



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 34 OF 2013

IN THE MATTER OF THE ESTATE OF CAROLINE KEYA (DECEASED)

JUDGMENT

1. This cause relates to the estate of Caroline Ocholi Keya, who died on 28th July 2000. A letter from the Chief of Marama Central Location, dated 2nd December 2004, indicates that the deceased was married to Isaac Kiruku Kibe, but were not blessed with issue, but she was survived by three children, who are not identified, that she had had from a previous relationship, that were left at the care of the Isaac Kiruku Kibe, but two have since moved back to their biological fathers, leaving only Naftali Opare Keya with Isaac Kiruku Kibe. The deceased is said to have died possessed of Marama/Lunza/2530.
2. Representation to the estate of the deceased was sought by Isaac Kiruku Kibe, in Butere SRMCSC No. 134 of 2004, in his purported capacity as widower of the deceased. He listed himself as the sole survivor of the deceased, and listed Marama/Lunza/2530 as the asset of the estate.
3. To that petition an objection was raised by Wycliffe Aburiri Keya on behalf of Naftali Opare Keya, a minor, who identified himself as a brother of the deceased. He stated that the deceased cohabited with Isaac Kiruku Kibe, but they had no children. He confirmed that the deceased had three children, two sons and one daughter. He also filed an answer to the petition and a cross-petition. The court conducted a full trial and eventually granted representation to Isaac Kiruku Kibe, on the basis that he was the surviving spouse of the deceased. Letters of administration intestate were made to Isaac Kiruku Kibe on 12th October 2007, and a grant was duly issued to him on 3rd December 2007. I shall hereafter refer to him as the administrator. The said grant was confirmed on 26th October 2009, on an application dated 7th September 2009, a certificate of confirmation of grant duly issued of even date. The estate property, Marama/Lunza/2530, was devolved wholly upon the administrator.
4. What I am called upon to determine is the summons dated 15th January 2013, seeking revocation of the grant made to the administrator in Butere SRMCSC No. 134 of 2004, to Isaac Kiruku Kibe. The application also seeks cancellation of the transmission of the estate asset to the administrator. The administrator was accused of having obtained the grant fraudulently by concealing material facts from the court, of intermeddling with the estate and of disinheriting the applicant, Leonard Opar Naftal alias Naftali Opari Keya.
5. In the affidavit sworn by the applicant in support of the application, it is averred that the applicant was a son of the deceased. He accuses the administrator of obtaining representation to the estate of the deceased in Butere SRMCSC No. 134 of 2004, while concealing the existence of the three children of the deceased, that is to say the applicant, Roselyne Mungala and Ismael Maloba. He avers that Roselyne Mungala and Ismael Maloba had moved back to their fathers after the deceased died and they lived with them. He asserts that Marama/Lunza/2530 had been acquired for his benefit since his father was unknown. He states that the administrator was merely cohabiting with the deceased but had no children with her. He complains that the administrator had not disclosed that he was also a beneficiary of the estate. He states that his objection to the making of the grant in Butere SRMCSC No. 134 of 2004 was dismissed as the court at Butere had no jurisdiction since such objection could only be heard at the High Court. He avers that he would like to have the said grant revoked and a fresh one made to him.
6. The administrator responded to the application through an affidavit that he swore on 2nd October 2014. He concedes that the applicant was a child of the deceased, but asserts that the property Marama/Lunza/2530 belongs to him and not to the child of the deceased. He concedes that he had offered the property for sale, but he did not manage to sell the property as there was a court order to the effect that the subject property was held by him as trustee for the applicant, and proposed that the same be shared equally between him and the applicant.
7. Directions were given on 27th March 2014, that the application was to be disposed of by way of oral evidence. The hearing happened on 12th November 2019. Five witnesses testified on the applicant's side. No witnesses were presented for the administrator.
8. The applicant, Leonard Opar Naftal alias Naftali Opar Keya, national identity card number [.....]. He testified first identified the deceased as his mother, and the administrator as a friend of his mother. He stated that the administrator was not his father. He further stated that the administrator and the deceased never lived together. He stated that when the administrator sought representation to the estate he did not inform him. He stated that the letter from the Chief, used for the purpose of the proceedings, did not list the children of the deceased. He named the three children as himself, Ismael Maloba Maloba and Roselyne Omungála. He stated further that the administrator did not list the

children of the deceased in the petition. He explained after the grant was made to the administrator he sold the land to someone else, who later sued then at the Butere court, where they were allowed to continue utilizing the property. He referred to proceedings that they had before the Chief, where it was agreed that the land be transferred to his name. He stated that his siblings were settled on their own land given to them by their fathers. He added that the three of them were entitled to inherit the land.

9. Wycliffe Aburiri Keya, national identity card number [.....], followed. He testified that the deceased was his sister, who had three children, who he named as Naftali Opar, Roselyne Mungála and Ismael. He stated that the deceased was not married and she had children with her friends.

10. Fatuma Oluchinya Mwale, national identity card number [.....], came next. He adopted his witness statement as her evidence.

11. Roselyne Omungála Aburiri, national identity card number [.....], was the last witness. She identified the deceased as her mother, who had three children, being herself, Ismael Maloba Maloba and Naftali Opar Keya. She stated that all the three children were entitled to inherit the land. She described the administrator as her mother's friend, but clarified that he was not her biological father. She stated that the two did not live together, and did not have any children between them.

12. The administrator did not call evidence, but Ms. Sijenje, who appeared for him, indicated that he was fully relying on his replying affidavit.

13. At the close of the oral hearing the parties were directed to file written submissions. As at the time I allocated the matter a date for judgement only the applicant had filed his written submissions, which I have read and noted the arguments made therein.

14. The application for determination is premised on section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. The said provision 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, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. In the first place, it would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation were not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate or *vice versa*. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator thereafter got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, unqualified to hold any office of trust.

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. My understanding of his case is that the process of obtaining the grant was defective, as the administrator used fraud, misrepresentation and concealed matter from the court. His

principle argument is that the administrator concealed from the court the existence of the deceased's three children.

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, and any grandchild of the deceased whose own parent is dead. The provision is in mandatory terms. The administrator herein only disclosed himself but not the three children of the deceased. The applicant asserts that the administrator was a friend of the deceased, but never lived with her. He does not assert that the administrator was not married to the deceased, but there is a clear implication. His submission, and that of his sister, is that the two were mere friends who did not even live together. The administrator did not avail himself at the hearing to give his side of the story. Although he claims in his papers to have had married the deceased, he presented no evidence of the marriage. No marriage certificates or marriage affidavit or evidence that a marriage could be presumed from prolonged cohabitation. My inclination is to find that the administrator had never married the deceased. However, the court in Butere SRMCSC No. 134 of 2004 handled objection proceedings where the issue of the marriage between the two came up for determination. BO Ochieng, RM, delivered a ruling on 19th October 2009, where he ruled on the issue of marriage as follows:

“The first issue raised is whether the two were married. There was evidence from the Asst Chief which confirmed this plus the facts that the two cohabited together and that he catered for the welfare of his family. He paid the bills including hospital and funeral expenses. He even built a house for her after her death in the land. I also noted that in the petition the petitioner put the names of the child in question which indicates that his action is applying to administrative this land or estate was genuine.”

19. The finding by the court in Butere SRMCSC No. 134 of 2004 was that the administrator was the surviving spouse of the deceased. That holding was not challenged on appeal, and, therefore, it binds this court. It should be made clear a summons for revocation of grant filed at the High Court with respect to a grant made by a subordinate court is not the equivalent of an appeal. A summons for revocation of grant is not a substitute for an appeal. That then means that the finding in Butere SRMCSC No. 134 of 2004 stands. The administrator was, therefore, justified to apply for representation to the estate of his late wife, the deceased.

20. Under section 51(2)(g) of the Law of Succession Act, the administrator was obliged to disclose the three children of the deceased who had survived her. He did not disclose them. I find that the administrator did not fully comply with section 51(2) (g). There were procedural defects in the manner the grant was obtained, as the administrator did not comply fully with the requirements of section 51(2) (g). There was fraud and misrepresentation. The administrator misled the court. There was concealment of important matter from the court, as the administrator was not the sole survivor of the deceased.

21. 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.

22. 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.

23. 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.”

24. Rule 26(1) (2) applies where representation is sought by a person with equal or lesser right to others who have not petitioned like him. In such case, the petitioner is expected to notify such persons with superior or equal entitlement with notice. The individuals with superior or equal 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 addressing these issues, that is by indicating that notice was given to all the other persons equally entitled and with prior right, and perhaps demonstrating that such persons had failed or refused to renounce their rights or to sign consents to allow him to go ahead with his petition.

25. The administrator in the instant cause, being a surviving spouse, had a right or entitlement to administration which was superior or prior to that of the children of the deceased, going by section 66 of the Law of Succession Act.

26. A reading of section 66 and Rules 7(7) and 26 of the Probate and Administration Rules would mean the said surviving spouse of the deceased did not need to comply with the requirements of Rules 7(7) and 26, since those provisions apply to persons who seek representation while they had an equal or lesser right to administration. The applicant had no entitlement to administration of the estate of the deceased which was superior to that of the administrator. He had entitlement as a son of the deceased, but that entitlement was inferior to that of the administrator, the surviving spouse of the deceased, and there would have been no need at all for the administrator to comply with Rules 7(7) and 26. He did not have to obtain the consent of the applicant before applying for representation to the estate of the deceased herein.

27. However, since there was no compliance with section 51(2)(g) of the Law of Succession Act, the grant was obtained in a defective process. I shall accordingly revoke the said grant. The non-disclosure of the children of the deceased means that the administrator cannot be fully trusted to be the sole administrator of the estate, and I shall consider reappointing him jointly with the applicant as administrators.

28. The applicant has prayed for transfer of the cause in Butere SRMCSC No. 134 of 2004 to the High Court for finalization. He has advanced no reasons at all for the transfer. The property in question measures only 0.30 hectare. Its value cannot possibly be above the jurisdiction of the court at Butere.

29. In view of everything that I have said, the final orders that I shall make in this matter, in the circumstances, are as follows:

(a) That the summons dated 15th January 2013 is allowed in terms of prayers 2, 3 and 4 thereof;

(b) That prayer 1 of the application is disallowed, and it is hereby directed that the court file in respect of Butere SRMCSC No. 134 of 2004 be returned to the Butere court for finalization;

(c) That that I hereby appoint Isaac Kiruku Kibe and Lenard Opar Naftal alias Naftali Opari Keya administrators of the estate of the deceased, and grant of letters of administration shall be issued to them by the Butere court out of Butere SRMCSC No. 134 of 2004;

(d) That that the new administrators shall apply for confirmation of their grant once the same is issued to them by the Butere court;

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

(f) That should any of the parties be aggrieved by the orders made herein, there is liberty to move the Court of Appeal, appropriately, within twenty-eight (28) days.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 8TH DAY OF MAY, 2020

W. MUSYOKA

JUDGE