



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISCELLANEOUS SUCCESSION APPLICATION 37 OF 2011

IN THE MATTER OF THE ESTATE OF PAULO KIPLAGAT BOIWO (DECEASED)

JUDGMENT

The application herein is brought by way of summons under Section 76 and Rule 4 (1) of the Law of Succession Act and the Rules therein, and is dated the 11th day of April, 2011.

The Applicants seek the Revocation and Annulment of the Grant of Letters of Administration made to Leonida Jepkorir Baiywo on the 18th February, 1988 which Grant was subsequently confirmed on the 29th September, 1993. The said Grant had been made in Succession Cause No. 43 of 1987 at Kapsabet relating to the estate of **PAULO KPLAGAT BOIWO** (Deceased).

The Applicants also sought preservatory orders over the property known as **NANDI/KOYLAT/68** pending hearing and determination of the matter to stop any dealings or transactions on the property aforementioned.

The Applicant relied on the grounds set out in the application and on the affidavits of **KIBAIYWA ARAP CHERUIYOT** and **PHILIP KIPKERING CHOGE** dated the 11th April, 2011.

The Applicants at the hearing hereof were represented by Learned Counsel Mr. Limo and the Respondent by Learned Counsel Mr. Chelashaw.

It was the Applicants contention that the Grant had been obtained by the Respondent who had made false statements, and concealed crucial material facts.

The Applicants also averred that the Grant was made by a court without competent jurisdiction which therefore rendered the Grant defective in substance and also incompetent.

Counsel for the Applicants argued that the Respondent gave the value of the estate as Kenya Shillings Fifty Four Thousand (Kshs 54,000/=). That even in the year 1987 this was a gross under valuation of the property.

That the total acreage of the estate is twenty seven point four (27.4) acres and even at 1987 the value of the estate was more than Kenya Shillings One Hundred Thousand.

That Section 48 of the Law of Succession Act restricts the Magistrate's Court's jurisdiction to Kenya

Shillings One Hundred Thousand (Kshs 100,000/=) therefore the Kapsabet Court that issued the Grant of Letters of Administration had no jurisdiction and no mandate to issue the same.

The Applicants further submitted that the Respondent had failed to disclose to the court that the 2nd Applicant had lived and settled on the parcel of land for over twenty nine (29) years and that the parcel of land did not belong solely to the deceased and that the Applicants were both entitled to a share of the property forming the estate of the deceased.

That the Respondent never informed the brother of the deceased that she had filed Succession Cause in Kapsabet and that she had been granted the Grant of Letters of Administration.

The Applicants prayed for preservatory orders and also for Revocation and Annulment of the Grant as the Respondent had concealed material facts to the court when she applied for the Letters of Administration.

The application was opposed by Counsel for the Respondent and Counsel relied on the affidavit of Leonida Jebkorir Baiywo made on 25th day of July 2011.

The Respondent submitted that the 1st Applicant was the father of the deceased and the 2nd Applicant was the brother and that dependency as set out under Section 29 of the Law of Succession Act was not proved by either the Applicants. That both were strangers to the Estate within the meaning of dependency out in Section 29 of the Law of Succession Act. None of the Applicants had locus to challenge the court's jurisdiction. The Respondent deponed that she had obtained the Grant of Letters of Administration in 1988 and the property was registered in the name of the Respondent in 1999. Whereas the Valuation Report tendered in as evidence was based on the current market value it was upon the Applicants to prove the value of the property at 1987 approximately twenty-three (23) years ago. The Respondents prayed that the application be dismissed with costs.

Upon hearing the arguments of both Counsel for the Applicant and the Respondent and having perused the affidavits in support the court finds the following **ISSUES FOR DETERMINATION**.

(1) Preservatory orders.

(2) Dependency.

(3) Concealment of material facts.

- Value of the property

- dependants/beneficiaries.

(4) Revocation or Annulment of the Grant.

(5) Costs.

LAW:

The requisite law is contained in the Law of Succession Act (Cap 160) Laws of Kenya and the relevant and applicable Sections are as set out hereunder:

(1) Section 29 gives the meaning of a dependant and states as follows;

“.....for the purposes of this part “dependant” means

a) The wife or wives, or former wife or wives and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

b) Such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters and half-brothers and half-sisters, as were being "maintained" by the deceased immediately prior to his death....."

(2) Section 39 states.

"Such of the deceased's parents, step-parents, grandparents, grandchildren, step-children". And it sets out persons who may take out a Grant of Letters of Administration where there is no surviving spouse or children and the order of priority is as follows:

".....39 (1) (a) Father, or if dead

(b) Mother, or if death

(c) Brothers and sisters and any child or children of deceased brothers and sisters in equal shares....."

(3) Section 48(1) sets out the Magistrates Court's jurisdiction as

".....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....."

(4) Lastly Section 76 provides the grounds for Revocation and or Annulment of a Grant.

a) That the proceedings to obtain the Grant were defective in substance.

b) That the grant was obtained making of a false statement and concealment from the court of something material to the case.

ANALYSIS

On the issue of preservative orders. Preservative orders are in essence similar to injunctive orders. The Applicants have to make out a prima case and show that they will suffer irreparable loss if the order sought is not granted. The Applicants must also show the substantial loss they are likely to suffer which loss is irreparable and cannot be compensated by damages.

The Applicants herein tendered very little evidence in their arguments and submissions to warrant preservative the orders sought. The main basis and body of their application was Revocation and Annulment of the Grant of Letters of Administration. Very little emphasis was put on making out a case in support of the preservative orders.

Starting from the issue of dependency in the context of Sec. 29 (a) & (b) of the Law of Succession Act it is for the Applicants to prove and tender evidence that they were being maintained by the deceased prior to his demise. No evidence was adduced by both Applicants in support of such dependency.

On the issue of entitlement to a share in the estate of the deceased whether as beneficiaries or joint owners, again the Applicants simply made averments in their affidavits with no concrete documents in support.

The 2nd Applicant averred that he (the brother) had settled on the land for twenty nine (29) years. He submitted therefore he was entitled to a share of the estate as it did not solely belong to the deceased.

To counter the above allegation the Respondent annexed "LJB10" a Letter of Consent from the Land Control Board which is evidence in support of the fact that the deceased bought the land from a **JOHN KIPTALAM ROTICH** for a consideration of Kenya Shillings Thirteen Thousand Five Hundred (KShs

13,500/=). This transaction was approved by the Land Control Board vide their meeting of 1st July 1977.

The Respondent also annexed annexure "LJB8" a Letter dated the 27th September, 1993 from the District Commissioner as evidence that the 1st Applicant, the deceased's father forcefully and illegally entered upon the property and started cultivating the same.

The court finds that the property was purchased in 1977 by the deceased. The deceased's demise was in the year 1981 yet the Applicants have tendered no evidence in support of their stake in the property during the lifetime of the deceased.

Had they contributed monies towards the property, this should have been tendered in evidence. The amount of monies given to the deceased, their portions in the said property, any written agreements, receipts or witnesses to any agreements. Absolutely no evidence was adduced in support of their claims.

The issue of having settled on the property for a period of twenty-nine (29) years does not obtain as the court finds that the occupation was not by consensus but rather by use of force. The commencement of occupation of the land was also not done during the lifetime of the deceased.

Section 39 does not apply herein because the deceased was survived by a spouse and children and also under Section 66 of Act the widow is the preferred person and is first in line when it relates to the issue of taking out a Grant of Letters of Administration. The father and the brother to the deceased therefore have no locus standi.

Lastly on the issue of the Magistrates Court's jurisdiction, the court finds that it is upon the Applicant's to produce evidence on the value of the property as at the time of taking out of the Grant of Letters of Administration. Going by the Letters of Consent in the year 1977. The consideration at that time was Kshs 13,500/=. The Respondent gave the value of the property as Kshs 54,000/= in 1987 when she sought the Grant of Letters of Administration. With no evidence to rebut the value as at 1987 on a balance of probabilities the court finds the amount to be a fair estimate of the value as at that time.

CONCLUSION.

The Applicants have failed to satisfy the court that the preservatory order sought is warranted or meritorious.

The court finds that the Applicants are neither dependants nor beneficiaries of the deceased within the context of Section 29 of the Law of Succession as the Applicants did not prove that they were being maintained by the deceased during his lifetime.

The Applicants also failed to satisfy the court that they had an interest in the property of whatever nature.

The court finds that the Applicants have failed to prove that the Grant was obtained fraudulently by the Respondent by making of a false statement and/or by concealing from the court material facts. The Applicants had no stake in the property and the Respondent was within her rights to exclude them.

The court also finds that the proceedings to obtain the Grant were not defective as the value of the property at that time was within the jurisdiction of the Magistrate's Court.

In conclusion, the application for Revocation and/or Annulment of the Grant of Letters of Administration has no merit and is dismissed with costs to the Respondent.

Dated and delivered at Eldoret this 25th day of April 2012.

A.MSHILA

JUDGE

Coram: Before Hon. Mshila J

CC: Sophie

Mutai holding brief for Limo for Applicants

Chelashow for Respondents.

Judgment read in the presence of both Counsels. Application for Revocation and Annulment of Grant dismissed with costs to Respondent.

A.MSHILA
JUDGE