



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 546 OF 2015

IN THE MATTER OF THE ESTATE OF ANNA KATILO NGUI (DECEASED)

ESTHER KANINI NGUI.....PETITIONER

VERSUS

JOSPHINE MUTHEU MAKAU.....APPLICANT/OBJECTOR

RULING

1. By a Grant of Letters of Administration Intestate dated 30th August, 2016, in respect of the Estate of the late **Anna Katilo Ngui**, (hereinafter referred to as “the deceased”) this Court on 29th July, 2016 issued the same to **Esther Kanini Ngui** who had petitioned for the same alleging that she was the deceased’s daughter in law

2. Unhappy with that grant, by way of Summons for Revocation or Annulment of Grant dated 30th August, 2018, the Objector/Applicant herein, **Josephine Mutheu Makau**, applied for the revocation and/or annulment of the said grant on the following grounds:

1. That the temporary grant was obtained by deceit and non-disclosure of matters material to the cause.

2. That the proceedings to obtain the grant were defective in substance in that the Petitioner is not a direct beneficiary in the deceased’s estate hence her name should be deleted and replaced with JOSEPHINE MUTHEU MAKAU the Applicant herein and her sister DOROTHY MWELU JOSEPH.

3. That the letter from Area Chief is falsehood (sic).

4. That the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant.

3. From the affidavit in support of the said summons, it would seem, though the Objector does not seem to expressly say so, that the objector is a daughter of the deceased. According to her, the Petitioner in this case is her sister in-law and the deceased to whose the proceedings herein related is her mother whereas the Petitioner is her daughter in-law. The Objector therefore averred that the Petitioner though a wife to her brother is not the direct beneficiary to the deceased estate hence the Objector is the only suitable person to be the administrator.

4. It was therefore the Objector’s case that the grant herein was fraudulently obtained by deceit and concealment of material facts relevant to this cause.

5. It was further deposed that the letter from Area Chief is false and was written in collusion between the Petitioner and the Chief.

6. To the Objector, some of the deceased’s Defendants were deliberately left out in the Petition and particularly the Applicant and her sister **Dorothy Mwelu Joseph**. The Objector contended that both Petitioner and the Area Chief knew that she and my sister were daughters of the deceased but despite all that declined their participation in the case. Apart from that some of the deceased properties were fraudulently transferred and/or alienated to other persons known to the Petitioner for her own personal gain and at the detriment of the other beneficiaries. It was disclosed that the Petitioner listed herself and her children as the only beneficiaries of the deceased’s estate and other properties were technically omitted in the grant – Plot No. Kyambuko 938 and Matiani 1151. It was deposed that instead, the Petitioner listed parcel No. Athi River/ Athi River Block 1/560 as the only property left by the deceased

7. According to the Objector, none of the other family members appointed the Petitioner as the administrator of the deceased neither have they consented to the Petition. The Objector however contended that the Petitioner has adverse interest in the deceased's estate and as such can't be trusted with the administration of the same.

8. According to the Objector, the Petitioner and her son one **John Ngui Peter** secretly and illegally sold the said parcel No. Athi River/Athi River Block 1/560 at Kshs. 3 Million without knowledge of the other beneficiaries hence the urge to file the present cause for subsequent transfer of the same to the purchaser notwithstanding the subject parcel of land was given to the Applicant by the deceased on 21/3/2017 at which meeting the Petitioner was present. Upon realization of the illegal sale, the Objector cautioned the property as a result of which the Petitioner had no choice but to apportion the purchaser part of the suit land worth Kshs. 1.8 Million as per the initial deposit so received and the other portion was transferred into the Objector's name.

9. The Objector averred that upon lodging a complaint with the Director of Criminal Investigation, Machakos the said office sought from the Deputy Registrar, Machakos High Court relevant documents pertaining to the Succession Cause.

10. Based on the foregoing, it was deposed that as per now parcel No. Athi River/Athi River Block 1/560 no longer forms part of the deceased's estate since it has changed hands and title deeds issued and same ought to be expunged from the list of properties and the cause be amended accordingly or a fresh grant of letters of administration be filed.

11. The Objector therefore sought for the annulment and/or revocation of the grant issued on 29th July, 2016 to the Petitioner and urged that her name to be deleted and replaced with those of the Objector and her sister **Dorothy Mwelu Joseph**.

12. When this cause was called out on 4th March, 2019, **Mr Tamata**, learned counsel for the Objector informed the court that though the Petitioner, who had not responded to the summons, had been present in court earlier in the morning, but on the advice of her children that she risked being arrested, had disappeared from the courtroom. That the Petitioner had been present as aforesaid was confirmed by the Petitioner's children, **Onesmus Nzivo, Margaret Mutindi** and **Cornelius Mutuku**, who were themselves present in court, but who could not explain the whereabouts of the Petitioner.

13. Accordingly, the application was not opposed.

14. Section 76(a), (b) and (c) of the *Law of Succession Act* provides as hereunder:

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;

15. Section 66 of the *Law of Succession Act*, Cap 160, Laws of Kenya provides as follows:

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:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

16. Section 39(1) of the Act which falls under Part V deals with situations where the intestate has left no surviving spouse or children and provides that:

Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

17. Section 51 (2) of the *Law of Succession Act* provides that:-

An application shall include information as to-

(a) the full names of the deceased;

(b) the date and place of his death;

(c) his last known place of residence;

(d) the relationship (if any) of the applicant to the deceased;

(e) whether or not the deceased left a valid will;

(f) the present addresses of any executors appointed by any such valid will;

(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) a full inventory of all the assets and liabilities of the deceased; and

(i) such other matters as may be prescribed.

18. In this case, it is clear that the Petitioner herein did not rank in priority to the Objector and her sister. Therefore, the Petitioner could only lawfully petition for grant upon receiving a consent from the Objector, or upon citation having notified the Objector of her intention to petition for grant in respect of the deceased's estate. This must be so because Part VI Rule 26(1) of the *Probate and Administration Rules* on the other hand provides that:

Letters of administration shall not be granted to any applicant without notice of every other person entitled in the same degree as or in priority to the applicant.

19. In either case, the Petitioner was obliged to disclose not only her relationship with the deceased but also the names and addresses of all surviving children of the deceased, and of the children of any child of his or hers then deceased. It is clear that in this case the Petitioner only disclosed the names of herself and her children as the alleged beneficiaries of the estate of the deceased. This was done with the apparent connivance of the Assistant Chief.

20. Although the Objector contends that the Petitioner did not disclose all the assets of the deceased, there was no evidence adduced showing that there were such other properties of the deceased which comprised his estate that were never disclosed.

21. It is however clear based on the evidence before me that the Petitioner did not disclose all the material required to have been disclosed and she was not the right person to have petitioned for grant in the circumstances. Section 52 of the Act provides that;

Any person who, in an application for representation, wilfully or recklessly makes a statement which is false in any material particular shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment.

22. In the premises I have no hesitation in revoking the grant issued to the Petitioner herein on 29th July, 2016 and dated 30th August, 2016 which I hereby do. I hereby direct the Petitioner to within three days from the date of service of this order upon her to return the original Grant issued to him to this court's registry for cancellation. It follows that a fresh Grant of Letters of Administration Intestate of the late **Annah Katilo Ngui** shall be issued jointly to the Objector herein, **Josephine Mutheu Makau**, and **Dorothy Mwelu Joseph**.

23. As the application was not opposed there will be no order as to costs.

24. It is so ordered.

Read, signed and delivered in open Court at Machakos this 11th day of March, 2019.

G V ODUNGA

JUDGE

Delivered in the absence of the parties.