



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 489 OF 2008

IN THE MATTER OF THE ESTATE OF NDATHO KOBIA Alias NDATHO M'KOBIA- DECEASED

ANDREW GITUMA NDATHO.....1ST PETITIONER

DAVIDSON MUTUMA NDATHO.....2ND PETITIONER

-VS-

NDUKU NKANATA.....OBJECTOR

FRANKLIN KIRIMI KASALA.....1ST INTERESTED PARTY

CAROLINE GATWIRI GATARA.....2ND INTERESTED PARTY

JUDGMENT

1.The Deceased herein **NDATHO KOBIA** alias **NDATHO M'KOBIA** died on 24th September 1996.As per the letter of the Kirigara Location dated 2nd October 2008 the deceased left behind the following dependants; **Catherine Igoki (1stwife), Nduru Nkanata Ndatho (2nd wife), Priscilla Kagwiria Ndatho, Esther Karuthe Ndatho, John Gatara Ndatho, Andrew Gituma Ndatho, Davidson Mutuma Ndatho, Purity Kagwira Kimathi, Anita Kanairo Ndatho, Penina Nkirote Ndatho, Julius Kigunda Ndatho**

2. The petitioners herein filed for Letters of Administration on 21st October 2008 listing the dependants/beneficiaries of the deceased as per the letter of the Chief and listing the following as properties of the deceased;

a. Abothuguchi/Karieni/1601,

b. Abothuguchi/Ruiga/645 &

c. Ntirimiti Settlement Scheme/32.

3. The petition for letters for Administration of the Estate was gazetted on 30th April 2010 and grant for letters of administration issued on 28th July 2010.

4. Following much delay, the objector applied through application dated 11th July 2013 seeking to have the aforesaid grant revoked and one to be issued to him. Annexed thereto is also a proposed mode of distribution. Consequently, the 1st petitioner, on 1st July 2014 filed summons for Confirmation of Grant which was replied to by the objector on 18th May 2015.

5. Both parties however agreed on the mode of distribution of the estate and filed Consent on 2nd November 2015 which was adopted as order of this Honourable Court on 7th December 2015. Subsequently, a Certificate of Confirmation of Grant was issued on 31st March 2016.

6. Aggrieved by this decision the 1st and 2nd Interested parties on 21st November filed their application dated 16th November 2017 that now forms the crux of this judgement. They sought for revocation of the grant issued to the petitioners and for an inhibition to be registered upon L.R. ABOTHUGUCHI/ KARIENI/1601 & NTIRIMI SETTLEMENT SCHEME/32.

7. The basis of their application is solely on the fact that when the consent was made they had already attained the age of majority and therefore the averments made by the other beneficiaries sought only to deceive this Honourable Court. They also averred that they had been granted a lesser share in Parcel No. L.R. ABOTHUGUCHI/KARIENI/1601 & NTIRIMITI SETTLEMENT SCHEME/32.

8. The same was replied to by the 1st petitioner in his replying affidavit dated 5th February 2018 stating that the applicants were given 1 ½ acres as opposed to 2 acres in L.R. NTIRIMITI SETTLEMENT SCHEME/32 because he had undertaken to pay the settlement scheme fund to which he annexed the receipts of payments without the help of the applicants father i.e. John Gatara Ndatho and that the applicants missed a share in L.R. ABOTHUGUCHI/KARIENI/1601 because their father had agreed his share to be sold to defray his hospital bills and the same was sold to Martin Mwiti Nyaki whose name was included in the Confirmed Grant.

9. Both parties agreed to file written submissions to the application but it is only the petitioner who filed written submissions.

Determination

10. The petitioner has submitted that this Honourable Court is *Functus Officio* and as such does not have jurisdiction to entertain the application by the interested parties. This position cannot be gainsaid to be true. This Honourable Court has jurisdiction to revoke a grant at any time before or after Confirmation of the grant.

11. This position is premised in the interpretation of the provision of **Section 76 of the Law of Succession Act** and as was highlighted in decision of John. M. Mativo **In re Estate of Wahome Mwenje Ngonoro Deceased [2016] eKLR**

I have carefully considered the affidavit and oral evidence by both parties and also the relevant law and authorities and in my view, the issues for determination are (i) whether or not the applicants have demonstrated sufficient grounds for court to revoke the grant as provided for under Section 76 of the Law of Succession Act[1] which provides that:-

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an 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 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 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.

The above provision was construed by the court of appeal in the case of Matheka and Another vs Matheka[2] where the court of appeal laid down the following guiding principles.

i. A grant may be revoked either by application by an interested party or by the court on its own motion.

ii. Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.

12. Having determined that this Court has Jurisdiction to determine the interested parties' application I shall now move to analyse the merits of the aforesaid application. The prayers by the interested party are solely based on the fact that they were given a lesser share in the estate. This position has however been explained away by the 1st petitioner vide his replying Affidavit whose position was supported by the statements of Thomas Mwobobia M'Rutere Kiriinya & Stephen Rutere dated 25th July 2018.

13. The petitioner did not attempt to rebut the allegation that the property in L.R No. **ABOTHUGUCHI/KARIENI/1601** was sold with the instructions of his father during the years of his ailment and/or the fact that the 1st petitioner had paid the sums owing to the settlement scheme in NTIRIMITI SETTLEMENT SCHEME/32 hence his entitlement to a higher share.

14. From the evidence I do think that there was concealment of material facts and/or making of a false statement when they filed the consent dated 2nd November 2015 the resultant of which the Certificate of Confirmation of grant was issued. This is borne out of the fact that at the time of filing this cause, applicants herein were of tender age. At the time of signing the Consent they had attained the age of majority but they never sought substitution thereof. The beneficiaries also considered them in the consent except it was indicated that their share of the estate shall be held in trust.

15. I therefore hold that the Application dated 16th November, 2017 lacks merit and is dismissed with no Order as to costs. However, the 1st and 2nd interested parties shall now take their respective shares identified in the grant directly. The resulting trust in their favour is lapsed when they attained majority age. I so declare. Given the nature of these proceedings, I order each party to bear own costs. It is so ordered.

Dated, signed and delivered in open court this 21st day of January, 2019

F. GIKONYO

JUDGE

In presence of

Kithinji for Interested party

Kimatha for petitioner – absent

F. GIKONYO

JUDGE