REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 401 OF 2011

IN THE MATTER OF THE ESTATE OF STEPHEN NYAGA GAKUANYI alias NYAGA GAKUANYI(DECEASED)

AND

JOHN PETER KANAKE.....1ST APPLICANT

JOSPHAT NJUE KANAKE.....2ND APPLICANT

FERISTA KATHUGU MBOGO.....3RD APPLICANT

VERSUS

LAORESIA MBIRO NDWIGA.....RESPONDENT

R U L I N G

A. Introduction

1. This ruling is in relation to the summons for revocation/ annulment of grant issued on 16th September 2011. The application seeks for orders for annulment of the grant issued and confirmed by the Runyenjes Senior Resident Court in Succession Cause 155/2010.

2. The application is based on the following grounds:

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 court of something material to the case.

c) The proceedings to obtain the grant were defective in that the applicant with other had protested against making of the said grant and was not heard by the court making such grant.

d) That the trial court lacked statutory and pecuniary jurisdiction.

B. Applicants' Case

3. The 1st Applicant testified as PW1. It was his testimony that when the respondent filed the succession cause in Runyenjes, the remaining beneficiaries were called by the Chief but they did not agree on the mode of distribution. He further testified that the respondent did not involve any other family member in the distribution of the estate.

4. He further testified that that the Respondent wanted to have 10 acres and gave him 6 acres. It was his testimony that the respondent duped him and other family members into signing the forms of distribution of the land. Thus he was dissatisfied with the court's ruling in Runyenjes Succession Cause 155/2010.

5. It was PW1's testimony that the 40 acres of the deceased's estate (Kagaari/Weru/677) should be shared equally among the 6 siblings. The 3rd applicant testified as PW2. She testified that the applicants did not agree on the mode of distribution and that when they proceeded to court were told to sign a document which they later discovered to be a distribution form. She testified that they refused the respondent to be administrator. She further testified that it was her wish that shares of her late siblings be given to their dependents.

C. Respondent's Case

6. DW1, the respondent testified that she called all his siblings to the 1st applicant's home to discuss distribution of the deceased's estate but none of the applicants showed up forcing her to go to the area chief who summoned his siblings. She further testified that despite the chief's attempt to reconcile them, her siblings were against it forcing the chief to direct that he would be a witness when the respondent filed the succession cause in Runyenjes.

7. The respondent further testified that way back in 1979, the deceased had given her 4 acres from the suit property where she has since settled with her family putting up a family home and cultivating 1500 stems of coffee. It was her testimony that as a result, the deceased's estate now became 36 acres which was distributed equally among her siblings. She further testified that it was a lie that the clerk at the Runyenjes court tricked the applicants into signing the documents.

8. DW2, the Chief of the area the parties in this court testified that he did not know the deceased but knew his 6 children. It was his testimony that sometime in 2011 the respondent asked him to summon the deceased's children to discuss the deceased's succession, particularly the sharing of Kagaari/Weru/677 measuring 40 acres, which he did and they all attended. He testified that the deceased's children disagreed on who was to file the succession cause after which he informed them that he would issue the requisite letter to whoever came for it, who happened to be the respondent.

D. Applicant's Submission

9. It was submitted that the 1st applicant filed the application for revocation as the probate court in Runyenjes lacked jurisdiction as the suit property was valued at 10 million which was beyond the jurisdiction of the probate court.

10. It was further submitted that they were not heard by the probate court in Runyenjes and further that the respondent had unjustly taken a larger share than other siblings.

E. Respondents' Submission

11. The respondent submitted that the issues raised by the applicants do not meet the threshold for revoking a grant. She further testified that the issue of jurisdiction raised by the applicants was an afterthought as it was not raised during trial and thus ought to be ignored.

12. She further testified that she like other beneficiaries was given land by the deceased prior to his death and that land should not form part of the deceased's estate as it was in the case of the other beneficiaries. Consequently, she submitted that the application ought to be dismissed.

F. The Determination

13. I have carefully considered the affidavit and 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 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 not withstanding that the allegation was made in ignorance or inadvertently;***
>
> ***d. ....."***

14. The above provision was construed by the court of appeal in the case of **Matheka and Another vs Matheka {2005} 2KLR 455** 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."***

15. The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of a grant to demonstrate the existence of any, some or all the above grounds.

16. A close look at Section **76** shows that the grounds can be divided into the following categories: -

§ *the propriety of the grant making process;*

§ *mal-administration; or*

§ *where the grant has become inoperative due to subsequent circumstances.*

17. The first issue that I will address is that of jurisdiction. The applicants submitted that the trial court lacked jurisdiction to determine the succession cause as the value of the estate of the deceased exceeded Kshs. 100,000/=.

18. The jurisdiction of the subordinate courts in succession matters is provided under **Section 48 of the Law of Succession Act**. Before the amendment was effected under Act No. 26/2015 to bring it in tandem with the pecuniary limits set under **Section 7(1) of the Magistrates' Courts Act, 2015,** the jurisdiction was **Kshs 100,000/=.**

19. The section provided:

> ***"Notwithstanding any other written law which limits jurisdiction but subject to the provisions of section 49, a Resident Magistrate shall have jurisdiction to entertain any application other than an application under section 76, and to determine any dispute under this Act and pronounce such decrees and make such orders therein as maybe expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings."***

20. This succession cause was filed in the lower court. The documents filed being P &A 5 and the affidavit in support of the application indicates that the estimated value of the assets was Kshs 100,000/=. The applicant did not raise the issue of lack of jurisdiction in the lower court. However, the applicants have submitted that the value of the deceased's estate was more than Kshs. 10,500,000/=. There is a valuation report on court record placing the value of the land at Kshs. 10,500,000/=.

21. Where the value of the property is in issue, the party raising it must tender a valuation report to assist the court to determine the issue as the applicant has done. It is a principle in the law of evidence that he who alleges must prove. The applicant has discharged the burden to proof of that the value of the land exceeded Kshs 100,000/=.

22. It is my opinion that Runyenjes Magistrate's court lacked pecuniary jurisdiction to grant letters of administration intestate and to confirm the grant thus rendering the said grant defective for want of jurisdiction.

23. A perusal of the court record reveals that the respondent at all times involved the applicants in the proceedings as he sought confirmation of grant. Further it is on court record that during the confirmation proceedings, all applicants were given due notice as the court had directed. The protest filed by the applicants in the subordinate court were in regard to the grant being issued to the respondent which the applicants abandoned as it was overtaken by events. Consequently, it is discernible that the grant to the respondent was not obtained fraudulently.

24. The applicants have raised in their grounds for revocation the issue of priority of the respondent to apply for letters to administer the deceased estate. It is unfortunate that despite having the constitution in place for over 6 years and numerous pronouncements by the courts on the issue of discrimination of married daughters and inheritance from their parents, it is still considered evil in some quarters for a daughter who is considered to be happily married and to having property of her own, to express any interest in her parents' estate.

25. In regard to inheritance, Kimaru J. in **Peter Karumbi Keingati & 4 Others Vs. Dr. Ann Nyokabi Nguthi & 3 Others (2014) eKLR** expressed himself as follows: -

> ***"as regards to the argument by the Applicants that married daughters ought not to inherit their parents' property because to do so would amount to discrimination to the sons on account of the fact that the married daughters would also inherit property from their parents' in-law, this court takes the view that the argument as advanced is disingenuous. This is because if a married daughter would benefit by inheriting property from her parents, her husband too would benefit from such inheritance. In a similar fashion, sons who are married, would benefit from property that their wives would have inherited from their parents. In the circumstances therefore, there would be no discrimination. In any event, the decision by a daughter or a son to get married has no bearing at all to whether or not such son or daughter is entitled to inherit the property that comprise the estate of their deceased parents. …This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which has a tendency of once in a while rearing its ugly head to be forever buried. The ghost has long cast its shadow on our legal system despite numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of the Constitution 2010, particularly Article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come for those discriminative cultural practices against women be buried in history."***

26. The parties have already testified before this court on who should have been appointed the administrator of the estate and on the mode of distribution. This application for revocation was filed in this court in September 2011. Before Runyenjes court was succession cause No. 155 of 2010 which gave rise to these proceedings in way of revocation of the grant. The succession proceedings date back to 2010 about eight (8) years ago. For this reason and in bearing in mind the principle of expeditious disposal of cases, I will proceed to determine the issues raised by the parties in their evidence.

27. I have already found in favour of the applicant in the grounds of want of jurisdiction of the Runyenjes trial magistrate. This finding

justifies the revocation of the grant given to the respondent in this case.

28. The 1st applicant argues that he is the one most qualified to be appointed the administrator of the estate and she is supported by his sister PW2. The respondent is a daughter of the deceased. Section 66 of the Act places all the children of the deceased on equal footing on administration of the estates of their parents. None of the beneficiaries in court ranks in priority over the other.

29. The respondent proposed equal sharing of the land of the deceased among the children. During the lifetime of the deceased, the applicant was allocated four (4) acres out of the only asset available for distribution. The land is in her possession but it was not transferred to her.

30. Section 42 of the Act provides that any property bequeathed to beneficiaries during the lifetime of the deceased must be taken into consideration.

31. Section 42 of the Law of the Succession Act provides: -

> ***(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 intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.***

32. The purpose of this provision is to achieve equality as much as possible among the beneficiaries in intestate succession. The deceased herein died intestate and the relevant law is applicable in distribution. The four (4) acres cultivated by the respondent must be taken into account during the distribution.

33. The respondent argued that her father gave her the four (4) acres to cultivate and live on because she was poor. She put up a permanent house on the land and lives there with her husband one Gerald Ndwiga. The land was not demarcated, surveyed or even transferred to her.

34. He evidence was that she ought to have the four (4) acres set aside for her and the remaining 36 acres divided equally between all the children of the deceased including herself. This mode of distribution is not supported by the relevant law.

35. The respondent alleged that her brothers had been given land elsewhere by their father during his lifetime. She failed to produce any evidence to that effect and the allegation which was denied but was not established.

36. The deceased was survived by six (6) beneficiaries among them Niceta Rwamba a grandchild who had been proposed to take the share of her deceased father on behalf of herself and her siblings. Section 38 of the Act is therefore the relevant law in this case for purpose of distribution.

37. Section 38 of the Law of Succession Act provides: -

> ***Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.***

38. The surviving children of the deceased ought to share the estate in equal shares. The deceased had one parcel of land **LR. Kagaari/Weru/677** measuring **40 acres**. This asset is available for distribution among the beneficiaries in accordance with **Section 38 of the Act**.

39. I therefore find in favour of the applicants in regard to distribution of the estate.

40. I proceed to distribute the estate as follows: -

1) Josphat Njue Kanake - 6.66 acres

2) Laoresia Mbiro Ndwiga - 6.66 acres

(To include the four (4) acre portion she has developed)

3) Ferista Kathungu Mbogo - 6.66 acres

4) Venasio Ireri Kanake - 6.66 acres

5) John Peter Kanake - 6.66 acres

6) Niceta Rwamba - 6.66 acres

(To hold in trust for herself and her siblings)

41. In effect, I make the following orders: -

i. That the grant issued to Laoresia Mbiro Ndewiga in Runyenjes court in Succession Cause No. 155 of 2010 is hereby nullified.

ii. That <u>Laoresia Mbiro Ndwiga</u> and <u>John Peter Kanake</u> are hereby appointed administrators of the estate herein.

iii. That the grant is hereby confirmed on the terms indicated above.

iv. That the administrators do proceed to execute the grant jointly and in default the Deputy Registrar of the high Court to execute all the necessary documents on behalf of any one of them who is unwilling to do his part.

v. Each party to meet their own costs of these proceedings.

42. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF JANUARY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. P. N. Mugo for petitioners/applicants

Respondent in person