



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 132 OF 2011

IN THE MATTER OF THE ESTATE OF: JOSIAH MANTU alias MUGWIKA.....
(DECEASED)

AND

CHARITY MUKWANYAGA MUKUNGI.....1ST APPLICANT

ERNEST KABURU.....2ND APPLICANT

VERSUS

ESTHER CIANJOKA M'MANTU.....ADMINISTRATOR/RESPONDENT

J U D G M E N T

1. The petitioner petitioned for grant of letters of administration intestate of the deceased estate herein on 14th March, 2011:-through Chuka SPMSC No. 101 of 2010. The petitioner listed all the beneficiaries of the deceased estate under paragraph 4 of Form P&A 5 and listed the deceased estate as comprising of Mwimbi/Chogoria/386 whose value she estimated at Kshs.300,000/-. The petitioner did not attach to her application Chief's letter, a copy of death certificate nor consent from the other beneficiaries consenting to her petitioning for grant of letters of Administration intestate of the deceased estate.
2. The lower court granted letters of administration intestate on 2nd August, 2010 and confirmed grant on 1st September, 2010 in which the only deceased property Mwimbi/Chogoria/386 was distributed to one Nicholas Kithuli Nyaga who got 1 acre and the petitioner got the balance. The other beneficiaries were not catered for.
3. Wallace Nkonge M'Mantu now deceased, through summons for revocation of grant filed on 14th March, 2011 sought the grant of letters of administration made to Esther Cianjoka M'Mangu on 2nd August, 2010 be revoked on the grounds set out in the application inter alia; the proceedings to obtain grant were defective in substance, that the grant was obtained by means of untrue allegation. The applicant relied on supportive affidavit dated 10th March, 2011 and 22nd November, 2011 and annexure attached thereto. That before the application could be heard the applicant passed on 21st July, 2013. The present applicants were subsequently substituted for the deceased applicant through an application dated 26th August, 2013 which was granted by consent on 24th September, 2013. The instant applicants filed further affidavits dated 30/9/2013 and one

Samuel Manta Mugambi sworn an affidavit dated 30/9/2013 and filed on 7th October, 2013 in support of the applicants application.

4. The petitioner on her part denied the applicants claim alleging she filed the cause at Chuka Law Courts with consent of Samwel Mugambi and distributed the estate as consented to by the applicants. She further averred that the deceased left a will dated 2/11/1997 and filed in court on 23/11/2011. She therefore contended there are no sufficient grounds to revoke the grant the estate of the deceased having been distributed. She alluded to the fact that the obtaining of the grant was not flawed as alleged by the applicants as it is not mandatory that the Chief's letter must be filed in court. The petitioner further contended there was no evidence of fraud otherwise the applicants would have pleaded the particulars of fraud which they have not done and that the applicants ought to have sought for a remedy by filing a fresh suit now that the land has been transferred to other parties who have not been joined in this suit and it would be unjust and unfair to condemn them without hearing them.
5. I have carefully summarised applicants' case as well as the petitioner's case. I have also carefully perused the proceedings. The application, supportive affidavits as well as replying affidavits; all annexures and authority relied upon by the petitioner. The issue for consideration is whether the applicants have satisfied the conditions to warrant revocation or annulment of the grant.
6. In the instant application there is no dispute that the applicants and the respondent are dependants to the deceased estate as defined under Section 29 of the Law of Succession Act; therefore all the parties in this application are entitled to the deceased estate.
7. The petitioner before petitioning for the grant of letters of administration to the deceased estate was under obligation to file the petition in court with jurisdiction to determine the matter. The jurisdiction of magistrate court to entertain and determine succession cause is well set out under Section 48 of the Law of Succession Act which provides:-

“48. (1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a resident magistrate shall have jurisdiction to entertain any application other than an application under section 76 and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings:

Provided that for the purpose of this section in any place where both the High Court and a resident magistrate's court are available, the High Courts shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act.”

The petitioner in Form P&A 5 under paragraph 6 gave the value of the deceased estate at Kshs.300,000/- which was above the jurisdiction of Magistrate's court in Probate and Administration Cases as shown in Section 48 of the Law of Succession Act. All what the court purported to do was and is all nullify for want of jurisdiction.

8. The petitioner was required to get consent of all other beneficiaries who ranked at parity or in priority under Rule 26(1) (2) of the Probate and Administration Rules which provides:-

“26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant. (2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”

9. The applicants denied having given any consent yet the petitioner insisted she had consent of other beneficiaries. She did not file any consent duly executed by other beneficiaries. There is none on record and therefore I find that the petitioner acted contrary to express and mandatory provision of the law which required her to seek and obtain consent of all other beneficiaries.
10. The petitioner petitioned for grant of letters of administration without the Chief's letter and a copy of death certificate. That whereas the Chief's letter is not mandatory in petitioning for the grant the petitioner is required to have a letter from an administration officer to confirm his/her relation with the deceased to facilitate speedy determination of the cause by the court's as regards who are the real beneficiaries without calling oral evidence. This is to say a chief's letter or Church Ministers' letter is relevant and ought to be filed, however in absence of the said documents an affidavit may do. On the other hand Death Certificate is mandatory as a prove of death without having to delabour on calling evidence as filing suit for the alleged deceased person to be presumed dead in a separate suit.
11. On confirmation of the grant the applicants did not sign any consent to confirmation of the grant or to the mode of distribution. The petitioner does not deny that but avers Samwel Mugambi signed consent to confirmation of grant which the said Samwel Mugambi denied on oath. Further the law requires all dependants either signed the consent to confirmation of grant or attend court during confirmation of the grant. There is no evidence that the beneficiaries signed consent to the mode of distribution and confirmation of the grant. There is no evidence of their being aware of the confirmation date or their being in attendance. The grant was confirmed contrary to Rule 40(8) of the Probate and Administration Rules which provides:-

“(8) Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit.”

12. The petitioner incidentally had the deceased property transferred into her name on 16th July, 2010 before issuance of temporary grant of letters of administration which were granted on 2nd August, 2010 and before confirmation of the grant on 1st September, 2010. The petitioner purported the deceased died on 16th June, 1990 whereas the Death Certificate shows the deceased died on 23rd June, 1990. The petitioner sought confirmation of grant notwithstanding 6 months period had not lapsed and failed to involve all other beneficiaries and included a stranger who she had allocated one(1) acre yet she disinherited all other beneficiaries. The petitioner actions were well calculated with one aim that is to defraud the other beneficiaries. This is a succession cause and not a suit as such and the petitioner's argument that particulars of fraud should be pleaded for an objection to succeed in succession cause has no basis as succession causes are not suits nor are they in the real sense subject to provisions of Civil Procedure Act.
13. The grounds for revocation of grant are well settled under Section 76(1) of the Law of Succession Act which provides:-

“76. 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; (d) that the person to whom the grant was made has failed, after due notice and without

reasonable cause either (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or.....”

14. Having carefully considered the affidavits by both parties I am satisfied that the applicants have established the grounds necessary for allowing their application as set out under Section 76 of the Law of Succession Act.

15. In view of the above conclusion I have come to, I find and hold that all the proceedings at the subordinate court were a nullity and further the grant of letters of administration was issued by court without jurisdiction. That the grant was obtained in complete breach of Rule 26(1),(2) and Rule 40(8) of the Probate and Administration Rules. I therefore proceed to make the following orders:-

- i. ***The grant of letters of administration made to Esther Cianjoka M’Mantu on 2nd August, 2010 and confirmed on 1st September, 2010 be and are hereby annulled.***
- ii. ***The petitioner Esther Cianjoka M’Mantu and the applicants Charity Mukwanyaga Mukungi and Ernest Kaburu are appointed joint administratixes and administrator respectively. The letters of administration intestate do issue forthwith to the administrators hereinabove.***
- iii. ***The administrators to apply for confirmation of the grant within 90 days from today.***
- iv. ***The titles arising out of subdivision of Mwimbi/Chogoria/386 being Mwimbi Chogoria/5090 and 5089 be cancelled forthwith and original title Mwimbi/Chogoria/386 do revert into the name of the deceased herein Josiah Mantu alias Mantu Mugwika(deceased).***
- v. ***The petitioner is condemned to pay the applicants costs of this application.***

DATED, SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF SEPTEMBER, 2014.

J. A. MAKAU,

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. Mr. Kiogora for the petitioner
2. Mr. J. Kariuki for the applicants.

J. A. MAKAU

JUDGE