



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO 113 OF 2019

REUBEN MANYISA SABOIGO.....1ST APPELLANT

ZABLON ARAKA SABOIGO.....2ND APPELLANT

VERSUS

MARIA NYABOKE SABOIGO.....1ST RESPONDENT

BOSIBORI NYABETE SABOIGO.....2ND RESPONDENT

(Being an appeal from the Ruling of the Chief Magistrates Court at Kisii, before Hon. S.K Onjoro S.R.M delivered on the 8th October 2019 in Kisii CM CSC No. 363 of 2017)

JUDGMENT

1. These proceedings relate to the estate of Saboigo Menge (Deceased) who died on 22nd May 1980. The deceased's only asset was a piece of land; NYARIBARI CHACHE/B/B/BOBURIA/1774.
2. The cause, **Kisii CM CSC No. 541 of 2016** was initiated by way of a citation filed by Ruben Manyisa Saboigo (Manyisa). The trial court upon hearing the application, through its ruling dated 18th July 2017 directed that a grant be taken out by the deceased's widows, Maria Nyaboke Saboigo (Maria) and Bosibori Nyabete Saboigo (Bosibori) together with the deceased's sons Zablun Araka Saboigo (Araka) and Manyisa.
3. Maria and Bosibori dissatisfied with the trial court's ruling filed **High Court Civil Appeal No 142 of 2018** but when the appeal came for mention, they withdrew the appeal while the respondent therein informed court that petition for grant of letters of administration had been filed. This court marked the appeal as withdrawn in light of the pending petition for grant of letters of administration.
4. The deceased's two sons, Araka and Manyisa through their petition dated 22nd July 2017 petitioned for grant of letters of administration. On the face of the petition, the petitioners included Maria and Bosibori but the deceased's widows did not sign the Petition. This was also the case with the affidavit in support of the petition which was signed by both Araka and Manyisa but not the respondents.
5. The trial court record reveals that grant was issued to Maria, Bosibori, Araka and Manyisa as personal representatives in the deceased's estate.
6. On 3rd December 2018 the appellants made an application to have the grant confirmed to Maria, Bosibori, Araka and Manyisa. The application was only signed by Araka and Manyisa.
7. In due course the respondents made an application before the subordinate court to have **Kisii CM CSC No. 363 of 2017** stayed, annulled, revoked, reviewed and/or set aside on grounds that the succession cause was commenced without their knowledge and consent. The trial magistrate allowed the application and the appellants dissatisfied with the subordinate court's ruling have lodged this instant appeal on the grounds appearing on the face of the memorandum of appeal dated 24th October 2019.

ANAYLSIS AND DETERMINATION

8. This being a first appeal, this Court is to reconsider the evidence evaluate it and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect (see. **Selle & Another v. Associated**

Motor Boat Co. Ltd & Others [1968] EA 123).

9. The issue for determination is whether the trial court could annul the proceedings on account of non-participation from the deceased's beneficiaries. The Law of Succession Act provides for revocation or annulment of grant under section 76 in the following terms;

“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.”

10. The respondents in their application dated 7th March 2019 sought the following orders;

1. *THAT this application be certified urgent and be heard ex-parte in the first instance.*

2. *THAT all proceedings in the Succession Cause herein, namely, KISII CMC Succession Cause No. 363 of 2017 relating to the estate of SABOIGO MENGE (Deceased) be stayed pending hearing and determination of this Application.*

3. *THAT this Succession Cause, namely, KISII C.M.C Succession Cause No. 363 of 2017 be stayed, annulled, revoked, reviewed and/or set aside.*

4. *THAT cost of this application be provided for.*

11. It is clear from the orders sought that the application dated 7th March 2019 was not for revocation or annulment of grant as provided by **section 76 of the Law of Succession Act**. This is also evident in the trial court's holding where the trial magistrate stated as follows;

“This court can therefore only conclude that in the absence of the applicant's signature that they were not aware of the proceedings. Succession proceedings are at times heated and emotive issues that ought to be handled with participation of all parties and this court having found that the applicants were not involved in the succession proceedings from the beginning has no option but annul all proceedings herein

The proceedings of Kisii Succession Cause 367 of 2017 are thus hereby annulled.”

12. The succession court may only revoke/annul a grant where any of the grounds under **section 76 of the Law of Succession Act** has been established but it cannot annul the proceedings. I have carefully looked at the record and note that there are summons for revocation of grant or annulment of grant dated 28th May 2019 filed by Maria and Bosibori. The application is yet to be heard and determined, and I therefore decline to comment or make any findings on the claims of annulment of grant.

13. For the reasons I have stated, I set aside the order of the subordinate court dated 8th October 2019 allowing the Notice of Motion dated 7th March 2019 and direct that the matter be mentioned before the Chief Magistrates Court at Kisi within 30 days with a view of setting down the application dated 28th May 2019 for hearing if need be. Parties in this matter have been in court from 2016. The administrators should endeavor to have it concluded.

14. In the interest of justice and timely disposal of this cause, I further direct that **CMC No. 541 of 2016** and **CMCSC No. 363 of 2017** be consolidated for hearing and determination of the deceased's estate.

Dated, signed and delivered at KISII this 22nd day of July, 2020

R. E. OUGO

JUDGE

In the presence of:

Mr. Sagwe For the Appellant

Absent For the Respondent

Ms. Rael Court Assistant