



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

SUCCESSION CAUSE NO. 1 OF 2017

IN THE MATTER OF THE ESTATE OF MARY NGINA KIDI (DECEASED)

NDUTA GLADYS MBECHA.....1ST APPLICANT

MONICAH MUTHONI KAROBIA.....2ND APPLICANT

GRACE WANJIRU.....3RD APPLICANT

VERSUS

SAMUEL KIOL.....DEFENDANT

RULING

The three applicants who allege that they are beneficiaries to the estate of the deceased in this matter filed chambers summons dated 22nd August, 2017 pursuant to Section 76 of the law of Succession seeking the following declarations.

1. That the grant of letters of administration issued to the respondent herein and confirmed on 24th November, 2016 in succession cause no. 58 of 2016 be revoked and or amended forthwith.
2. The grounds in support of the petition for revocation are crafted in the following language.
3. That all the surviving daughters and son of the deceased are entitled to inherit from the estate of the deceased but were excluded by the administrator/ respondent.
4. That the administrator herein is the brother to the applicants/ objectors in a family of six.
5. That the grant herein was obtained procedurally by material non-disclosure, misrepresentation and in exclusion of all bona fide beneficiaries.
6. That during the confirmation of grant on 24th November, 2016 the applicants were excluded as beneficiaries of the estate of the deceased as the respondent misrepresented to the court that he was entitled to the estate solely and absolutely.
7. That despite the applicants being bona fide beneficiaries to their mother's estate they did not participate in the proceedings relating to the confirmation of grant because they were not informed or notified of the proceedings before court and did not therefore consent to the administration or distribution of the estate of the deceased as per the certificate of confirmation.
8. The costs of this application be provided for.

The respondent was visited at his home by the process server but he only managed to get the wife whom he served with the court documents. The affidavit of service to that effect is dated 25th August 2017. In the cause of the pre-trial conference an order of this court was issued to secure hearing notice through the Chief of the Location as supported by an affidavit dated 28th September, 2017.

The chief of the location Kariuki Nganga in whose jurisdiction the respondent resides filed a certificate detailing efforts made to trace him but with no success of his whereabouts. In view of the earlier affidavit of service this court directed that the application does proceed for

hearing concerning the estate of the deceased.

The applicants authorized out Nduta Gladys Mbecha to have the conduct of the case on their behalf given the nature and factual foundation of the dispute. In this respect Nduta Gladys Mbecha filed an affidavit in support of the chamber summons dated 15th August, 2017. She also augmented the affidavit by her own oral testimony before this court. From her testimony and the affidavit filed by Nduta Mbicha testified and singled out the events which culminated in their filing this objection to the confirmation of grant.

The gist of her evidence is that at the initial stage of seeking grant for letters of administration they did not participate nor notified of the petition concerning the estate of the deceased. Gladys Nduta Mbecha further told the court that in the subsequent hearings there was no notice of attendance or information on the process touching on the estate of their late mother.

Gladys Nduta Mbeche in her testimony pointed out that the impugned grant issued to the respondent was irregularly confirmed without them giving the necessary consents as required by law. She further deposed that the respondent even went further to confirm the letters of grant outside the statutory period of six months without any special reasons advanced before the probate court.

In her further evidence the letters of grant was confirmed in absence of other beneficiaries entitled to inherit the share of the estate. At any rate the applicants faulted the trial court in issuing confirmation orders of grant without ascertaining that the named beneficiaries accorded their respective consents. She prayed that this court exercises discretion and revoke or direct the confirmed grant to the estate of the deceased issued un-procedurally, irregularly and false misrepresentation be annulled.

Issues for determination arising from the pleadings and evidence:

- (a) Whether the respondents applied for confirmation of letters of grant without involving the applicants.**
- (b) Whether the confirmed letters of grant was obtained through misrepresentation and, non-disclosure of material facts.**
- (c) Whether the applicants are entitled to the order prayed for in the chamber summons dated 22nd August 2017.**

The applicable law

This motion of objection is granted under section 76 of the law of succession Act which provides as follows:

“A grant of representation whether or not confirmed may at any time be revoked, or annulled if the court decides, either on application by interested party or its own motion”

- (a) That the proceedings to obtain the grant were defective in substance***
- (b) That the grant was obtained by the making of a false statement or by concealment from the court of something material to the case***
- (c) That the grant was made by an untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.***
- (d) The person to whom the grant was made faulted, after dire notice and without reasonable cause either: to apply for confirmation of the grant within a year from the date thereof or such longer period as the court has ordered or allowed or to proceed diligently with the administration as is required by the provisions of paragraph 6 and 9 of Section 83 or has produced such investigations or account which is false in any material particular or that the grant has become useless and inoperative through subsequent circumstances.***

Section 76 is one of the most litigated provisions under the law of Succession Act before our courts. The jurisprudence which has arisen out of the superior courts on this provisions can be exemplified by the following case commentaries. In the matter of the estate of ***Justus Wangai Muthini Nairobi High court Succession Cause No. 1949 of 2001*** the court in the circumstances was faced with an application for revocation of grant on grounds that the administrator applied for letters of grant without notifying the other beneficiaries whose names were to appear in the certificate of confirmation of grant. The orders issued for confirmation disinherited the beneficiaries to the estate and ordered that the certificate of confirmation be cancelled.

Further in the case of the Estate of ***Ezekiel Mutanda Masai Probate and administration Cause No. 4 of 1992*** the court held that a grant is liable for revocation where the person who obtained it concealed material information from the court and excluded some of the survivors of the deceased. In the matter of the estate of ***Ngaii Gatumbi alias James Ngaii Gatumbi (Deceased) Nairobi High Court Succession cause No. 783 of 1983*** before Koome J. as she then was held that:

“An application for revocation of letter of grant brought by persons who were omitted from the petition for grant although they were equally entitled to apply but were not notified of the petition nor their respective consents obtained was void abinitio. The court held that the grant be revoked on the ground that it had been obtained by a defective or irregular process.”

In the present application this court has the sworn evidence and corresponding affidavit supporting the revocation of the grant. It is not disputed that the applicants are daughters and beneficiaries to the deceased estate. The distribution of the estate is therefore provided for

under Section 35(5) of the law of Succession Act which states:

“Subject to the provisions of Section 41 and 42 and subject to any appointment or award under this Section, the whole of residue of the net estate shall in the death or in the case of a widow, remarriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children”

The evidence on record as set out in form P & A 5 reveals that the applicants were listed as survivors and beneficiaries to the deceased estate. The estate of the deceased was to be administered and distributed in conformity with the law as stated under Section 35 as read with section 38 of the law of Succession Act. The record further shows that the initial grant of probate intestate was issued to the respondent. It was to the effect of ensuring that the other beneficiaries participated in the entire process of grant of representation and confirmation.

In this case on 28th June, 2016 grant o letters of administration intestate was issued to the respondent in exclusion of the applicants upon specific grounds not exhibited on the record of the probate court the letters of grant were confirmed on 24th November, 2016 bequeathing the entire property and assets to the respondent absolutely. The respondent did not obtain the necessary consents from the other beneficiaries nor is there evidence that they were notified of the proceedings on confirmation.

The constitution of Kenya under Section 27(1) makes it abundantly clear that every person is equal before the law and has the right to equal protection and equal benefit of the law. Section (5) a person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause 4 which reads:

“The state shall not discriminate against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth”

The law of succession through the readings of Section 35, 38, 40 and 41 espouses the equality principle. The general anchor is that all the children of the deceased are entitled to inherit shares of the property irrespective of their age, sex, gender, social status i.e. marriage or unmarried. It is not disputed that the deceased was survived by the applicants and the respondent. In all fairness each of them unless they renounced their rights and are entitled to a portion of the free property left behind by the deceased.

What happened at the confirmation hearings was invalid and irregular where the court did not take into account the availability of necessary consents, lack of notice to the other beneficiaries, absence of ascertaining specific shares to be allocated to the applicants, and concealing from court by the respondent something material to the case. The probate court proceeded to justify issuance of confirmed grant inadvertently and by means of untrue allegations tainted with lack of essential material facts.

It is also irregular to confirm the letters of grant under Section 71(1),(3) of the law of Succession before the expiry of six months period without compelling and exceptional circumstances as stipulated under the law of Succession. The respondent who mascaraed as the sole survivor of the estate never exhibited prima facie evidence to warrant confirmation of the grant before the expiry of six months period. The respondent’s conduct is in breach of Section 76 of the law of succession.

I have carefully reviewed the probate court record, the application by the applicants and respective affidavits and evidence. The evidence adduced has been further applied to the provisions of the law on cited authorities in support of the applicants claim.

It is my finding that the respondent obtained confirmation of letters of grant by false statements and or concealment of material information of the other beneficiaries. Secondly, while making the confirmed grant the learned trial magistrate failed to factor in the consents of the applicants. Thirdly, the respondents failed to notify the applicants that the process of confirmation of the grant to the estate of the deceased Mary Ngina Kioi has or was scheduled to be adduced on 24th November, 2016. Fourthly, the process of obtaining the confirmed grant of representation discriminated against the applicants who have equal right to inheritance of the property left behind by the deceased.

Accordingly there would be a failure of justice if the letter of confirmed grant issued to the respondent is left to stand. In the result the confirmed letters of grant as obtained is hereby revoked/and or annulled forthwith.

The confirmation hearing in respect of the deceased estate do commence denovo in the interim a restriction order be placed against title Ngong/Ngong/ 7503 by Land Registrar until further orders from this court. In the event the administrators currently on record does not present himself to the family, notification /or substitution proceedings be commenced to ensure the deceased estate is administered in strict compliance with the law.

A declaration is hereby made that the applicants being the children of the deceased are entitled to inheritance of the estate of Mary Kioi. That in the event the respondent had conveyed title/interest to a third party during the pendency of the letters of confirmed grant, such titles/subdivision be and are hereby cancelled. The respondent is further injuncted/restrained from intermeddling or dealing in any way with the estate of the deceased Mary Kioi. The Deputy Registrar serve the Land Registrar with this ruling for him to enter a restriction in respect of Title Ngong/Ngong/7503. The costs of this application be in the cause.

Dated, signed and delivered in open court at Kajjado this 7th day of February, 2018.

.....

R. NYAKUNDI

JUDGE

In the presence of:

Ms. Nduta learned counsel for the applicant

The applicant in person