



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO.155 OF 2001

IN THE MATTER OF THE ESTATE OF M'IRACHA Alias IRACHA GATUMO (DECEASED)

LESIT, J.

TITUS MBAABU M'IRACHA M'IRACHA.....PETITIONER

-VS-

JUSTUS MUTHAMIA.....OBJECTOR

AND

BONIFACE GICHURU.....)

EDWARD NTEERE.....)......APPLICANTS

DAVID KIOGORA.....)

JUDGEMENT.

1. The Applicants vide a Notice of Motion Application dated 2nd October, 2012, brought pursuant to the provisions of Section 76 of the Law of Succession Act and Order 40 Rule 1 and 4 of the Civil Procedure Rules 2010 and any other enabling provisions of the Law have sought the following orders:
 1. ...
 2. **That this Hon Court be pleased to grant an order of temporary injunction restraining the Petitioner, TITUS MBAABU by himself, his agents, servants, or anyone acting on his behest from subdividing, transferring or in any other way interfering with the deceased's estate and especially Land Parcel No. Abogeta/U-Kithangari/874 pending the hearing and determination of this application.**
 3. **THAT this Honourable court be pleased to revoke and or annul the grant of representation issued to Titus Mbaabu as the Administrator of the estate of the deceased's estate M'Iracha alias Iracha Gatumo and consequently the Applicants be made co-Administrators of the deceased's estate.**
 4. **THAT cost of this Application be provided for.**
2. The said Application is said to be premised on the following grounds:
 1. **THAT the grant was obtained fraudulently and secretly in that after the death of the first Petitioner herein Joseph Mwit, the current Petitioner sought to replace him without seeking**

- the consent of the other family members including the Applicants who are beneficiaries and dependants of the deceased estate.**
- 2. THAT the said Titus Mbaabu obtained the said grant by making false statements and concealment from court of material facts.**
 - 3. THAT the said Titus Mbaabu misrepresented facts to court and as a result, the deceased estate was distributed unfairly and in an inequitable manner.**
 - 4. THAT if the said grant is not revoked, the Applicants and other family members will be disinherited when others will benefit unfairly.**
3. The brief history of this succession cause is that letters of administration in respect of the deceased's estate were initially issued to the original Petitioner Joseph Mwiti on 31st August 2007. Unfortunately before distribution could be done, the said Petitioner died on 10th December 2007, whereupon the current Petitioner, vide an application dated 20th December 2007, applied to court to substitute the deceased Petitioner as an Administrator of the estate.
 4. The 1st and 2nd Applicants are sons of the deceased and both the Petitioner and the Objectors are their brothers. The 3rd Applicant is a grandson of the deceased in this cause and a son of the deceased Petitioner Joseph Mwiti.
 5. The Applicants case is that the original Petitioner Joseph Mwiti had the consent of all family members to seek the said grant to administer the estate but that upon his demise the incumbent Petitioner did not seek their consent during the said substitution. The Applicants further contend that the Petitioner obtained the said grant through making fraudulent and false statements and concealment of material facts to the case.
 6. The Applicants aver that the Petitioner misrepresented the marital status of some of the daughters of the deceased and that the Petitioner made the court to believe that Land Parcel No. Abogeta/U-Kithangari/364 was sold to enable the 1st Applicant proceed to the United States of America and that as such he ought not to benefit from the other parcels of land.
 7. The Applicants further contend that the Petitioner is in the process of transferring parcel No. Abogeta/U-Kithangari/878 as per the schedule of distribution and that if this is done, the beneficiaries of the estate shall stand to suffer irreparably. That title is not the one quoted in prayer 2 of this application in which injunctive relief is sought. That allegation is therefore of no consequence.
 8. The Petitioner on the other hand contends that after the death of the deceased Petitioner, he was not the one who sought to replace him but rather it was all the beneficiaries especially 2nd Applicant who gave his name to their then advocate for substitution as a result of which an application for substitution was filed. That the said application was allowed on 3rd March 2008.
 9. The Petitioner has denied obtaining the said grant fraudulently or making any false statement at all since all the beneficiaries were involved and concealing any material fact of the marital status of the two daughters since they are also entitled to a share of the estate.
 10. The Petitioner further contends that even though the proceeds of sale of Land Parcel No. Abogeta /U-Kithangari /364 were used to cater for the education of the 1st Applicant in the United States of America, he has not been disinherited since he has a share in the distribution of Land Parcel No. Abogeta/U-Kithangari/878.
 11. The Objector on the other hand has contended that during the hearing of the petition, the 1st and 2nd Applicants cooperated with the Petitioner and that at the time that the death of deceased Petitioner Joseph Mwiti occurred in 2007, he had already made an application for confirmation of grant vide application dated 5th March 2002. The Objector contends that the current Petitioner has not changed the proposals contained in the original application for confirmation of grant. He further contends that there was equal distribution of the deserving beneficiaries and that the Applicants have not shown how the deceased estate was distributed unfairly and that as such there is no basis for revocation.
 12. I have carefully considered the rival submissions by the parties. Section 76 of the Law of Succession Act CAP 160 of the Laws of Kenya pursuant to which the instant application is premised provides 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 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

ii. to proceed diligently with the administration of the estate or

iii. to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular or

e). that the grant has become useless and inoperative through subsequent circumstances.

13. In paragraph 9 of the Applicants supporting affidavit, it has been alleged that the Petitioner obtained the grant through making fraudulent and false statements and concealment of material facts to the case. This material facts have however not been disclosed. It has also been contended for the Applicants that the Petitioner misrepresented the marital status of some of the daughters of the deceased by claiming that two of them were unmarried while the truth is that all the daughters of the deceased are married and live with their husbands in their respective matrimonial homes.

14. The Applicants, whereas they acknowledge that the deceased's daughters are entitled to a share of his estate on the strength of the Constitution 2010, they urge the court to find that due to the unique circumstances of this case it is not conducive and or favorable for them to get a share out of the said estate. Article 27 (1) thereof provides as follows:

“Every person is equal before the law and has the right to equal protection and equal benefit of the law.”

Subsection 3 thereof further provides as follows:

(3). women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

17. The other issue raised by the Petitioner is that Land Parcel No. Abogeta /U-Kithangari /364 was sold to enable the 1st Applicant proceed to the United States of America for further studies. This has been denied by the 1st Applicant who contended that he used his personal savings and friends to go to United States of America and that the said sale was well orchestrated scheme to disinherit him.

18. First of all it is evident from the schedule of distribution of property that the Petitioner, the 1st

and 2nd Applicants are all getting an equal share of Land Reference No.Abogeta/U-Kithangari/878. It is only the Objector who is getting the whole of Land Parcel No. Abogeta/U-Kithangari/879, and Jane Mwiti who has gotten a share of Land Parcel No. Abogeta/U-Kithangari in life interest for herself and as a trustee for her minor children who include the 3rd Applicant herein.

19. It is not disputed that the grant of letters of administration had initially been issued to John Mwiti. He was subsequently substituted by the current Petitioner namely: Titus Mbaabu. The Petitioner has averred that it was all the beneficiaries who gave his name to their then advocate to apply to for substitution. Even though the beneficiaries have denied this, and a formal consent of his appointment is missing from the record, the record of the court is clear that on 3rd March, 2008, in the presence of the advocates for the Objector and Petitioner, the application dated 20th December, 2008 was granted in terms of prayers (a) and (b).

20. That application sought an order substituting the deceased Petitioner with the current Petitioner as personal representative of the deceased herein and Administrator of his estate. No objections were raised. Pursuant to the court order of 3rd March, 2008 a Grant of Letters of Administration was issued in the name of the current Petitioner, TITUS MBAABU M'IRACHA on the same day.

22. I have noted that an application for confirmation of grant dated 5th February, 2002 was eventually heard through filed affidavits in which the parties filed proposals for distribution of the estate. A judgment was thereafter delivered on 22nd May, 2009 in which the court made orders as to how the estate of the deceased was to be distributed to all the beneficiaries. That judgment still stands as it has not been set aside, varied or appealed from. The wording of the current application to effect that some or any beneficiaries have or are in the process of being disinherited; or that the distribution has been done unfairly and inequitably are not arguments that can be entertained here. One, the distribution is in accordance to the judgment of this court delivered on 22nd May, 2009. Second, if any party was aggrieved by the said judgment, he/she ought to have filed an appeal in the Court of Appeal. To make such allegations before this court is an attempt to re-open the case through the back door and to turn this court into an appellate court of its own decision, which is irregular.

23. I see no need to revoke the Grant of letters of Administration issued to TITUS MBAABU. However I see no harm in increasing the number of Administrators to oversee the final distribution of the deceased estate. It is not in dispute that the Petitioner, the 1st Applicant and the 2nd Applicant are brothers. The 3rd Applicant was a son of the original Petitioner and a grandson of the deceased. The 1st and 2nd Applicant would rank in priority over the 3rd Applicant as to the persons who would be entitled to apply for letters of administration.

24. In the result I dismiss the instant application and in lieu of same order as follows:

1. I hereby direct that the 1st and 2nd Applicants be co-Administrators of the estate of the deceased. I further order that in order to facilitate the appointment of the additional Administrators, the Grant of Letters of Administration be amended/rectified to include the 1st and 2nd Applicants, BONIFACE GICHURU and EDWARD NTEERE to this application as co-Administrator of the estate of the deceased together with TITUS MBAABU M'IRACHA.

2. Subject to the rectification/amendment herein above, the Application must fail.

3. Since all the parties are family members, each party to bear their own costs.

Dated, signed and delivered this. 17th day of October, 2013.

LESIT, J

JUDGE.