



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 538 OF 2009

IN THE MATTER OF THE ESTATE OF NGETI MBAI DECEASED

NYOLO NGETI..... APPLICANT

VERSUS

KANINI NGETI.....ADMINISTRATOR/RESPONDENT

R U L I N G

1. The Objector/Applicant filed an application dated 6-6-2017 pursuant to Section 76 of the Law of Succession Act and Rule 44 (1) of the Probate and Administration Rules seeking orders inter alia; that the grant of letters of administration issued to the Petitioner and confirmed on 15-6-2012 be revoked and or annulled; that an order that the estate of the deceased be preserved pending determination of the application. The applicant also seeks for costs.
2. The application is supported by the affidavit of the applicant sworn on even date plus grounds. The gist of the application is that the petitioner did not obtain the consent of all beneficiaries and further concealed the fact that the deceased had two wives namely Syevose Ngeti and Mutheu Ngeti. The applicant finally averred that the distribution of the estate was done in a manner not acceptable to him and his mother's house.
3. The application was strenuously opposed by the petitioner vide her affidavit dated 13-10-2017. The petitioner denied concealing any information since the chief's letter contained all the beneficiaries which she captured in the petition documents. She added that all the beneficiaries including the objector herein was present during the confirmation of grant on 15-6-2012. She further averred that she had since distributed the three parcels of land equally between the two houses of the deceased and new boundaries set. It is the view of the petitioner that the objector is only out to harass her for no apparent reason and that the application should be dismissed with costs.
4. Parties agreed to canvass the application vide written submissions. It was submitted by Mr Kamanda for the applicant that the grant should be revoked and distribution done afresh so that he gets his share from the estate. Learned counsel further submitted that the respondent does not benefit from the estate of the deceased but from the house of Mutheu Ngeti who had married her in a woman to woman marriage under Kamba customary law. Counsel further submitted that land parcel Wamunyu/Kilembwa/150 should be given to the hose of Syevose Ngeti as she had bought it from one Mutune Munguti in 1954 while the remaining be distributed between the two houses of Syevose Ngeti and Mutheu Ngeti. He finally submitted that all the properties should revert back in the names of the deceased before distribution thereof. On the other hand it was submitted by Mr. Kituku learned counsel for the petitioner that the distribution done by the petitioner is quite fair as each household received 9.68 Ha despite the fact that the petitioner's household comprise of eight units compared to that of the objector which has only four units. It was the learned counsel's view that the petitioner's household should get more than the applicant's household as she incurred expenses in the petition upto the sub division of the parcels. In fact it was the petitioner's desire that her household should get $\frac{2}{3}$ of the estate while the objector's household get $\frac{1}{3}$ of the estate should this court be inclined to interfere with the confirmed grant.
5. I have considered the rival affidavits and the submissions presented. It is not in dispute that a grant was issued in favour of the petitioner and that the same has since been confirmed. It is also not in dispute that the petitioner has already commenced the process of distribution of the estate of the deceased which comprises of three assets namely LR Wamunyu/Kilembwa/59, Wamunyu/Kilembwa /150 and Wamunyu/Kilembwa/54 which has precipitated the present application. It is also not in dispute that the deceased had two wives and hence left behind two households. The issue for determination is whether the grant issued and confirmed should be revoked and or annulled.
6. The issue of revocation of grant is found in Section 76 of the Law of Succession Act which gives the court jurisdiction to revoke or annul grants. The said section provides as follows:

“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 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 made has failed after due notice and without reasonable cause either-**
 - i. To apply for confirmation of grant within one year from the date hereof or such lower period as the court has ordered or allowed.**
 - ii. To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraph (e) and (g) of Section 83 or has produced any such inventory or account which is false in any material particulars.**
- e. That the grant has become useless and inoperative through subsequent circumstances.**

In the present application the objector seeks to have the grant as confirmed revoked and or annulled on the grounds that his family had not been involved in the filing of the petition all through to confirmation. He has also averred that the distribution carried out by the petitioner is not fair to his household. On the other hand the petitioner has discounted these claims and has averred that her actions all through have been above board and that the objector and his family have been involved in the process. A perusal of the initial pleadings filed in support of the petition reveals that the area chief's letter dated 13-8-2008 clearly shows that the names of the wives of the deceased and all children including the objector were duly included. There is also a consent to confirmation of grant duly signed by all the beneficiaries. Again the court record for the 15-6-2012 reveals that the beneficiaries were present and on that basis the court duly proceeded to confirm the grant. With all these revelations, I find the objector's allegations of concealment by the petitioner appear to be doubtful. It seems the objector filed the application pursuant to the distribution of the estate to the distribution of the estate by the petitioner. According to the objector, his mother's household ought to get an extra share of land that had been amalgamated into the family land yet it had been purchased by the objector's mother Syevose Ngeti. This appears to be the main grouse by the objector and who wants the land bought by his late mother set aside and the rest be shared equally between the two households. The petitioner on her part has shared out the properties equally between each getting 9.68 Ha. I have noted that the petitioner's household has 8 units while the objector's household has 4 units. As the deceased had died intestate the distribution of his estate ought to be done in accordance with Section 40 of the Law of Succession Act which provide as follows:

“40 where intestate was polygamous;

- 1. Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall in the first instance be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.**
- 2. The distribution of the personal and household effects and the residue of the net estate within each house shall then be in accordance with the rules set out in section 35 to 38”.**

Looking at the above provision the estate of the deceased ought to be distributed among the twelve units. If this is adopted, then the petitioner's household is likely to have a larger share than that of the objector's household. Despite this acceptable formula the petitioner has been magnanimous enough to agree to have the assets shared equally between the two houses. The gesture by the petitioner ought to be appreciated by the objector's family but should not be vilified. The objector's claim that his late mother had purchased a separate portion which was later amalgamated into the family land is not convincing for a number of reasons. Firstly, the objector has not availed any evidence to that effect by way of a sale agreement between his mother and one Mutune Munguti allegedly entered in 1954 or a statement from the family of the seller. Secondly, there is no evidence that the objector's family took up the claim with the deceased herein over the alleged purchase of the land by the deceased's late wife Syevose Ngeti. In the absence of such evidence I find the three properties wholly belonged to the deceased and thus available for distribution among his dependants. I find the proposed mode of distribution by the petitioner to be fair and reasonable and in tandem with the provisions of Section 40 of the Law of Succession Act. The objector's other suggestion that the assets be shared equally between the two houses has already been considered by the petitioner in her proposed mode of distribution. I find the objector's application is only meant to stall and frustrate the final determination of this matter. As the petitioner is at the tail end of the administration of the estate, she should be allowed to finalise the distribution without any interruption or sideshows. I am unable to see any bonafides in the objector's application as the same appears to have been lodged in a bid to stall and to checkmate the petitioner for no good reason at all. I find the objector has not presented any good reasons to warrant the revocation of the grant issued and confirmed on 15-6-2012. Granting the order will prejudice the beneficiaries who are now patiently waiting to have their rightful entitlements under the estate. It is fair, just and prudent to allow the petitioner finalize the task of administration of the estate for the benefit of the beneficiaries. The petitioner's complaints that she has incurred a lot of expenses over the succession cause are genuine concerns. However her suggestion that she should be allowed to get a larger share of the estate than the other house will not augur well. By taking up the duties of an administrator she was expected to know that such was fiduciary in nature and that she was to expend all her energies towards the estate for the benefit of the beneficiaries. If she intended to be reimbursed for her expenses she ought to have factored that up in the schedule of distribution and okayed by the beneficiaries. As at now that is not possible and she must shelve the same and concentrate on finalizing the sub divisions exercise.

7. In the result it is my finding that the objector's application dated 6-6-2017 lacks merit. The same is ordered dismissed. As parties are family members there will be no order as to costs.

It is so ordered.

Dated and delivered at **Machakos** this **20th** day of **April, 2020**.

D. K. Kemei

Judge