



REPUBLIC OF KENYA



In re Estate of Lyoshi Sayisi Lucy alias Lucia Lyoshi Sayisi (Deceased) (Succession Cause 25 of 2021) [2024] KEHC 14424 (KLR) (14 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14424 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 25 OF 2021
SC CHIRCHIR, J
NOVEMBER 14, 2024**

IN THE ESTATE OF LYOSHI SAYISI LUCY ALIAS LUCIA LYOSHI SAYISI.(DECEASED)

BETWEEN

LEONIDA LIBUTSULI LYOSHI OWEGI PETITIONER

AND

MAURICE OTUNDA LUGONZO RESPONDENT

RULING

1. There are two Applications coming up for determination. The first one is dated 13/11/2013. It is brought by Maurice Otunga Lugonzo , (herein after referred to as the respondent for purposes of this ruling
2. The 2nd one is dated 26/4/2022 . The same was brought by Leonida Lubitsuhi Lyoshi Owegi, (Hereafter referred to the petitioner.) Both Applications seek for revocation of Grant.

Background

3. To fully appreciate the issues in the two Applications , a brief background to this matter is necessary.
4. The proceedings relate to the Estate of Lyoshi Soyisi Lucy alias Lucia Lyoshi Sayisi (Deceased). The Petitioner is the sister to the deceased while the respondent is the deceased's step- son.
5. Upon the demise of the deceased ,the petitioner filed proceedings at the High Court in Milimani under Succession Cause No. 1995 of 2012 where she petitioned for probate of written will . The Grant of Probate was issued to her on 24/1/2013.
6. Meanwhile at Kakamega High Court the respondent applied for Letters of Administration intestate dated 7th August, 2023. Then the Petitioner identified himself as the son and only dependant of the



deceased. The Grant of letters of Administration intestate was issued to him on 9/8/2013 under Kakamega Succession cause No. 613 of 2013.

7. Through an order dated 3/11/2021 by the High Court in Milimani the cause was transferred to this court and given the present cause Number.
8. By a consent order entered on 25/2/2022 the two cases were consolidated and this file was designated as the lead file.

The Application dated 13/11/2013.

9. Through the above stated Application the respondent seeks orders as follows:
 - a. That this honourable court be please to revoke and/or nullify the Grant of Letters of Administration issued to the Petitioner and consequently confirmed on 23rd day of September, 2013.
 - b. Costs of the summons be provided for.

Applicants Case

10. The Respondent states that the deceased was his step-mother; that his father the late Stephen Lugonzo had married the deceased on 19/12/2081 and that the couple had established a home on land parcel No. Butso/so/Shibeye/676 . He further states that the deceased had taken him and his two sisters, Lucy and Mary ,under her care and accepted them as her children.
11. It is further stated that the Petitioner applied for the Grant of Letters of Administration for the deceased's estate by making false statement of fact, non disclosure of the full list of beneficiaries/heirs and concealment of material and vital information from the court. It is further stated that there having been a valid marriage between his father and the deceased, his late father had matrimonial interest in the estate Therefore he argues that his father's interest should be passed to him and his siblings, as beneficiaries.
12. It is finally stated that the will deposited in court is a total forgery.

Petitioner's case

13. In a Replying Affidavit sworn on 10/3/2020 the petitioners opposes the Application.
14. She stated that she is the biological sister of the deceased; that the deceased died on 14/5/2012 having bequeathed all her properties through a will dated 24/10/2000 (A copy of the will is annexed to the Affidavit and marked "LLL O-Z").
15. That she filed this succession cause, and on 24/1/2013 she was issued with a Grant of probate with written will, and confirmed as executor of the deceased's estate. That the Grant of probate was not challenged and was confirmed on 23/9/2013.
16. That after confirmation ,she transferred the land parcel No. Butso/so/ shibeye/ 676 (suit property) to herself as per the will . She thereafter transferred it to her son , Hillary Opiyo Owegi.
17. That the suit property was purchased by the deceased in the year 1977, before her marriage to the Respondent's father in December 1981; that the Respondent's father has other parcels of land where he resided with his family, including the deceased herein. Further she states whereas the deceased had stated in her will that the respondent's father should not be buried in the suit property, the Respondent forcefully buried his father on the deceased's property apparently as a way of claiming ownership of



the land. Courts documents on the burial dispute have been annexed to the Affidavit. The Petitioner further states that the deceased who had no children of her own raised her and took care of her and her children.

18. The petitioner further states that the Deceased had allowed her to till and cultivate the suit property even during her lifetime; that she continued the cultivation after the deceased died until 7/9/2013 when the Respondent forcefully entered and started residing on the land. The respondent destroyed her sugarcane plantation and started growing his own crops.
19. The petitioner further states that having proved the will, there is no reason for this Court to depart from its earlier finding; that the allegation of forgery on the will has not been substantiated in any event.
20. The Petitioner filed a further Affidavit sworn on 2/9/2022. She stated that when the Respondent applied for the grant in Kakamega case No. 613 of 2013 he made a false statement of fact by stating that he was the son of the deceased, yet the deceased did not have any children; that further the Respondent failed to disclose to the court that the deceased had left a written will.

The Application dated 26/4/2022

21. In the Application dated 26/4/2022, the Petitioner herein seeks for revocation of the Grant of letters of Administration issued to the respondent under Kakamega succession cause No. 613 of 2013. She further seeks that the Grant of probate with written will issued to her under this cause be upheld.
22. She states that the Grant was issued on the basis of false statement of fact , to wit that the Respondent was the child of the deceased, yet he was not. It is further stated that the Respondent concealed from this court the fact that the Deceased had bequeathed all her properties to the Petitioner, through a written will. Finally, it is stated that the Respondent failed to disclose to the court the fact that the Petitioner had been given a Grant of Probate.

Petitioner's Submissions

23. The Petitioner has proposed that the court should first determine whether there was a written will and that if such a will is found to have existed and valid , then the will must be upheld. While relying on Section 5,6,7,8 & 11 of the *Law of succession Act*, the petitioner submits that the will met all the legal requirements of a written will. The petitioner further submits that the deceased had made a written will, attested by 2 witness, one of whom was Alfonse Siteyi alias Alphonse Makoti Siteyi; that the said Alphonse has sworn an Affidavit affirming that he witnessed the will. That the will met all the legal requirements; that further the will was subjected to prove and was found valid by the High Court at Milimani ,following which a Grant of Probate was issued. That consequently the work of this court is simply to uphold the will.
24. Turning to the Grant of Letters of Administration Intestate, the petitioner while relying on Section 76 of the Act submits that Grant is eligible for revocation as it was obtained on the basis of false facts; that the respondent told the court that he was child of the Deceased when he was not and that on that basis the Grant was issued.
25. The petitioner then went to cite the decision in Yasmin Rashid Genatra & Another -VS- Gilzar Abdul (2015)eKLR and in the estate of Francis Gichure Macharia (2018)eKLR where the court held inter alia that failure to disclose that the deceased had a written will is a material fact, and can use a ground for revocation.
26. The respondent did not file any submissions.



Determination.

The Application dated 13/11/2013

27. In seeking nullification of the grant of probate the respondent has argued that it was issued through making false statement of fact , non- disclosure of the full list of beneficiaries ; that he and his siblings were under the care of the deceased and finally that the will deposited in court was a forgery.
28. On the validity of the will, the respondent’s allegation that there will was a forgery has been made without any basis . The respondent has not bothered to demonstrate that the will was a forgery. For instance there was no evidence from a document -examiner to disapprove that the signature appearing on the will belonged to the deceased. The will was signed by the deceased , it was attested by two witnesses namely one mercy Muhonja and Alfonse siteyi . Further the law presumes that the testator was of sound mind unless the contrary is proved. However alleges a fact must discharge the burden of proving that fact. Section 109 of the evidence stated “ the burden of proof as to any particular fact was on the person who wishes the court to believe its existence unless it is provided by written law that the proof of that fact shall live in a particular person” . The allegation of the will being a forgery was not proved.
29. I find that the will met the requirements of a valid will as contemplated under section 11 of the *law of succession Act.*
30. The other complain by the respondent is that the petitioner failed to disclose all beneficiaries. However the petitioning of for prove of probate of written will does not contemplate the presence of beneficiaries outside of the will. It is only at the time of confirmation that the Administrator is required to disclose whether the deceased had other dependants. The Respondent however has not raised any complain about this .
31. Further if the respondent’s claim is that he was being taken care of the deceased , then subject to limitation of time , as set out in section 30 of the Act, he should have moved the court for “ provision for dependants” under sections 26 to 29 of the Act.
32. I find no merit in this Application.

The Application dated 26/4/2022

33. It is the petitioner’s contention that the respondent made a false statement of fact; that the grant was issued to him on the allegation that he was a son of the deceased when he was not. In response, the respondent admitted that he was the step- son of the deceased. He further went on to state that in any event the two parties were now joint Administrators of the deceased’s estate.
34. Section 76 of the Act sets out the grounds for revocation of grant and one of such grounds is if the grant was obtained fraudulently by making a false statement . The respondent has indirectly admitted that he made a false statement. He pleaded that he was the deceased’s son when he was not.
35. The petitioner has further stated that the respondent failed to disclose to the court the fact that the deceased left a will. However the petitioner has failed to convince this court that at the time of applying for the grant the respondent had any knowledge of the existence of the said will.
36. On being joint Administrators, this argument is misplaced as the orders appointing the two as Administrators were set aside by this court in a ruling delivered on 30th November 2023.
37. The petitioner’s Application is merited



38. In the end ,I hereby make orders as follows:-

- a). The Grant of Letters of Administration issued on 9th August, 2013 to Maurice Otingu Lugonzo is hereby revoked.
- b). The Grant of Probate with written will issued on 24th January, 2013 is upheld
- c). Following the court orders of 30th November 2023,the Fresh Grant of Letters of Administration dated 23/3/2023 is hereby revoked.
- d). Each party to meet their own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 14TH DAY OF NOVEMBER, 2024.

S. CHIRCHIR

JUDGE

In the Presence of :-

Godwin Luyundi – Court Assistant.

Mr Situma for Mr. Kiongora for the petitioner

