



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

MISC CIVIL APPLIC. NO.212 OF 2011

IN THE MATTER OF THE ESTATE OF THE LATE:

JOHNSON RATEMO ACHIMBA.....DECEASED

AND

JESCA B. RATEMO.....APPLICANT

VERSUS

NORAH WERE.....RESPONDENT

JUDGMENT

1. The applicant herein Jesca B. Ratemo filed Summons for Revocation of Grant pursuant to **Sections 48 and 76** of the **Law of Succession Act** for orders that:-

1. The grant of letters of administration issued to the respondent by the Senior Resident Magistrate's court Rongo vide Succession Cause No.54 of 2010 issued on the 6th day of September 2010 and confirmed on the 24th November 2010 of the above named person be revoked or annulled.

*2. The registration of the titles **LR No. Suna East/Wasweta 1/3751 and Suna East/Wasweta 1/3749, Suna East/Wasweta 1/6477 and Plot No.338 (8) 1 Ragana** in the names of Norah Were also be revoked upon granting prayer No.1 above herein.*

3. There be an order of injunction restraining the respondent herein from intermeddling in any manner whatsoever whether by sale, lease, mortgage charge in any manner detrimental or adverse to the interest of the applicant herein pending the hearing and determination of the application herein.

1. The Summons was supported by an affidavit sworn by the applicant in which she avers to the following: she is the daughter to the deceased one Johnstone Ratemo Achimba (hereinafter referred to the deceased) who died on 9th February 2008 and was survived by one wife and 8 daughters; the deceased left behind a vast estate whose estimated value exceeds Kshs.100,000/=; the respondent filed Rongo Law Court Succession Cause No.54 of 2010 and with fraudulent intent indicated only herself in exclusion of the surviving wife to the deceased that is Adirah Ratemo as administrator of the estate of the deceased.

2. The applicant also avers that with intent to defraud the survivors/beneficiaries, the respondent has already disposed of some of the deceased's assets and has also registered herself as the sole proprietor of

parcels of land viz: **LR No. Suna East/Wasweta 1/3751 and Suna East/Wasweta 1/3749, Suna East/Wasweta 1/6477 and Plot No.33 B 1 Ragana.**

3. It is also the applicant's case that neither herself(applicant), her siblings nor her step mother Adirah Ratemo were consulted by the respondent when she (respondent) instituted the succession proceedings in respect of the estate of the deceased; that the respondent who is a stranger to the deceased's estate was not preferred as the administrator and neither was the family privy to the institution of the impugned succession cause.

4. The applicant finally avers that the acting area Chief's (Suna Ragana) letter of introduction for purposes of instituting the succession cause was falsified and not representative of the wishes of the family members as the family never nominated the respondent to undertake the succession as administrator and that the respondent now wanted to dispose of the parcels of land through

LR No. Suna East/Wasweta 1/3749, 3751 and 6477 and Plot No.33 B (1) Ragana which are all developed without the beneficiaries being given their shares. That in the circumstances, the applicant and other beneficiaries left out by the respondent stand to suffer irreparable loss.

5. In response to the application, the respondent filed a replying affidavit dated 28th December 2011 in which she states that she is the surviving widow of the deceased, that the applicant is lying to the court as she lacked consent from other Dependants and after the demise of her mother, applicant has been stubborn and not co-operating with other Dependants.

6. The respondent also states that she has set apart the applicant's share and other Dependants' share as title **No. Suna East/Wasweta 1/3749** to their house (applicant's house) and plot **No.Suna East/Wasweta 1/6477** belonging to one Lona Adoyo Okumu which was in trust of the deceased. Moreover, that as the surviving widow, she invited both parties to the Land Control Board to facilitate transfer of their shares to them and that the full report was now with the area D.O. and Administrators.

7. The respondent however denies allegations that she has disposed off parcels belonging to the deceased person as she has a big family depending on deceased's estate. She further contends that the application is bad in law and should thus be struck out with costs.

8. The respondent also filed a further replying affidavit dated 8th May 2012 in which she clarifies that the deceased was survived by the 1st wife Joyce Gesare Ratemo who had 6 children and herself as the 2nd wife. That she has 5 children. That all the daughters from the first wife got married a long time ago and are comfortably staying with their husbands and families in their respective homes and that the deceased left behind some parcels of land whose value she estimates to be Kshs.100,000/=.

9. The respondent denies the allegation that she filed the Rongo Court succession cause with fraudulent intent as alleged by the applicant and states that by the time she filed the succession cause, all the six daughters from the 1st wife were living at their respective homes with their husbands and families and it was only herself and her four children who were at home, and by implication, she could not have obtained consent from or even consulted the applicant and her married siblings.

10. The applicant also contends that before filing of the succession cause, the family members held a meeting to deliberate on the estate of the deceased where it was decided that:-

a. The late Ratemo had only two wives;

b. The first wife the late Joyce Ratemo had six children;

c. The second wife Norah Were had four children;

d. The piece of land will be equally divided into two;

- e. *The maize the late Ratemo left when he passed away was consumed by the mourners;*
- f. *Beds were four, two are possessed by Joyce's children and two are possessed by Norah Were;*
- g. *One piece of land was given to father-in-law as dowry;*
- h. *The rent from the shop as income to be divided equally.*

1. She further avers that she did not need to consult her married daughters in their various homes scattered all over the country and neither did she consult one Adira Ratemo who was a stranger to her when she was filing the said succession cause. That after the grant was confirmed in her names, she filled all the mutation and transfer forms to enable proper division of the estate as agreed upon by the family. Furthermore, that the said agreement was done before the area District Officer – D.O. Suba East Division though the applicant refused to attend the said meeting.

2. The applicant also contends that succession cause No.54 of 2010 filed at Rongo Law Courts was duly gazetted vide Gazette Notice No.9046 of 30th July 2010 and no objection was lodged against it. She says that the assets which the family allocated to her house belong to her and her children. The respondent prays that the summons for revocation of grant filed by the applicant be struck out since the affidavit in support was not commissioned by commissioner for oaths.

3. When the matter came before me on 13th May 2013, both counsel agreed to canvass the application by way of written submissions. The submissions were duly filed and are on record. After carefully reading through the submissions, the issue that arises for determination is whether the applicant has made out a case for the prayers sought.

4. Section 76 of the Law of Succession Act, states as follows:-

“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.

d.”

1. From the affidavit evidence given by both applicant and respondent, the following facts are undisputed:-

1. Deceased was married to two wives that is applicant's mother as first wife and respondent as the second wife.

*2. Applicant's mother is deceased thus respondent applied for letters of administration as the deceased's surviving spouse in accordance with **Section 66 of the Law of Succession Act.***

3. Though applicant listed down all the children of the deceased in Form P&A 5, she did not consult all the children of the deceased on how the estate of the deceased should be distributed. This is evident in paragraph 10 of her further replying affidavit dated 8th may 2012 where she avers:-

“That I need not to consult my married daughters in their various homes scattered all over the country neither did I need to consult one Adira Ratemo, a stranger to us when I was filing the said succession.”

1. M.A. Angawa, in her book **Procedure in the Law of Succession** in Kenya at page 14 has stated that where the applicant is a widow with adult children, the adult children are required to give consent to the widow/widower to apply for the grant as per Form 38 of the Probate and Administration Rules. It was a statutory requirement for the respondent to consult all the parties interested in the deceased's estate, among them the applicant.

2. There is another issue. The respondent at paragraph 6 of the further replying affidavit dated 8th May 2012 contends:-

“That all my children who comprises of both boys and girls are still minors and schooling.”

Section 58 of the Law of Succession provides:-

“Where a continuing trust arises:-

a. No grant of letters of administration in respect of an intestate estate shall be made to one person alone except where that person is the Public Trustee or a Trust Corporation.”

1. The fact that the respondent has minor children means that a trust was created as a result of the death of the deceased. Therefore, there was need for two persons to apply for the letters of administration to the deceased's estate.

2. Thirdly, the grant issued to the respondent was confirmed only 2 months after the same was issued, that is to say while the grant was issued on 6th September 2010 the certificate of confirmation was issued on 24th November 2010.

3. Section 71 of the Law of Succession Act provides:-

“71(1) After the expiration of a period of six months or such shorter period as the court may direct under subsection (3) from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.”

Subsection (3) of the same section provides:-

“The court may on the application of the holder of a grant of representation, direct that the grant be confirmed before the expiration of six months from the date of the grant if it is satisfied -

a. that there is no Dependant of the deceased as defined by Section 29 or that the only Dependants are of full age and consent to the application;

b. that it would be expedient in all the circumstances of the case so to direct.”

1. There is no doubt that the Respondent did not comply with the two conditions under **Section 71 (3)** of the **Law of Succession Act** to justify confirmation of grant before expiry of six months as provided under **Section 71 (1)** of the Act.

2. Lastly, it is an undisputed fact that the deceased's estate comprised of four properties (pieces of land). It has not been indicated in the confirmation of the grant how the respondent intends to distribute the deceased's properties. What the respondent did was simply to write her name against the properties and has not demonstrated how she intends to share out the said properties not only to her children but also to

the children of the deceased's 1st wife unless the children of the 1st wife have clearly waived their right to inherit from their deceased father's estate. Moreover, even though no valuation form has been attached to either the affidavit of the applicant or the respondent, I am not convinced that all the 4 pieces of land could cost only Kshs.100,000/= or less for jurisdiction of the deceased's estate to be conferred to the SRM's court at Rongo.

3. For the above reasons, the summons for revocation of grant dated 25th October 2011 and filed by the applicant on 26th October 2011 must succeed. Accordingly, I allow prayers 1, and 2 of the Summons for Revocation of Grant dated 25th October 2011.

4. Each party to bear their own costs of the application.

Delivered, dated and signed at Kisii this 23rd day of October, 2014

R.N. SITATI

JUDGE

In the presence of:-

N/A Agure Odero (absent) for Applicant

Mr. Onyango (present) for Respondent

Mr. Bibu - Court Assistant