



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION NO. 501 OF 2012

IN THE MATTER OF THE ESTATE OF LATE MWALIMU UDU BWANAMKUU (DECEASED)

RULING

1. Mwalimu Udu Bwanamkuu, the deceased herein died on 3.6.12 in Kisauni, Mombasa. A grant of letters of administration (the Grant) was on 3.5.13 issued to his grandchildren Bini Faraj Mohamed (Bini) and Yusuf Shee Mohamed (Yusuf), the Respondents. In their application for the Grant, the Respondents indicated that the deceased was survived by themselves, Kale Udu Bwanamkuu, Nohamed Udu Mohdhar and Hassan Masoud Athman.

2. About 3 months later on 14.8.13, Thuweba Ahmed Muhammad filed a summons of even date seeking revocation of the Grant. The grounds contained in the Applicant's affidavit are that the Grant was defective in substance in that the Applicant's consent as one of the beneficiaries of the estate, was not obtained. As a grandchild of the deceased, the Applicant was of equal priority as the Respondents who are her cousins, to be administrator. She too wished to be included as one of the administrators of the estate of the deceased. For this reason she declined to sign the consent sent to her for signature. This fact was communicated to the Respondents' previous advocates. However, the Respondents proceeded to obtain the grant without the consent and participation of the Applicant. She was also omitted in the list of beneficiaries notwithstanding that the chief's letter included her as a beneficiary. Further, the Respondents concealed from the Court the existence of the house on Plot No. MSA/Block XVI/1350 (Plot 1350) belonging to the deceased.

3. The Respondents oppose the Application. In a replying affidavit sworn on 28.8.13, and further affidavit sworn on 4.11.16, Bini stated that Plot 1350 was omitted as they were not aware of the same. They will indicate to the Court the existence of the same. The Applicant is not a beneficiary of the estate of the deceased. As such her consent was not required. Bini states that the deceased left no spouse, child or parent. Under Islamic law, the only heir of the deceased who survived him was his full brother Kale Udu Bwanamkuu (Kale). Kale died on 23.2.15 and he too left no spouse, child or parent. Bini states that under Islamic law, there are 3 groups of heirs with the first group inheriting to the exclusion of the others. When the first group is not available the second group inherits to the exclusion of the third group. In the instant case, following the demise of the deceased's full brother Kale, the next group of heirs comprises the Respondents, and their brothers all being the sons of the deceased's full brother Mohamed Udu Bwanamkuu. Bini further stated that the area chief does not know the correct heirs of the estate of the deceased.

4. Parties filed written submissions which I have considered together with the authorities cited.

Is the Applicant a beneficiary of the estate of the deceased?

5. It was submitted for the Applicant that Courts have recognised the importance of an introduction letter from the area chief in succession matters. The Applicant relied on the case of re Estate of Ambutu Mbogori (Deceased) [2018] eKLR where the Court noted the importance of a chief's letter in ascertaining the deceased's dependants as well as his properties. An in In re Stanley Mathenge Ruriga [2018] eKLR, the Court stated that the Chief's letter ensures that the right party applies for a grant of representation.

6. The Court has looked at the chief's letter dated 24.8.12. This letter, now rejected by the Respondents, was the Respondent's document filed by them in support their petition for the Grant. The importance of the chief's letter in a succession matter cannot be gainsaid. In addition to determining whether a petition is filed by the correct person, the chief's letter assists the Court in determining who the rightful beneficiaries of a deceased person are and whether the consent of all beneficiaries has been obtained. The chief's letter filed herein included the name of the Applicant as one of the "*rightful dependants in respect of Mwalimu Udu Bwanamkuu (deceased)*". The Respondents have submitted that the Applicant being the daughter of the sister of the deceased, she is not an heir of the deceased. The Court declines to make a determination at this stage on the Applicant's entitlement to the estate of the deceased. Properly advised, the Applicant's remedy lies elsewhere and not in this Application.

Whether the Grant should be revoked

7. The Law of Succession Act confers upon the Court the power to revoke a grant of representation. Section 76 of the Act provides:

“ 76 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 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. The Applicant’s case is that the Respondents got the Grant without obtaining her consent. As such, the Grant was defective in substance for want of her consent. Rule 26 of the Probate and Administration Rules provides:

- 1. Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.**
- 2. An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.**

9. As noted earlier the Applicant was indicated in the chief’s letter as one of the rightful dependants of the deceased. The chief’s letter however does not state the relationship between the Applicant and the deceased. It is not disputed that the Applicant is a grandchild of the deceased, as are the Respondents. It is however not possible for the Court to determine who among the parties have priority over the other. As such, the Court is not satisfied that the Grant was defective in substance, for want of the consent of the Applicant.

10. As regards omission of Plot 1350 in the list of assets of the estate of the deceased, the Respondents have stated that they were not aware of its existence. They are however ready to have the same included at confirmation of the Grant. With this explanation, the Respondents cannot be said to have obtained the Grant fraudulently by the making of a false statement or by the concealment from the court of something material to the case. In any event, the omission of an asset can be easily cured by the filing of a summons for inclusion of omitted assets.

11. In the end, I find that the statutory grounds for revocation of grant have not been established. Accordingly the Application dated 14.8.13 lacks merit and the same is hereby dismissed. Each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 17th day of January 2020

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondents**

..... **Court Assistant**