



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 27 OF 2019

KIMATHI SHADRACK ETIRIKIA.....APPELLANT

VERSUS

TERESIA NTUNDU M'IMANA.....1ST RESPONDENT

RAEL ATIA.....2ND RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Maua A.G. Munene SRM dated 13th January 2019)

JUDGEMENT

1. The appeal herein arose from the ruling of Hon A. G. Munene in Maua CMC Misc. Application Succession No. 61 of 2018 where the trial court revoked the limited grant issued of 17th August 2018 and ordered that the parties obtain a letter from the chief detailing all the beneficiaries of the estate and that the beneficiaries sign the consent form authorizing Kimathi Shadrack Etirikia to petition for Limited grant to the estate of the deceased herein.
2. Having been dissatisfied with the ruling the appellant filed a memorandum of appeal dated 12th March 2019 seeking the setting aside of the ruling dated 13th February 2019 in **MAUA CMCC MISC SUCCESSION NO. 61 OF 2018**. The application was based on the following grounds;
 - a. The learned trial magistrate erred in law and facts in failing to find and hold that the appellant legally held grant ad litem for the good of the estate
 - b. The learned trial magistrate erred in law and facts in failing to consider the affidavit of the 2nd respondent who deponed that her affidavit was forged by the 1st respondent and that the appellant was their half brother
 - c. That the learned trial magistrate failed to consider the appellants evidence and relied on the respondents' evidence despite the glaring contradictions.
 - d. That the learned trail magistrate erred in law and in fact in disregarding the appellant witness affidavits and the area chief letter
3. The appeal was canvassed by way of written submissions where the appellants argued that the trial magistrate did not factor in all the evidence. The 2nd respondent swore an affidavit dated 12th September 2019 asserting that the 1st respondent together with her advocate forged her thumb print and illegally framed an affidavit to seek the revocation of the suit grant. She asserted that she is the sister to the 1st respondent and a half-brother to the appellant. The trial court also failed to consider the fraudulent dealings of the estate and in addition failed to consider the evidence by the area chief. Even though the succession court has primary power to protect and preserve the estate it failed to do so.
4. On the other hand the 1st respondents in their submissions contended that that it is trite law that those deserving of issuance of grant of representation include, spouses and children of the deceased person. The appellant herein who claims to be the son of the deceased was born on 11th April 1991 while the deceased died on 7th August 1987. Therefore cannot be his son. additionally it is not in dispute that the respondents herein are the daughters of the deceased and they were neither consulted nor did they consent to the issuance of the grant to the appellant and on this ground the grant issued to the appellant ought to be revoked.
5. The 2nd respondent in her submissions stated that the appellant is her brother and they have lived together as a family with her mother and his siblings who are her half siblings on the said suit estate all their lives. The 1st respondent however is trying to cover up her fraudulent dealings with their land which is their only inheritance.

6. The question before the court is whether to set aside the ruling dated 13th February 2019 and uphold the grant of letters of administration ad litem granted to the appellant?

7. The court must therefore first determine who has a right to apply for a grant of representation. The guide as to who can apply for a grant of representation is provided by **Section 66** of the **Law of Succession Act** that states that:

“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.”

8. It is therefore clear that for one to apply for a grant of representation for a intestate deceased, he/she has to demonstrate that he/she is:

(1) a spouse

(2) a beneficiary entitled to intestacy.

9. On perusal of the record the appellant herein in his replying affidavit dated 12th September 2018 in paragraph 8 and 9 he claimed that he was the son of the deceased born in 1987 and that the birth date on his I. D was a mistake. However, the appellant seems to have changed his story in his submissions as he stated that the 2nd respondent is his half-sister. If the appellant herein was born in 1991 and was not being maintained by the deceased immediately prior to his death, he therefore cannot be a beneficiary according to section 29 of the Law of Succession Act.

10. In addition, the appellant did not give notice to the beneficiaries when he applied for the said grant. **Rule 26(1) of the Probate and Administration Rules** provides that no grant of representation shall be granted unless notice is given to every person entitled in the same degree as or in priority to the applicant. The Trial court in Issuing orders that the Chief provides a letter with details of rightful beneficiaries to the estate of the deceased was proper in the circumstances to avoid disinheritance by the fraudulent conduct and actions of 3rd Party's. Being that the Trial Magistrate questioned the relationship of the Appellant to the deceased it will only be fair and just that those orders are complied with.

11. In conclusion therefore, I find that the appeal herein lacks merit and is consequently dismissed with costs to the respondents.

HON A. ONG'INJO

JUDGE

JUDGEMENT DELIVERED, DATED AND SIGNED IN COURT ON 09TH DAY OF OCTOBER 2019.

HON A. ONG'INJO

JUDGE

In the presence of:

C/A: Mwenda

Appellant

Respondent:- Ms Mbogo Muriuki Advocate for 1st Respondent

Mr Thangicia: I pray for a copy of the Judgment

HON A. ONG'INJO

JUDGE

Order

Appellant to pay for copying charges to be supplied with a copy of Judgment.

HON A. ONG'INJO

JUDGE