



No. 2742

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
SUCCESSION CAUSE NO. 510 OF 1997
IN THE MATTER OF THE ESTATE OF NYABANDO MATURETI – (DECEASED)

AND

EDWARD ALDRINE NYABANDOAPPLICANT

-VERSUS-

MARIKILINA NYABANDO.....RESPONDENT

RULING

Edward Aldrine Nyabando, hereinafter **“the applicant”** on 18th May, 2010 filed an application dated 20th April, 2010. That application was expressed to be brought under section 76 of the **Law of Succession Act** and rules 44, 58, 70 and 73 of the **Probate and Administration rules**. He prayed in the main that the grant of letters of administration intestate issued by this court on 12th January, 1998 and confirmed on 20th July, 1998 to **Marikilina Nyabando** hereinafter **“the respondent”** as the administrator of the estate of the late **Nyabando Matureti** be revoked.

The application was taken out on the grounds that the grant was obtained unlawfully, fraudulently and by a single administrator. The applicant also contented that the respondent did not obtain consent from all the other beneficiaries before the grant was issued to her and subsequently confirmed contrary to the mandatory requirements of the law. As proof of the respondent’s acts of fraud, the applicant contented that she was not the only beneficiary of the estate of the deceased as there were others who did not consent or issue a citation of their intention not to petition for the said grant. Using the grant she obtained as aforesaid, the respondent managed to transfer to herself land parcel **Central Kitutu/Mwamosiaria/361** hereinafter **“the suit premises”**. In the process she disinherited other bonafide beneficiaries. Since then she had transferred portions of the suit premises to strangers without the applicant’s consent.

The applicant swore as well an affidavit in support of the application. Where pertinent he deponed that he was the fourth born son of the deceased and respondent. The deceased was the registered proprietor of the suit premises before he passed on sometimes on 23rd August, 1974. The deceased passed on intestate and left the applicant, **Ernest Jomba Nyabando** (deceased), **Charles Ondieki Nyabando**, **Titus Nyabando** and **John Oreki Nyabando** (deceased) as his only surviving sons but had not subdivided the suit premises among them. Since then their mother, the respondent had obtained a grant and fraudulently caused the suit premises to be transferred to her, whereupon she proceeded to subdivide the same into fourteen portions and transferred some thereof to outsiders without his consent. In the process she had disinherited the applicant. According to the applicant, he was aware that in succession matters there must at least be two administrators, and therefore his mother, the respondent could not have been the only appointed administrator of the estate of his deceased's father. He was also in the know that no transfer of the suit premises was possible before a proper grant was obtained and distribution thereof of the estate done. Finally, he deponed that by concealing and doing the aforesaid, the respondent fraudulently obtained the grant, had the same confirmed and proceeded to have the suit premises subdivided and registered in the names of strangers without his consent.

The respondent replied to the applicant's accusations in terms that at the time of filing the petition for the grant of letters of administration intestate, the applicant consented to her doing so. In the premises, the applicant's assertion that she acted fraudulently has no basis at all. Following the grant she proceeded to subdivide the suit premises among her sons, the applicant included as follows:

- **Ernest Jomba Nyabando (deceased) – Kitutu/Mwamosioma/2336 and 2343.**

- **Charles Ondieki Nyabando – Kitutu/Mwamosioma/2333 and 2338.**

- **Titus Masengo Nyabando – Kitutu/Mwamosioma/2331,2332 and 2340.**

- **Edward Aldrine Nyabando – Kitutu/Mwamosioma/2334 and 2341.**

The respondent was however, aware that following the aforesaid transfers, the applicant had sold his inheritance to one, **Jackson Masega Nyamongo** and transferred the same to him. As far as the respondent was concerned she had dutifully and with due diligence administered the estate of the deceased according to law since she had no option but to subdivide the deceased's estate amongst her sons. She questioned the applicant's motive of lodging the instant application fourteen (14) years after and when he was given two portions which he had sold and transferred to a third party. Otherwise the applicant was a vexatious litigant.

When the application came up for directions before **Musinga J.** on 21st May, 2010, parties agreed that the same be disposed of by way of affidavits on record and by written submissions. Subsequent thereto, parties filed and exchanged written submissions which I have carefully read and considered.

Under section 76 of the **Law of Succession Act**, a grant of representation, whether or not confirmed can at any time be revoked or annulled if the court so decides either on the application by any interested party or of its own motion on the grounds:

“a. That the proceedings to obtain the grant were defective in substance;

b. That the grant was obtained fraudulently by the making of 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 a 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 it 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”.

In the instant application, the applicant has anchored his complaint on fraud. He thinks that his mother acted fraudulently because she petitioned for the grant as a sole administrator and that he was never consulted nor was his consent sought and obtained before the grant was issued and subsequently confirmed to her. Fraud is a very serious charge to make against a party. The burden of proving fraud is indeed very heavy. It is not on a balance of probability like in any other civil claims nor is it beyond reasonable doubt as in criminal cases. However the standard of proof in this case is in between the aforesaid standards of proof.

Tackling the applicant’s first complaint that the respondent obtained the grant as a single administrator, this complaint has no basis at all in law. There is no requirement under the **Law of Succession Act** that a grant of letters of administration intestate must be made to two people. The applicant did not in his affidavit in support of the application and indeed in his written submissions point to any such provisions of the law. To my mind such requirement is purely for administrative purposes. In any event the respondent was the wife of the deceased and in terms of priority for purposes of petitioning for a grant of letters of administration intestate, she ranks first among those who could have petitioned for such grant. Section 66 of the **Law of Succession Act** besides giving the court unfettered discretion in deciding who should be issued with a grant of representation, also gives the order of preference as to who should be given a grant. It provides inter alia:

“...When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interest of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference:

- a. *Surviving spouse or spouses, with or without association of other beneficiaries.*
- b. *Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by part V.*
- c. *The public trustee; and*
- d. *Creditors:*

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will...”.

The applicant being a son of both the deceased and respondent could not in the circumstances taken precedence over his mother.

I have perused the petition for the grant of letters of administration filed by the applicant and I do not discern any procedural irregularities alluded to by the applicant in his written submissions. Incidentally the alleged procedural irregularities did not form part of the applicant’s complaint in the application. Those allegations in the premises can only be dismissed as afterthought. Indeed had the alleged procedural irregularities referred to by the applicant been serious as the applicant would want us to believe, then the petition would not have gone for Gazettment and the grant thereafter issued. The applicant complains that forms P&A 80 and 57 were not dated as required and also that the Notice to the principal registrar in form 73 that accompanied index card were not filled and or forwarded as required under rule 4(1). I have seen forms P&A 80 and 57. Contrary to the submissions of the applicant, they are all thumb printed. Who said that thumb printing is not a signature? And even if they are not dated, this is an omission which does not go to the root of the petition. As I said earlier, this petition was Gazetted in the Kenya Gazette as Gazette Notice number 6664. Every citizen of this country is presumed and deemed to read the Kenya Gazette. Accordingly, it must be taken that the applicant read the said Kenya Gazette Notice. If he had any misgivings regarding the process, he should have raised the red flag then. He did not. Subsequently, the petition went through the entire process until it was confirmed. Yet the applicant did not as much as raise any finger regarding the legality of the process. I can only suspect that he did not challenge the petition then as he stood to gain extensively from now what he claims to have been a flawed process.

According to the letter dated 31st October, 1997, addressed to the Deputy Registrar of this court by the chief, Kisii town, he said in pertinent paragraph

“...Also or parcel No. Central Kitutu/Mwamosioma /585 there is one purchaser Mr. Erick Barongo Aminga ID No. 910785651 who had bought whole share of Mr. Edward Aldrin Nyabando ID/No. 9110457... so that she can get the necessary papers which will enable her use in subdividing the said parcel and may transfer and give each of her son his title deed and also the same to the purchaser Mr. Eric Barongo Aminga ...”. From the foregoing, it is quite clear that the respondent was given his share of the land long even before the petition was filed and he did not protest much as it was illegal. He proceeded to sell the same to the third party. He did not then object to being given the land in the absence of a confirmed grant as it suited him then. He cannot be heard to fault that process when he, was in the forefront in violating the same.

It is instructive that what the respondent has deponed to in response to the application has not been rebutted by the applicant either by a further affidavit or in his written submissions. It must therefore be taken to be true. He was, following the confirmation of grant given two parcels of land. He never

challenged the distribution then. He now comes 14 years after the event and after he has sold off his inheritance to challenge the distribution. Who can allow him to do so? It smacks of bad faith on his part.

I have also looked at the annexures in the replying affidavit filed by the respondent. In particular I have looked at the suit filed by the applicant against one, **Simon Mokindu Kiema**, in which he sought an order cancelling the certificate of title in respect of land parcel **Central Kitutu/Mwamosioma/2344**. In that suit he claims to have brought it as the donee of the respondent who had taken out letters of administration to administer the estate of her late husband. Here again, the applicant demonstrates that as long as the occasion suited him, he had no qualms using the grant which he now seeks to impugn to advance his cause. It is also instructive that much as the applicant accuses his mother of subdividing the suit premises and dishing out portions thereof to strangers, he did not as much as indicate who these strangers were. However, it is now apparent that some of strangers are indeed those he himself sold his inheritance to. Is it possible therefore that the applicant is merely seeking the revocation of the grant that was regularly and lawfully obtained so as to reclaim his parcels of land sold as aforesaid. From what I have seen so far on record, I am persuaded that indeed, that is the ultimate goal of the applicant. On the whole, I have no doubt at all that at the institution of this succession cause, the applicant was in the loop throughout and he is estopped from stating to the contrary. There is no evidence at all of fraud perpetrated on the applicant by the respondent.

The respondent did not in her petition state that she was the only beneficiary as claimed by the applicant. Indeed from P&A 5 is crystal clear. Under paragraph 4 of the said affidavit she gave out all the names of the beneficiaries the applicant included. Further and contrary to the assertion of the applicant, the transfer and subsequent transfer of the suit premises into the name of the respondent did not at all disinherit him. He has not denied that following the subdivision he was given two parcels of land therefrom just like his other brothers save for **Titus Masengo Nyabando** who got three parcels. There must be a reason why Titus ended up with three parcels. Had that not been the case I am certain that the applicant and his brothers would have raised hell.

Finally, and if I may ask, out of all the four brothers, why is it that it is only the applicant who is seeking to revoke the grant? If his complaint was genuine, I am certain that his other brothers would have joined the fray in his support. That they have not can only confirm that the applicant is a lone ranger and the application is purposely brought to achieve ulterior motives.

The same accordingly denied with costs to the respondent.

Ruling dated, signed and delivered at Kisii this 31st day of March, 2011.

ASIKE-MAKHANDIA

JUDGE