



REPUBLIC OF KENYA

High Court of Kisii

Succession Cause 86 of 2007

IN THE MATTER OF THE ESTATE OF

DISMAS MAINYA NYACHIRO DECEASED

AND

IN THE MATTER OF CITATION FOR LETTERS OF ADMINISTRATION BY:

CHRISTINA MONYENCHE MAINYA1ST PETITIONER

JUSTUS GESICHO MAINYA 2ND PETITIONER

VERSUS

DIONYSIUS OYUNGE MAINYA 1ST OBJECTOR

SECLETON MAINYA 2ND OBJECTOR

RULING

1. The objectors filed summons for revocation or annulment of grant dated 28th July 2008 under **section 76 (b), (c), (d) of the Succession Act Cap 160 Laws of Kenya** and **rule 44 (1) of the Probate and Administration Rules** seeking:-

1. *That the grant of letters of administration granted to Christina Monyenche Mainya and Justus Gesicho Mainya and issued on 27th May 2008 be revoked on the following grounds:-*

(a) That the grant was obtained fraudulently or by concealment from the court of material facts.

(b) That the objectors are the genuine sons and were dependent upon the deceased.

(c) That the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant in that the allegation was made in ignorance or inadvertently.

2. The application was supported by an affidavit sworn by the 1st objector with the authority of the 2nd objector averring that he and the 2nd objector are the bonafide dependants of the deceased's estate and that the petitioners herein are imposters/strangers as they have no any blood relationship to the deceased at all; that the deceased died on 28th January 2005 and grant of letters of administration was issued to the 1st and 2nd petitioners on 27th May 2006; that the grant was obtained fraudulently on the basis of a false

affidavit which concealed the real dependants to the estate who include the Objectors and their children.

3. He further averred that the petitioners have not revealed their existence and that of their children and yet they knew that they are the beneficiaries to the estate; that the papers filed by the petitioners are misleading and the grant obtained therefore is unjust to them and their children and should be revoked; that no one notified them of this cause and that in view of the fact that the grant was made by court without the information the objectors have now revealed, the same should be revoked.

4. The petitioners on their part filed a replying affidavit dated 4th November 2008 sworn by the 1st petitioner in which she averred that she was the 2nd wife of the deceased, that she had filed a citation cause No. 298 of 2006 and leave was granted to bring this cause; that the citation was duly served upon the objectors and all along the objectors were aware of the proceeding in court which they ignored and the court proceeded as required by law. She further averred that the objectors have an intention to mislead the court by changing their names as they appear in their identity cards in pleading ignorance of this matter that the grant issued by court on 27th May 2008 was properly issued in accordance with the law of succession; that the objection is misconceived, baseless as their names appear in form P&A 5 and hence same ought to be dismissed with costs. In conclusion the deponent prayed that the objection be dismissed with costs and the grant so issued be sustained.

5. The application was then heard by way of viva voce evidence.

6. Seleton Mainya, the 2nd objector told the court that his father was the deceased; his mother's name was Elizabeth Nyarindo who is also deceased; he is the second born and his siblings are Dionysius Oyunge Mainya and Julia Ogao. That he did not know the petitioners at all; that he was not served with the citation, and that he did not know the people listed in form P&A 5 or the sureties who signed form P&A 12. He further told the court that he did not know the chief who wrote the letter dated 15th June 2009 signed by Chief N.N. Teya as their chief is Oriaro of Kiogoro location. He also told the court that the papers filed by the petitioners are all fake.

7. On cross examination by the 1st petitioner, he maintained that the 1st petitioner was not married to the deceased. He also denied that he burnt the 1st petitioner's house, or that he chased her away from their home after the deceased died. The 1st petitioner stated that he did not know how the chief gave her the letter she brought to court.

8. On cross examination by the 2nd petitioner, the 2nd objector maintained that he was not the 2nd petitioner's brother; that he did not know how the chief wrote the letter which was brought to court; that he did not know the names in the letter and that they were not served with any citation. He further revealed to the court that there was no division of land done by the deceased; that he and the 1st objector were not chased away when they came to bury their dead brother on the land and that they came to court because strangers wanted to take away their land.

9. On re-examination he clarified that they were not served with any court process; that there was a notice in the Kenya Gazette regarding this matter and they did not burn the petitioner's house.

10. Dionysius Oyunge Mainya the 1st Objector told the court that he hails from Matinywa sub location, Kiogoro location and their sub chief is Kennedy Orioro but he does not know the name of the chief; that the deceased who was his father died in 2005; his mother was Elizabeth Nyarinda; that he did not know the 1st & 2nd petitioners nor the names of sureties in P&A 12 and P&A5. That Carol Bitutu Mainya was the deceased wife but she died and N.N. Teya is an assistant chief of Boronyi sub location. He further told the court that the petitioners' documents are fraudulent and he knows this case as he was following up his late father's land at the Lands Registry.

11. On cross examination by the first petitioner, he maintained that she was not the deceased's wife; the deceased did not give him any land; that she did not get 4 children with the deceased. He further

maintained that he did not chase her away from their land; he did not know how she received a letter from N.N. Teya; he was not served with any document by a process server and that the deceased did not allow her to bury any dead children on his land. The 1st objector denied that he has changed his name.

12. On cross examination by the 2nd petitioner the 1st objector maintained that he was not his brother; they did not chase away a process server and that he did not know the sureties who signed the papers. He further told the court that he stays in Molo, and was not aware of any of his brothers who passed away never buried in their land. He denied chasing the 2nd petitioner away from the land and that he was raised by the 1st petitioner after his mother died. The 1st objector said he and his co-objector were not willing to give away any part of the deceased's estate to strangers.

13. PW3 was Naftali Ombiro Gitugi who told the court that the deceased was a relative and more or less like his father; he was the chairman of community policing since 2007 and that the deceased had Elizabeth Nyarinda and another wife who are both dead. He further told the court that he found the 1st petitioner in the deceased home about 6 years ago, she was not a wife of the deceased, as she had been married elsewhere and came to the deceased's home with a young boy. That N.N. Teya is an assistant chief of Boronyi sub location and he was acting chief of Kiogoro location for some time. That he knew the objectors as children of the deceased; though he did not know the sureties of the petitioner and he was not aware of any children of the deceased who died and were buried in the deceased's land.

14. On cross examination by the 1st petitioner, he stated that he did not know whether her children were fathered by the deceased; that Kennedy was the assistant chief of Mabungwa sub location and the deceased was not her husband.

15. On cross examination by the 2nd petitioner the 1st objector maintained that Orioro was chief of Mabungwa sub location and N.N. Teya was chief of another sub location and was not an acting chief of Kiogoro location. He maintained that he did not know who the sureties were or where the 1st petitioner was married and that he was not a son of the deceased. He told the court that the objectors were not raised by 1st petitioner as alleged; the land in question was not divided and a share given to the objectors. He also stated that he did not incite people to burn their house; he did not know the 2nd petitioner nor his brother who passed away and buried in the deceased's land.

16. On re-examination, he clarified that he never incited people to chase away the petitioners from deceased's land; that the 1st petitioner was not married to the deceased as they were only friends.

17. PW4 was Charles Mechewa Makori who told the court that this case was heard at Keumbu in 1996 before a D.O. as the 1st Petitioner wanted to be married to the deceased but she was married to Joseph Abere Mukunumi though she still befriended the deceased but her father refused part of the dowry. That the 1st petitioner was told to produce her identity card before the D.O and it read Christine Monyenche Maina, that the D.O. told 1st petitioner to bring title deed of deceased and that she should go back to where she had been married. He further told the court that the deceased later married a woman by the name Carol Bitutu.

18. On cross examination he denied that the 1st petitioner was married to the deceased in 1970, as the first wife of the deceased died in 1976. He further told court that the first petitioner got 10 children with the deceased, that no children were buried on the deceased's land, he was a clan member of the deceased and that he was present before the D.O. at Keumbu, He did not know how much dowry was paid to the 1st petitioner's father by her husband and that he did not participate in destroying their house.

19. On cross examination by the 2nd petitioner he told the court that the deceased was his uncle, they had the case in Keumbu in 1996, the 1st petitioner was not married to the deceased in 1970 and the 1st petitioner wanted to be married by the deceased when she had 8 children from her husband. He maintained that he did not know about the house that was burnt, or anything to do with dowry paid by the

deceased to his grandfather.

20. PW5 was John Matundura Sororo who told the court that the deceased had 2 wives namely Elizabeth Nyarinda as first wife and Caroline Bitutu as the 2nd wife. That the first wife died in 1976 and after sometime he married Caroline Bitutu.

21. On cross examination by the 1st petitioner he maintained that she was not married to the deceased, that the 1st petitioner did not take the deceased to be baptized in 1970, she did not bury her dead children in the deceased's land and that the deceased did not have 3 wives. He further stated that Carol Bitutu is living on land that was bought by the deceased and that he did not know that the 1st petitioner had 10 children with the deceased.

22. On cross examination by the 2nd petitioner he maintained that he did not burn their houses; that there was no land given to the 1st petitioner and the deceased land was divided between two houses and not three.

23. The 1st petitioner then took the stand and stated that she was married in 1970 to the deceased then known as Mainya Nyanchiro, she took him to church and he was baptized as Dismus. That his first wife had died and she never met her. She further told the court that she stayed with the children of the 1st wife as they were young, took them to school but one dropped out. She was planting pyrethrum and she used to sell it to educate the children. That they got children with deceased and 2 of them died on the same day and they buried them on the land.

24. That in 1980 the deceased went to the area chief William Mogire and Assistant Chief Samuel Mose for the purpose of subdivision of the land between the 2 houses and by that time Carol Bitutu as the third wife. In 2005 when the deceased died the objectors left his body in the mortuary and burnt her house and destroyed crops.

25. That in 1996 the deceased married Carol Bitutu and gave her land at Bassi, that the objectors and herself have the other parcel of land and even erected a boundary between her house and their house, that the objectors destroyed the boundary after burning her house, and since then, she has been staying in Kisii and recently her son died in a road traffic accident when she went to bury him she was chased away. She prayed that she be returned to her husband's land.

26. On cross examination by the 2nd objector, she told the court that when she married the deceased he was still very young. She took him to Nyakegogi School but he refused, his mother had died before she was married, the deceased paid 8 cows for her dowry and Atange and Moriasi were witnesses to the marriage. That the dowry was paid in 1978 and that she does not know how old his elder brother was when she married the deceased.

27. When the 2nd petitioner took the stand; he told the court that he was the son of the deceased and his mother is the 1st petitioner. That the 1st petitioner was married in 1970 and the deceased shared his land between the 1st house (mother of objectors) and the 2nd house which is the 1st petitioner in 1980. He was born in 1978. He stated further that when the deceased gave a share of the land to the petitioners the objectors were upset by it and they burnt the petitioner's house together with some of their witnesses. That they were then advised to file this case and the objectors were served with a citation but they did not file anything. He said that their house was burnt in 2005 after which the objectors destroyed the boundary between their land and theirs forcing them to stay with relatives. He also told the court that some of his brothers and sisters who are dead were buried in the suit land and that one of their brothers died recently but when they wanted to bury him on the land, they were chased away by the objectors.

28. He then stated that all they wanted was a share of the land forming part of the deceased's estate.

29. On cross examination by the 2nd objector he stated that he stoned them when they were coming to

bury their late brother. He also said the 1st objector is about 69 years old and that Lawrence and Meshack and Samuel Mose were their witnesses when the land was being divided.

30. Upon close of hearing viva voce evidence this court finds that the following issues need to be determined:-

1. *Has the 1st petitioner proved on a balance of probability to be the 2nd wife of the deceased?*
2. *Who is entitled to take letters of administration of the estate of a deceased person who dies intestate and is survived by minors?*
3. *Did the petitioners fraudulently conceal any material fact while taking the letters of administration to warrant this court to revoke the said letters of administration?*

31. As to the issue of whether or not the 1st petitioner was a wife to the deceased, the objector's testimony pointed to the fact that the 1st petitioner was not a wife to the deceased. However, I find that the objectors' evidence was not consistent. PW5 one John Matundura Sororo stated that the deceased alleged second wife one Carol Bitutu is still alive while the 2nd objector stated that the said Carol Bitutu was deceased. In addition the 1st petitioner in her evidence stated that she took the deceased's first wife's children to school but one of them dropped out. She maintained the same statement on being cross examined by the 2nd objector as she told him that he was the one who dropped out from school. This court finds that the 1st petitioner's evidence as to her being married to the deceased was consistent and unshaken therefore on a balance of probability the 1st petitioner was the deceased 2nd wife.

32. Where a continuing trust arises, no grant of letters of administration may be made to one person alone except where that person is the public trustee or a trust corporation.

33. In **Veronicah Mwikali Mwangangi –vs- Daniel Kyalo Musyoka [2005] e KLR** Anga'wa J. persuasively stated that:-

“Where children are concerned in an estate, where the legal representative is a male or female there must be two administrators to take up the limited grant for purposes of filing suit. This assists in ensuring that the resulting trusts created for the children are safeguarded.”

34. In the above case the letters of administration were given to the 1st and 2nd petitioners as the spouse and son respectively of the deceased estate and thus in accordance with **section 58 (1) of the Law of Succession Act.**

35. With regard to revocation of grant the objectors summons for revocation of grant are grounded under **section 76 (b) (c) and (d) of the Law of Succession Act** which provides:-

- a) *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.*
- b) *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.*
- c) *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*
 - ii) *to proceed diligently with the administration of the estate; or*

iii) *to produce to the court, within the time presented any such inventory or ... of administration as is required by the provisions of paragraphs (e) and (g) of section 80 or has produced any such inventory or account which is false in any material particular.*

36. Upon perusal of the court record herein, by a letter from the office of the chief of Kiogoro dated 15th June 2007 the deceased is said to have 13 children excluding the 1st petitioner who was his wife. The consent affidavit however shows that the petitioners obtained consent from only seven of the deceased's children which in essence excluded consent from the two objectors and other beneficiaries.

37. In the case of **Mary Gatumbi alias James Ngari Gatumba (deceased) Nairobi High Court succession cause number 783 of 1993** Koome, J. (as she then was) stated that:

“A grant will be revoked where a person who is entitled to apply is notified by the petitioner of their intention to apply and that persons consent to the petitioner’s application is not sought.”

38. Although it is a disputed fact whether the objectors were served with the citation from the petitioners, it is an undisputed fact that consent to the taking of the letters of administration was done without the consent of the objectors and other beneficiaries.

39. In view of the above, I am satisfied that the grant of letters of administration issued on 27th May 2008 should be revoked. The same be and is hereby revoked. There shall be no order as to costs.

Dated and delivered at Kisii this 21st day of February, 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

----- for Petitioners

Mr. C.A. Okenye for Nyagaka (present) for Objectors

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE