



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 208 OF 2012

IN THE MATTER OF THE ESTATE OF NDINDI KISOI NGITHO (DECEASED)

SCHOLASTICA NDINDA WAMBUA.....APPLICANT

VERSUS

KIOKO KISOI NGITHO1ST PETITIONER/RESPONDENT

WAMBUA MUTWII KISOI 2ND PETITIONER/ RESPONDENT

ELIZABETH KAVINDU NDETO ...3RD PETITIONER/ RESPONDENT

RULING

1. The application dated **16th day of 2012** is brought pursuant to the provisions of **Section 76(a) (b) and (c) of the Law of Succession Act**. The applicant seeks an order revoking/annulling the grant issued by the Resident Magistrate, Makueni dated **15th September 2011**.

2. The application is premised on grounds that: the court made orders without jurisdiction; the grant was obtained by means of misrepresentation and false statements; the petitioner failed to disclose the entire list of beneficiaries thus disinheriting them; the 2nd and 3rd petitioners are strangers to the estate of the deceased; the grant was obtained through forgery of court documents and it is in the interest of justice that the application be allowed.

3. In an affidavit in support of the application, the applicant deposed that she is the daughter to the deceased **Ndindi Kiso Kioko Ngitho** who died on the **17th May 2010** at **Kiumoni**. The deceased had a co-wife known as **Mwikali Kiso**. Land parcel No. **Kathonzweni/Muusini/65** belonged to **Ndindi Kiso Ngitho** but the court awarded it to the second household of her father as if it belonged to him.

4. Further she deposed that the trial magistrate acted without jurisdiction as he was not supposed to handle a cause where the property in issue was in excess of **100,000/=**; the property in issue measured approximately **22 acres** which was valued in excess of **100,000/=**.

5. That the letter written by the chief was drafted in a manner purporting to distribute the estate of the deceased which misled the court. The court was misled as the beneficiaries of the deceased namely:

- i. Kavesu Kiso
- ii. Kamene Kiso
- iii. Ndinda Kiso (applicant)
- iv. Kioko Kiso

were not disclosed. Consequently the property was not transmitted to rightful beneficiaries. The applicant a daughter to the deceased was excluded as the estate was distributed to strangers.

6. The 3rd respondent in response deponed a replying affidavit. He stated that the deceased was her grandmother and mother to the applicant and the 1st respondent. The deceased was invited by her mother **Kaveso Kiso** to reside on the land but fraudulently caused the land to be registered in her name. The title should therefore have been held by the deceased in trust for the entire **Kiso Ngitho's** family. Revoking the grant would be prejudicial as the property has already been distributed.

7. Rival submissions were filed by both counsels for the applicant and respondents that I have duly taken into consideration.

8. According to evidence adduced by way of affidavit it is evident that the applicant herein is the daughter of the deceased while the 3rd respondent is the granddaughter of the deceased. The deceased and **Mwikali Kiso** were co-wives. Upon the demise of the deceased, the respondents applied for letters of administration in respect of the estate of the deceased. The lower court proceeded to hear the matter and issued grant of letters of administration intestate despite the fact that the subject suit, an asset of the deceased's estate was valued in excess of **Kshs.100,000/=**.

9. Contending that the court acted in excess of its jurisdiction, the applicant attached a valuation report by Verity Management Limited, who valued the property on the 4th July 2012 and established that it measured **21:175 acres** valued at **Kshs.2,175,000/=**.

10. The grant was confirmed in **September 2011**. It is apparent that the value of the property was above **Ksh.100,000/=**. **Section 48(1)** of the **Law of Succession Act** Provides thus:

“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 shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act.”

11. A perusal of the replying affidavit clearly shows that it is not in dispute that the value of the subject estate exceeded **Kshs.100,000/=**. What the affidavit evidence sought to establish was that the land in issue was already subdivided following the court order.

12. In the case of **Njagi Baranya versus Kasi Girigorio Baranya & Others (2014) eKLR** the court held thus:

“it is apparently clear from the above-mentioned Section the Resident Magistrate,

or Principal Magistrate and the Chief Magistrate shall have jurisdiction to entertain any application other than an application under Section 76 and determine any dispute under the Law of Succession Act and pronounce such decrees and make such orders therein as may be expedite in respect of any estate the gross value of which does not exceed one hundred thousand shillings (underlining mine to emphasis the jurisdiction limitation matters). The lower courts therefore have no jurisdiction to entertain any application in respect of any estate whose gross value exceeds one hundred thousand shillings.”

13. The court having acted without jurisdiction the orders granted thereof were a nullity.
14. A copy of the certificate of confirmation of the grant issued has the description of the property subdivided and the names of people who benefited therefrom who are identified as:
- i. Kioko Kisoi Ngithu – 7 acres
 - ii. Wambua Mutwii Kisoi – 6 acres
 - iii. Elizabeth Kavindu Ndetei – 7 acres
 - iv. Kioko Kiinga – 2 acres

15. It is averred that the distribution of the estate of the deceased had reached an advanced stage such that revoking the grant will be unfair and an unjust.

16. **Section 76** of the **Law of Succession** provides thus:

“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”

The distribution of the estate of the deceased having gone far as stated is not one of the conditions to be taken into consideration in deciding whether or not to revoke the grant. The court having acted without jurisdiction perse made the order a nullity. Failure to disclose the existence of the existence of those who should have been given the first priority in inheriting the estate of the deceased was another issue that cannot be overlooked. It is evident that the grant was obtained following concealment of material facts in the matter.

The distribution carried out having involved strangers to the estate of the deceased was void.

17. From the foregoing the applicant has demonstrated that the prayers sought must issue. In the circumstances I do revoke the grant issued by the Resident Magistrate in **Succession Cause No. 10 of 2011**.

18. The consequence of the order made is that Land Parcel **No. Kathonzweni/Muusini/65** shall revert to the name of the legal owner **Ndindi Kisoi Ngitho**.

19. Parties will be at liberty to petition for grant of letters of administration afresh.

20. The applicant shall have costs of the application.

21. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 18TH day of NOVEMBER, 2014.

L.N. MUTENDE

JUDGE