



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION MISC. APPLICATION NO.278 OF 2013

IN THE MATTER OF THE SENIOR RESIDENT MAGISTRATE'S COURT AT KEHANCHA

IN THE MATTER OF SUCCESSION CAUSE NO.44 OF 2012

IN THE MATTER OF THE ESTATE OF:

MARGARITA MWITA MACHERA DECEASED

AND

LUCAS MWITA MACHERA 1ST APPLICANT

NYANSWI MWITA HABUBA 2ND APPLICANT

VERSUS

ZEDEKIAH HABUBA MWITA 1ST RESPONDENT

MATHIAS MWITA HABUBA 2ND RESPONDENT

RULING

1. The applicants herein Lucas Mwita Macherera and Nyanswi Mwita Habuba filed a summons for revocation/annulment of grant of Letters of Administration dated 28th May 2013 pursuant to **Section 76** of the **Law of Succession Act** and **Rules 44, 49, 59, 63** and **73** of the **Probate and Administration Rules** seeking:-

1. *Spent.*

2. *Spent.*

3. *Spent.*

4. *That the Grant of Letters of Administration issued to the Respondents on the 28th January 2013 vide the Senior Resident Magistrate's Succession Cause No.44 of 2012 be revoked and/or annulled.*

5. *That costs of this application be provided for.*

1. The application was supported by an affidavit sworn by the 1st applicant with authority from the 2nd applicant. The deponent avers:- that the deceased one Margarita Mwita Macherera was his

grandmother. She possessed 1/5 share of LR No.Bukira/Buhiringera/221 (hereinafter known as the suit land); that the deceased was survived by a biological daughter Gati Mwita (the 2nd applicant) who is the deceased's daughter in-law through Kuria Customary Woman to Woman Marriage, thus he is the son of the 2nd applicant and hence a customary grandson of the deceased having been born and brought up on the suit land on which he has his home together with his wife and children.

2. That the 1st respondent Zedekiah Mwita Habuba has his own 1/5 share of the suit land which was given to him by his late father and so does the 2nd respondent.

3. In addition to this, that 1/5 share of suit land was given to the deceased being her share given to her by her husband; deceased did not bear any son hence she opted for the customary woman to woman marriage under Kuria Customary Law thus his mother Nyanswi Mwita Habuba the 2nd applicant was married by the deceased Margarita Mwita Machera and he was born to the said 2nd applicant.

4. However, that the respondents now want to take over the deceased's share so as to disinherit him and the 2nd respondent. The deponent thus contends that the grant obtained herein was obtained by way of fraud for the following reasons:-

- i. *The respondents are not sons of the deceased;*
- ii. *The lawful beneficiaries of the deceased are Christine Nyanswi and Gati Marwa;*
- iii. *He was left out of the Estate beneficiaries list;*
- iv. *The respondents have already taken their share having been so given by Mwita Machera, the husband of the deceased Margarita Mwita Machera herein.*

1. That, the respondents have already sold part of the Estate to third parties namely:-

- *Meresa Tingo; and*
- *Joshua Nyambane;*

1. That the said purchasers are not beneficiaries of deceased's estate; no requisite consent of beneficiaries was obtained prior to filing of the succession cause; the estate property is valued at over Kshs.100,000/= as the same comprises of over 12.5 acres of land well beyond jurisdiction of Kehancha Law courts and the grant is about to be confirmed given the fact that surveyors have been brought to the ground by the respondents with a view to marking out the estate property and distributing the same.

2. The respondents through Zadekiah Habuba Mwita filed a replying affidavit stating that:-

a) *Margarita Mwita Machera (deceased) was their step-mother who passed away on 5th August 2004.*

b) *The 1st applicant is a son to the 2nd applicant who was married to Margarita Mwita Machera in Woman to Woman Kuria Customary Marriage similar to the one of Esther Mbone who is his step-mother.*

c) *The suit land was owned in common by five people namely: Margarita Mwita Machera (deceased), Zedekiah Mwita Machera, Yohana Rabare, Chacha Mwita and Meshack Machera on one over five share each.*

d) *That Zedekiah Habuba Mwita is entitled to 1/5 share of suit land and deceased was also entitled to 1/5 share.*

- e) *That respondents filed succession proceedings in SRM's court at Kehancha in respect of the estate of deceased where the 2nd applicant who is the mother of 1st applicant is named as the 1st survivor of the deceased among others.*
- f) *That inclusion of the 1st applicant in the succession proceedings was not necessary as his mother (2nd applicant) was named as a survivor of the deceased.*
- g) *That the 1st and 2nd applicants are currently residing and doing cultivation on the 1/5 share of suit land without any interference whatsoever.*
- h) *The suit land is less than Kshs.100,000/= consequently the SRM's court at Kehancha is seized with jurisdiction to hear and determine the succession cause contrary to contentions of applicant.*
- i) *On 24th June 2010 Zedekiah Habuba Mwita entered into a sale of land agreement with Joshua Nyambane Chweya in respect of a portion of land measuring ¼ acres of LR Bukira/Bwisaboka/2409 registered jointly in his name and that of 2nd respondent. Consequently applicants cannot claim any interest in the same.*
- j) *On 23rd July 2005 Zedekiah Habuba Mwita and Meshack Machera sold their share in suit land to one Joseph Tingo Nyamatiko (deceased) who was the husband of Meresa Atieno Tingo who has been named as purchaser in the succession cause.*
- k) *That the applicant's application is not only made in bad faith but the same is scandalous, frivolous, vexatious and an abuse of the process of the court thus ought to be dismissed by this honourable court with costs.*

1. When the matter came before court on 1st August 2013 both counsel agreed to canvass the application by filing and exchanging written submissions. Both counsel filed their written submissions and I have read them. From a reading of both sets of submissions, the issue that arises for determination is whether the applicants have presented a *prima facie* case to warrant the revocation/cancellation of the letters of administration intestate issued to the respondents on 28th January 2013?

2. **Section 76** of the **Law of succession Act** which deals with revocation or annulment of grant stipulates 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 justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.”**

1. Under **Section 66** of the **Law of Succession Act** preference is given to certain persons to administer where deceased has died intestate. The said section provides:-

“When a deceased has died intestate, the court shall, save as otherwise expressly provided have a final discretion as to the person or 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) **the Public Trustee; and**
- d) **Creditors.”**

The court thus has wide discretion to order the revocation or annulment of a grant under any of the three circumstances set out under Section 76 either on application by an interested party or on the court's own motion. The underlying reason for these provisions is, in my view, the necessity to protect the estate of a deceased estate from being intermeddled with.

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

“7 (7) 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 exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has:-

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

1. The applicant in this case in my humble view ranked higher than the respondents. This has also been confirmed by the fact that the deceased married the 1st applicant under Kuria Customary Woman to Woman marriage in order to give the deceased a son. The deceased's wish to have a son was realised when the 1st applicant as a wife to the deceased bore her a son. It is also undisputed that the 1st respondent already had his own share of the suit land that is 1/5 of it and why he still wanted to be the administrator of the deceased's estate when the deceased left behind 1st applicant as her wife and a son the 2nd applicant is a matter that only the respondents can explain.

2. Although the respondents sought consent from the 1st applicant to administer the estate of the deceased, it was also important for the 1st respondent to seek consent of the 2nd applicant to administer deceased's estate since the interest of the 2nd applicant in the suit land ranked higher than that of the respondents.

3. The application clearly shows that the 2nd applicant has not renounced her right to apply for a grant of deceased's estate; did not consent in writing to the making of the grant by the respondent; was not issued with a citation calling upon her either to renounce such right or to apply for a grant.

4. For the above reasons, the applicant's motion dated 28th May 2013 for revocation/cancellation of grant of Letters of Administration issued to the Respondents on the 28th January 2013 vide the SRM's Court Kehancha Succession Cause No.44 of 2012 is allowed in terms of prayer 4 thereof.

5. The respondents shall bear the costs of the application.

Dated and delivered at Kisii this 28th day of August, 2014

R.N. SITATI

JUDGE.

Mr. Nyagwencha for abisai for Applicant

Mr. Ayienda (absent) for Respondents

Mr. Bibu - Court Assistant