REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 250 OF 2015

IN THE MATTER OF THE ESTATE OF ELIZA ISIGI ASAMBA (DECEASED)

JUDGMENT

1. This matter relates to the estate of Eliza Isigi Asamba, who died on 30th April 2005. According to the letter from the Chief of West Maragoli Location, which is undated, but was filed herein on 30th April 2015, the deceased had been survived by six sons, being Paul Changa Asamba, Daniel Agala Kaguruka, Isaiah Kidaha Asamba, Josephat Asuga Asamba, John Gidali Asamba and Philip Chabira; four daughters, being Jane Kaka Asamba, Josephine Kadi Asamba, Gladys Kareha Asamba Fridah Muhonja Asamba; and one daughter in law, Beatrice Musimbi Asamba.

2. Representation to his estate was sought vide a petition lodged herein on 30th April 2015, by Daniel Agala Kaguruka and Gladys Kareha Asamba, in their capacities as son and daughter, respectively, of the deceased. They expressed the deceased to have had died possessed of North Maragoli/Kisatiru/997, 1383, 1384, 1387, 1388 and 1389, and to have been survived by the individuals mentioned in the Chief's letter that I have mentioned above, save that the names of Philip Chabira and Beatrice Musimbi Asamba were omitted. Letters of administration intestate were made to them on 6th August 2015, a grant was duly issued, dated 28th August 2015. I shall consequently refer to two as the administrator and administratrix, respectively, and as administrators, collectively.

3. What I am tasked with determining is the summons for revocation of the grant made on 6th August 2015. The application is dated 15th January 2016 and was lodged herein on even date, by Philip Chabira, to be hereinafter referred to as the applicant. The grounds upon which the application was premised are set out on the face of the application, while the factual background is given in the affidavit in support of the application, sworn by Philip Chabira Kaguluka, on 15th January 2016. He avers that he brings the application on his own behalf and on behalf of his two sisters-in-law, Beatrice Musimbi Asamba and Mary Ongoge Changa. He states that the certificate of death relied on to initiate the secession cause was a forgery. He avers that the administrators did not involve them before they initiated the succession cause, yet they were rightful survivors of the deceased and heirs of the estate. The complained of being disinherited.

4. The applicant swore a further affidavit on 16th February 2016. He describes himself as a son of the deceased, and asserts his entitlement to administration of the estate in equality and priority to the administrators. He avers that the administrators left out their sisters in law, Beatrice Musimbi Asamba and Mary Ongoge Changa, who were the surviving widows of two sons of the deceased, the late Kitty Asamba and the late Paul Changa, both of whom had children, the grandchildren of the deceased. He states that he had the authority of Beatrice Musimbi Asamba and Mary Ongoge Changa to plead their case. He avers that Paul Changa was alive at the time the cause was being initiated, but he had not given his consent to the process being commenced by the administrators. He also avers that one of the others sons of the deceased, known as Josephat Asuga Asamba, did not also sign the consent. He further avers that the administrator had mental illness, and was, therefore, not qualified for appointment as administrator. He complains that although his name and that of Beatrice Musimbi Asamba were in the Chief's letter they were still left out. The administrators are also accused of excluding some assets from the schedule, being Kakamega/Lugari/160 and a plot at Lugari/Kongoni market. He also mentions that prior to the deceased's death, there had been proceedings before the Vihiga court, in Vihiga SPMC Misc. Case No. 18 of 2005, where orders were made distributing the property amongst family members.

5. The reply to the application was by the administrator, Daniel Agala. He swore it on 9th November 2016. He explains that he obtained the certificate of death procedurally, adding that he was unaware that the applicants had obtained another certificate. He states that the applicant, Philip Chabila Kaguluka, was a person that he did not know, and asserts that he was not a biological child of the deceased. He describes him as a purported son of their late father, who had been settled by their father at Bulokhoba, Tiriki, but that he sold the land and was now disturbing them. He accuses the applicant and his associates of having previously caused estate property to be transferred without going through succession proceedings, and of eventually transferring the same to the name of a third party identified as Seth Asuza Changilwa. He argues that what they are trying to do is to justify what they have been doing, and for that reason he says they cannot be trusted to administer the estate. On Paul Changa, he avers that his widow, Mary Ongoge, is entitled to take his share. On Kitty Asamba, he avers that he had fraudulently transferred some property to his name, alleging that the deceased was dead while she was still alive, and he had caused that property to be transferred to the name of his wife, Beatrice Musimbi Asamba, which she in turn sold to Seth Asuza Changilwa. He denies lacking mental capacity. He states that Kakamega/Lugari/160 belonged to the estate of their late father, Zakayo Asamba Kaguluka, and the same had not yet passed to the name of the deceased and was awaiting confirmation in his estate. He explains that North Maragoli/Kisatiru/997 was estate property. Initially, it belonged to the late Zakayo Asamba Kaguluka, it was sold by him to Ebrahim Onguo

Ambwere, to pay off a bank loan, the said Ebrahim Ambwere exchanged it with the deceased by giving North Maragoli/Kisatiru/997 in exchange for another property belonging to the deceased.

6. The applicant filed a further affidavit on 16th November 2017 to answer the averments made in the administrator's replying affidavit, as they related to North Maragoli/Kisatiru/997 and 1186, asserting that the deceased held those assets in trust, the same having been transferred to her name by the late Zakayo Asamba Kaguluka, their father. He concedes that the late Zakayo Asamba Kaguluka had bought property at Bulokhoba, Tiriki, but then he sold it before he died to settle estate debts. He states that he, Kitty Asamba Kaguluka and Paul Changa Kaguluka had brought proceedings at the Sabatia Land Disputes Tribunal against the deceased, after she had subdivided some of the assets belonging to the estate of the late Zakayo Asamba Kaguluka, and in the end the Tribunal apportioned the land amongst sons of the late Zakayo Asamba Kaguluka. The verdict of the Tribunal was eventually made an order of the court by the Vihiga SPM's court. He asserts that that verdict was never appealed against and still stands.

7. Directions were given on 16th November 2017, to the effect that the same be disposed of by way of affidavit and *viva voce* evidence.

8. The oral hearing commenced on 27th November 2018. The applicant, Philip Chabira, was the first on the witness stand. He stated that their late father had two wives, and the administrators were his half-siblings. He identified their mothers as the deceased herein and Jesca Khaleha, who was his own mother. He stated that his mother died in 2016, and was buried at her farm at Turbo. He said that she had separated from the deceased. He said that he was raised at the home of their late father, on the parcel of land known as North Maragoli/Kisatiru/1186, which the deceased herein subsequently subdivided and shared out amongst her children. He insisted that North Maragoli/Kisatiru/1186 belonged to their father and not the deceased herein. He stated that he was raised by the deceased in the same compound with the administrators. He asserted that before their father died, he had shared out his land. He gave him Tiriki/Bukuloba/615, but the father later sold it to settle a loan. He was then given plots at North Maragoli, being North Maragoli/Kisatiru/1186 North Maragoli/Kisatiru/997 and 1389, to share with Kitty Asamba and Paul Changa. The deceased then gave them North Maragoli/Kisatiru/1389 in exchange for North Maragoli/Kisatiru/1386, after which the witness sold North Maragoli/Kisatiru/1386 and bought land elsewhere. He stated that he was claiming North Maragoli/Kisatiru/997, and that he would be satisfied if he got it.

9. During cross-examination, he confirmed that the deceased was not his biological mother. He conceded that their late father had given him land at Tiriki, but he, the father, later sold that land and his mother ran away with the money. He stated that he sold North Maragoli/Kisatiru/1386 to Seth Asuza Changilwa and that the property was under the name of that person. He stated that he and his associates used a court decree to cause themselves to be registered as proprietors of North Maragoli/Kisatiru/1386. He stated that North Maragoli/Kisatiru/997 was sold by public auction, and was bought by Ebrahim Ambwere in 1974 and was transferred to his name, then after that it moved back to the name of his late father and later to the name of the deceased. When shown documents, he confirmed that North Maragoli/Kisatiru/997 was exchanged between the deceased and Ebrahim Ambwere without involving their late father. He said that everything that was registered in the name of the deceased originally belonged to their late father.

10. The case for the administrators opened on 8th July 2018, with the administrator, Daniel Agala, on the witness stand. He identified the applicant as his half-brother, who was born outside wedlock. He identified Beatrice Musimbi Asamba and Mary Ongoge Changa as his sisters-in-law, being widows of his late brothers. He stated that his late mother, the deceased, had eleven children. On North Maragoli/Kisatiru/997, he explained that it originally belonged to the deceased, it was auctioned, and Ebrahim Ambwere bought it. The deceased then approached Ebrahim Ambwere and persuaded him to exchange it with another plot known as North Maragoli/Kisatiru/1186 which was registered in her name. He said that the applicant was not entitled to North Maragoli/Kisatiru/997. He said that the applicant been given land at Tiriki, which he later sold. He asserted that the applicant was not a son of the deceased.

11. During cross-examination, he stated that their late father had left Plot No.160 Lugari Settlement Scheme which he had not yet allocated to the deceased. He said that North Maragoli/Kisatiru/1186 originally belonged to their late father. He gave it to the deceased in 1974, and she subdivided it and gave it to her children. He described the applicant as his brother, born of a different mother who was not married to their late father. He said that the applicant was not raised by the deceased, and he could not tell whether he lived with their late father or not. He further said that the deceased had given property at Tiriki to the applicant and others, who later sold it. He stated that the applicant sold North Maragoli/Kisatiru/1386 and bought land at Idakho. He stated that Kitty Asamba Paul Changa and the applicant had sued the deceased at the Tribunal, but he said he did not know the outcome of the Tribunal proceedings.

12. At the close of the oral hearing the parties were directed to file written submissions. They have complied. I have read through them and noted the arguments raised.

13. The application for determination seeks revocation of a grant representation. The deceased died in 2005, which was after the Law of Succession Act, Cap 160, Laws of Kenya, had come into operation in 1981. Her estate, therefore, falls for administration and distribution in accordance with the provisions of the said Act.

14. The Law of Succession Act provides for revocation of grants under section 76, which states as follows:

> *"76. Revocation or annulment of grant*
>
> *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."

15. Under section 76 of the Act, a grant of representation is liable to revocation on three general grounds. The first ground would be where the process of obtaining the grant was attended by glaring difficulties, such as where the same was defective, say because the person who obtained representation was not qualified to be appointed as personal representative, or the procedural requirements were not met for some reason or other. It could also be because the petitioner used fraud or misrepresentation or concealed important information in order to obtain the grant. The second general ground is where the grant is obtained procedurally, but the administrator subsequently runs into difficulties during the process of administration of the estate. Such difficulties include his failure or omission to apply for confirmation of his grant within the period allowed in law, or where he fails to exercise diligence in administration of the estate, such as where he omits to collect or get in an asset, or where he fails to render accounts as and when he is required to do so by the law. The third general ground is where the grant has become inoperative or useless on account of subsequent circumstances, such as where the sole administrator died or loses the soundness of his mind or is adjudged bankrupt.

16. In the instant case, the applicant anchors his case on the first general ground, that there were issues with the manner the grant was obtained. He has raised arguments about the process of obtaining the grant having had challenges. He has not complained about anything that would bring the case within the second general ground, nor the third ground. My understanding of his case, therefore, is that the process of obtaining the grant was defective, as the administrators used fraud, misrepresentation and concealed matter from the court. His principle argument appears to be that his consent was not obtained before the grant herein was sought. He is also raising issue with the certificate of death used in the proceedings.

17. The framework for applications for grants of representation is set out in section 51 of the Law of Succession Act. The most relevant portions, for the purpose of this application, are in subsection (2)(g), which state as follows:

"*Application for Grant*

51. (1) …

(2) Every application shall include information as to—

(a) …

(b) …

(c) …

(d) …

(e) …

(f) …

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;

(h)..."

18. My understanding of section 51(2) (g) is that the petitioner is required to disclose all the surviving spouses and children of the deceased. The provision is in mandatory terms. The administrators herein disclosed themselves and other children of the deceased but they left out members of the family of the son of the deceased who had died, Kitty Asamba. They created an impression to the court that these individuals were not survivors of the deceased. They should have disclosed the widow of Kitty Asamba or her children, the grandchildren of the deceased. Therefore, there was no compliance with section 51(2) (g).

19. From the material before me, Paul Changa was alive at the time and was listed in the petition. There would have been no basis then to have his wife listed as a survivor of the deceased. Regarding the applicant, Philip Chabira, I note that he was not a biological child of the

deceased, and he has not demonstrated that he was child that she had taken in as her child in terms of section 3(2) of the Law of Succession Act, which, in any event, does not apply to a child being taken in by a woman. There was, therefore, no obligation for him to be listed as a child of the deceased because he was not one.

20. To my mind, the above indicates procedural defects in the manner the grant was obtained to the extent that the administrators did not comply fully with the requirements of section 51(2) (g). There was fraud and misrepresentation to the extent that they did not disclose all the persons who survived the deceased. They misled the court into believing that the deceased did not have a daughter in law or grandchildren, whose husband, and father, a son of the deceased, had died. There was, therefore, concealment of important matter from the court, to the extent that they did not disclose those survivors of the deceased. That meant that a group of survivors was locked out of the succession process.

21. The applicant complains that he was unaware of the proceedings. That would mean that he was not consulted before administration was sought, or, put differently, that his consent was not obtained before representation was sought by the administrators.

22. The law on who qualifies to apply for representation in intestacy is section 66 of the Law of Succession Act, which sets out the order of preference with regard to who ought to apply and be appointed administrator in intestacy. Priority is given to surviving spouses, followed by the children of the deceased. Rule 7(7) of the Probate and Administration Rules requires that a person with a lesser right to administration ought to obtain the consent of the person or persons with a greater priority to administration, or get that person or persons to renounce their right to administration or cause citations to issue on them requiring them to either apply for representation in the estate or to renounce their right to so apply.

23. For avoidance of doubt, these provisions state 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 …"*

and

> "*7 (7). Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has –*
>
> *(a) renounced his right generally to apply for grant; or*
>
> *(b) consented in writing to the making of the grant to the applicant; or*
>
> *(c) been issued with a citation calling upon him to renounce such right or to apply for a grant. "*

24. Then there is Rule 26 of the Probate and Administration Rules, which states as follows:

> "*26(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 equally or *priority, be supported by an affidavit of the applicant and such other evidence as the court may require."*

25. Rule 26(1) (2) applies where representation is sought by a person with equal right to others who have not petitioned like him. In such case, the petitioner is expected to notify such persons with equal entitlement with notice. The individuals with entitlement who have not applied for representation would signify that they had been notified of the petition by either executing their renunciation of their right to administration or by signing consents in Forms 38 or 39, depending on whether the deceased died testate or intestate. Where a consent or renunciation is not forthcoming, then the petitioner should file an affidavit, ostensibly dealing with these issues, that is by indicating that notice was given to all the other persons equally entitled, and perhaps demonstrating that such person had failed or refused to renounce their rights or to sign consents to allow him to go ahead with his petition.

26. The administrators in the instant cause, being surviving children of the deceased, had a superior right to administration over a stepchild by another woman, and any other relatives of the deceased, going by section 66 of the Law of Succession Act. A reading of section 66 and Rules 7(7) and 26 of the Probate and Administration Rules, would mean the biological children of the deceased did not need to comply with the requirements of Rules 7(7) and 26, since those provisions apply only to persons who seek representation while they had an equal or lesser right to administration. They did not, therefore, have to obtain the consent of the applicant, nor of their sisters-in-law, or of their nephews or nieces, before they applied for representation to the estate of their late mother. I note that the appellant has submitted that Paul Changa did not sign the consent forms. He cannot speak for the said Paul Changa., for he would not know the circumstances that might have led to the said Paul Changa not signing the consent when the other survivors signed it.

27. The applicant has raised issue that the certificate of birth used to initiate the cause was forged. In the first place, the death of the deceased is not disputed. I do not, therefore, understand the significance of the argument that the document used to prove her death should not have been used or was irregularly obtained. A certificate of death is meant to satisfy the court that the person named in it was dead. That fact is not disputed, and a fight over how the certificate was obtained would be idle. Needless to say, that a claim that a document is forged borders on accusing a person of criminality. Such accusation should not be made with frivolity. If the maker of such allegation desires to pursue them beyond merely making them, they must provide evidence that is concrete so as to establish beyond doubt that there was a forgery. That would entail calling document examiners to give evidence on the alleged forgeries, and calling officers from the registry of births and deaths to attest to the fact that the certificates of death in question had not originated from their office. Without that, the allegation that the certificates were forgeries remains idle talk.

28. The applicant made a lot of play about assets of the estate not being included in the petition, some assets listed not belonging to the deceased and other assets listed being held in trust by the deceased for the other children of the deceased, who were not her biological children. The failure to list an asset of the estate or to list assets that do not belong to the estate or are held in trust, does not, of itself, render the proceedings to obtain a grant defective nor fraudulent. It is not a ground for revocation. The issue as what the estate comprises of, and what should be available for distribution, should be dealt with at the stage of confirmation of grant. Under Rule 40 of the Probate and Administration Rules, any person who has an interest in any of the assets may file protest affidavits which would qualify him to be heard at the confirmation hearing where he can state its case. That issued, when raised at this stage of the proceedings, before the administrators apply for confirmation of their grant, is premature, and I shall not tax my mind trying to figure out which of the assets bandied about belonged to the estate and what was available for distribution.

29. From what I have seen so far I can safely conclude that the process of obtaining the grant herein was defective and was attended by misrepresentation and concealment of matter from the court, to the extent that the administrators did not disclose to the court the existence of some of the survivors of the deceased. That alone is sufficient ground for revoking the grant. However, the power in section 76 is discretionary. The court may or may not revoke the grant. In this case, I am persuaded that I ought not to revoke the grant. Instead I shall direct the administrators to ensure that at the time of applying for confirmation of grant they list all the survivors of the deceased, that is to say the surviving sons and daughters of the deceased, and where there are any sons or daughters who have died, then their children, who are the surviving grandchildren of the deceased, or their mothers, the widows of the late sons of the deceased. All the individuals, referred to above, should be listed whether or not they are entitled to get a share, or whether or not they had benefited during lifetime from i*ntervivos* distributions. The administrators should equally list all the assets of the deceased available for distribution.

30. I note that the deceased died in 2005 and representation was granted on 30th April 2015. Confirmation of grant should have been, sought six months after 30th April 2015. That application is therefore, long overdue, and the administrators should move with due dispatch and have it filed.

31. In the end, the final orders that I shall make in this matter are as follows:

(a) That I hereby dismiss the summons for revocation of grant dated 15th January 2016;

(b) That I direct the administrators herein to file an application for confirmation of grant within the next forty-five (45) days from the date of delivery of this judgement;

(c) That administrators shall, in that application, comply with all the requirements of section 71 of the Law of Succession Act and Rule 40 of the Probate and Administration Rules, and accommodate all the issues that I have raised in paragraph 29 of this judgment;

(d) That the administrators shall cause the contemplated application to be served on all interested parties, and in particular the applicant herein, and Beatrice Musimbi Asamba and Mary Ongoge Changa;

(e) That any individuals who shall be beneficially interested in the assets of the estate and who shall be dissatisfied with the proposals to be made in (b) above shall be at liberty to file affidavits of protest making their own proposals on distribution;

(f) That such individuals shall thereafter attend court, on the date to be appointed, for the hearing of the confirmation application, to state their position;

(g) That the matter shall be mentioned thereafter for compliance and for further directions on the disposal of the confirmation application;

(h) That each party shall bear their own costs; and

(i) That any party aggrieved by the orders made herein shall be at liberty to appeal against the same at the Court of Appeal, within the next twenty-eight (28) days.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 7th DAY OF FEBRUARY, 2020

W. MUSYOKA

JUDGE