



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VIHIGA

SUCCESSION CAUSE NO. 37 OF 2021

(Formerly Kakamega High Court Succession Cause No. 276 Of 2012)

IN THE MATTER OF THE ESTATE OF ZACHEAUS SUMANI KADAGALE also known as SIMANI KADAGALA- DECEASED

RULING

1. This succession cause is in respect of the estate of Zacchaeus Sumani Kadagale, hereinafter referred to as the deceased, who died on 22nd January 2000. According to the letter from area Chief of Tambua Location, Hamisi District, dated 27th February 2012, he left behind one Anne Josephine Owinga, as his only heir, since he did not have a wife prior to his demise, and that the said Anne Josephine Owinga was his child born out of wedlock. The said Anne Josephine Owinga sought representation to the estate on 18th April 2012, and a grant of letters of administration intestate was issued to her on 22nd November 2013. I shall hereafter refer to her as the administratrix. On 6th February 2015, she filed for confirmation of her grant.

2. On 25th May 2015, one Grace Auma Olouch, who had been joined to the cause through an application, dated 26th June 2019, on 16th July 2019, filed a summons for revocation of grant, and for injunction orders to restrain the administratrix from dealing, in any way, with the estate of the deceased. I shall refer to her as the first applicant. In her affidavit, she avers that, she and another, brought the revocation proceedings as the wife and mother, respectively, of a deceased person named Eric Oluoch Ogwang, who had purchased the estate land from one Aineah Marande Kadagale a brother of the deceased. She attaches a letter from Chief confirming the sale of land by the said Aineah to Eric but did not indicate when exactly this sale was done. The first applicant placed a caution on the land. The interested party further stated that the administratrix was not a daughter of the deceased, but her blood sister, and that they had common parents, and, therefore, the entire process of obtaining the grant was fraudulent, since there was concealment of material facts, and she urges the court to annul the grant.

3. The administratrix filed a replying affidavit on 19th June 2015, where she deposes that the first applicant had separated with Eric, long before his demise, and she had purchased the land from Aineah Malande, the brother to the deceased. She further avers that the letter from the Chief, attached by the interested party, was a forgery, as it was written in 2015, long after the demise of the said Eric. She further avers that the caution on record was entered on 4th February 2015, after the death of Eric on 12th October 2014, and the grant had been made on 22nd November 2013, and asserts that Eric was all along aware of the succession proceedings. She stated that Aineah Malande sold the land to her, when he was in urgent need of money, for his medical treatments and that they went to the area Chief for a letter dated 27th February 2012, and that she paid the first installments and the land was transferred during the lifetime of Eric. She confirms that the interested party was her sister, and alleges that she had been defaming her after the demise of the said Eric. She denies any concealment of facts, and states that the interested party did not have capacity in the cause, as she is not a beneficiary of the estate of the deceased.

4. Another summons for revocation of grant was filed on 6th May 2016, by Bartholomew Oumba, hereinafter referred to as the second applicant, dated 5th May 2016, seeking annulment of all acts done by the administratrix in respect to the estate of the deceased. He brought these revocation proceedings as a nephew of the deceased. He confirms that the deceased, at the time of his demise, was not married and did not have any children. He attaches a birth certificate of the administratrix and that of the first applicant showing that they had common parents. He states that the first applicant was married to the late Eric, who had purchased the estate land from his father, Aineah Malande. He states that the sale was void since no grant had been issued at the time of sale. He states that neither the first applicant nor the administratrix had proprietary rights over the land since the land was sold without legal authority, and, therefore, the acts of the administratrix were fraudulent, and the grant ought to be revoked.

5. The second applicant filed an amended summons for revocation of grant, dated 15th June 2016, where he states that since his father had left the matrimonial home, and his mother was infirm, he is now the sole surviving heir of the deceased, capable of getting the grant to the exclusion of the administratrix and the first applicant, who were strangers in the estate. It is the amended summons of revocation of grant, dated 15th June 2016, which is the subject of the present ruling.

6. Directions were given on 10th March 2020 and 20th May 2021. The parties have filed their respective written submissions, which I have read through and noted the arguments made in them.

7. The principal issue for determination is whether the grant on record ought to be revoked. Revocation of grants is provided for under section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. Rules 44 and 73 of the Probate and Administration Rules are also relevant. Section 76 states:

“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 first applicant 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 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 order or allow; 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.”

8. In *Jamleck Maina Njoroge vs. Mary Wanjiru Mwangi* (2015) eKLR (Achode J), the court discussed circumstances under which a grant can be revoked. It said:

“11. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of a first applicant or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.”

9. The grant herein ought to be revoked. Firstly, the administratrix falsely presented herself to this court as the sole heir of the deceased, being an only child, born out of wedlock, when in fact, from her birth certificate number D No. 399410, she was the daughter of Joab Walter Odhiambo Owinga and Risper Aoko Onyango, who are also the parents of the first applicant, as per her birth certificate number A No. 564754. She, therefore, misrepresented material facts and made an untrue allegation of a fact essential to a point of law. The proceedings to obtain the grant were defective as she was not a daughter of the deceased and, therefore, she had no capacity to institute the succession proceedings whatsoever. Since she lacked capacity to institute the succession proceedings in the first instance, the powers she obtained from the grant were false and pretended, and any acts done by her, using the grant were of no effect, and any transaction is based on them ought to be nullified.

10. The next issue is whether the court should issue a grant of representation to the second applicant. The second applicant herein claims to be the sole heir of the estate by virtue of being a nephew of the deceased. He submits that his father left the matrimonial home and that his mother is infirm. Section 66 of the Law of Succession Act gives a list of persons to whom a grant in intestacy can be made. The provision states as follows:

“66. Preference to be given to certain persons to administer where deceased died intestate

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 interests 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.”

11. The courts have variously addressed the purport of section 66. In *In re Estate of Gamaliel Otieno Onyiego (Deceased)* [2018] eKLR (J. Makau J), the court stated:

“18. Under Part V referred under Section 66(b), the persons given priority over an intestate are the surviving spouse and children. That where the intestate has unfortunately left no surviving spouse and children, the provisions of Section 39 of the Law of Succession Act stipulate the net intestate shall devolve upon the kindred of the intestate in manner of order of priority.”

12. Section 39(1)(2) of the Law of Succession Act is relevant for the purposes of the instant case, for the deceased was neither survived by a spouse nor children, and the next in line would be his parents and siblings. The said provision states as follows:

“39. (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-

(a) Father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.”

13. In this case, the second applicant has not provided the names of all the beneficiaries of the estate or the immediate survivors of the deceased whether alive or dead. The letter from the area Chief should have included these names, and so should have the affidavit in support of the petition. This should be brought out clearly for ascertainment of all the beneficiaries. The court cannot directly grant the second applicant representation to the estate until it ascertains that there is no other person above him in the order of priority provided in section 66 of the Act. Further, the fact that his father left the matrimonial home does not diminish his right or entitlement to administration of the estate of his brother since he is still alive. The claim that the mother is infirm remains that, a claim, since no concrete evidence has been provided to confirm the same.

14. It is also clear that the only property of the deceased, Nyangori/Gemalenga/289, has illegally been sold. The first applicant claims her husband, Eric, had purchased the land from Aineah Malande, a brother to the deceased. The administratrix claims that she is the one who purchased the land from the said Aineah. All these alleged transactions were done before the grant was made or confirmed, which by itself was an illegality under the Law of Succession Act.

15. Section 45 of the Act makes such acts criminal, that is acts which interfere with a property of a dead person without proper authority. The provision states:

“45. No intermeddling with property of deceased person

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the asset with which he has intermeddled after deducting any payments made in the due course of administration.”

16. Section 82 (b) (ii) of the Act outlaws sale of immovable property of the estate before a grant has been confirmed. The provision says: *“No immovable property shall be sold before confirmation of the grant.”* The court had to deal with that in *Virginia Mwari Thurania vs. Purity Nkirote Thurania* [2017] eKLR (Gikonyo J), where it said:

“As for the assertion that the Respondents mother sold 1 ½ acres of land to Elias Mugambi Mwangera, I have this to say. The said sale agreement is null and void for violating Section 82 (b) (ii) of the Law of Succession Act, as the said Julia Thurania had not obtained Letters Administration of the estate of the deceased at the time of the alleged sale. The property of a deceased person vests in the legal representative and constitutes the estate of the deceased person. It is only the legal representative of the estate or a person

under the authority of the written law shall have authority to deal with the estate of the deceased, but in accordance with the grant or authority of the written law or order of the court...Therefore, until a legal representative is appointed in intestacy, any act done in respect of the estate of a deceased by a person without authority of the law amounts to intermeddling, illegality and is a nullity.”

17. By virtue of these provisions and the judicial pronouncement in *Virginia Mwari Thurania vs. Purity Nkirote Thurania* [2017] eKLR (Gikonyo J), with respect to such sales, the sale transactions relating to Nyangori/Gemalenga/289 were null and void, as the same were done before representation had been granted to the estate. However, this being a succession court whose mandate is limited to the ascertainment of beneficiaries and assets of the deceased, I cannot proceed to deal with issue of ownership of land, as the same is a reserve of the Environment and Land court and the magistrate’s court with jurisdiction over land matters, and, therefore, the same should be addressed in that court.

18. In the end I shall allow the application for revocation of grant, and I do hereby revoke and annul the grant made on 23rd November 2011 to the administratrix herein. I shall not appoint the second applicant the administrator of the estate herein, instead that I shall direct the immediate survivors of the deceased to agree on an administrator or administrators. They can thereafter file an application for appointment of administrators, or record a consent on administrators, should they reach consensus on the matter.

19. In the end, and for avoidance of doubt, the final orders that I am moved to make are:

a. That the grant of letters of administration intestate made on 22nd November 2013 to the administratrix herein is hereby revoked;

b. That the said grant is hereby recalled for surrender to the Deputy Registrar of the High Court at Vihiga, for cancellation;

c. That any acts committed or transactions carried out by the administratrix by virtue of the powers emanating from the said grant are nullified in totality;

d. That fresh administrators are to be appointed in line with the directions that I have given in paragraph 18 above;

e. That each party shall bear their own costs; and

f. That any party aggrieved, by the orders made in this ruling has leave of twenty-eight days, to move the Court of Appeal appropriately.

20. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 10TH DAY OF DECEMBER, 2021

W. MUSYOKA

JUDGE