased estate. Even if that were so and the applicant had no right to the deceased estate, he needed to reveal to the court that the suit land is owned in half share by both the deceased and PW2. His failure to state this fact clearly was a concealment of material facts which only

leads to the conclusion that he wanted to keep the suit land entirely to himself in exclusion of his cousins.

4. I also find that the grant obtained by PW2 was defective in substance since PW2 decided to petition for grant of the estate of the deceased without obtaining requisite consent from the respondent who stood in higher ranking than him (PW2) for applying for the grant. **Section 66 (a) and (b) of the Law of Succession Act** provides that:-

“When a deceased has died intestate, the court shall, save as otherwise expressly provided have a final discretion as to the persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference:-

- a) surviving spouse or spouses with or without association of other beneficiaries;**
- b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V.**
- c) and**
- d)”**

5. Similarly **Rule 7 (7) (a), (b), and (c) of the Probate and Administration Rules** provides:-

“Where a person who is not a person in the order of preference set out in Section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having prior preference to a grant by virtue of the Section has:-

- a) renounced his right generally to apply for grant;**
- b) consented in writing to the making of the grant to the applicant;**
- c) been issued with a citation calling upon him either to renounce such right or to apply for a grant.”**

6. In the instant case, both the respondent and PW2 are guilty of concealing material facts from the court when obtaining grant of letters of administration to the estate of the deceased. Their acts of concealment of material facts can be narrowed down to:-

- a) Failure to indicate in the Form P&A 5 that the suit land was actually owned in half shares by both PW2 and the deceased;*
- b) Failure to disclose all the beneficiaries to the suit land;*
- c) Failure to obtain consent from the beneficiaries who rank higher or have prior preference to obtain grant;*
- d) Filing the succession causes in a court that had no jurisdiction to deal with the same.*
- e) Obtaining two grants in respect of the same subject matter.*

7. Having reached the above conclusions, I allow the applicant's Chamber Summons dated 17th June 2010 and make the following orders/declarations:-

- 1) *That at the time of filing the respective petitions in P&A 7 and 8 of 2010 before the SRM's Court at Kehancha, the said court had no pecuniary jurisdiction to determine the succession causes whose subject matter was more than Kshs.100,000/= in value.*
- 2) *The Grants issued to both the Respondent and PW2 in Succession Causes No.7 and No.8 of 2010 be and are hereby revoked.*
- 3) *All consequential actions arising from the said grants be and are hereby revoked.*
- 4) *The parties are at liberty to petition for fresh grants from the High Court of Kenya at Migori, either jointly or as they see fit.*
- 5) *Each party shall bear its own costs for this application.*

Dated and delivered at Kisii this 29th day of August, 2014

R.N. SITATI

JUDGE

Mr. Minda for Oguttu-Mboya for Applicant/Objector

M/s Kwanga Mboya (absent) for Respondent/Petitioner

Mr. Bibu - Court Clerk