



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 509B OF 2009

IN THE MATTER OF THE ESTATE OF M'KUBANIA MAUNGUTI (DECEASED)

M'MAITAI KUBAYIAPETITIONER

-VS-

CIOLINGERA M'KUBANIA.....1ST INTERESTED PARTY/APPLICANT

DAVID MWITI KUBANIA2ND INTERESTED PARTY/APPLICANT

J U D G M E N T

1. **M'KUBANIA MAUNGUTI (“the deceased”)** to whom this Succession Cause relate, died on 18th May, 1991. On 3rd April, 2009, the Chief of Athwana Location wrote a letter of introduction introducing the beneficiaries of the deceased.

2. On 6th July, 2009, **M'Maitai Kubayia (“the petitioner”)**, petitioned for letters of administration of the estate intestate and set out the following as the survivors of the deceased:-

- a) Ciolingera M'Kubania - Widow
- b) M'Maitai Kubayia - son
- c) Mwiti Kubania - Son

3. In the Petition, he also set out parcel numbers **L.R Akithi/Atwana-Akithi/ 407 approx 3.0 Ha, L. R Akithi/Atwana-Akithi/1861 Approx. 0.7 Ha** and **L. R. Akithi/Atwana-Akithi/1447 approx 1.0 Ha** as the assets of the estate. He specified Richard Nturibi (purchaser), Gerald Kathiari (purchaser) and Tirisio Mbaabu (purchaser) as the liabilities.

4. On 8th April, 2010, the Petitioner was granted the letters of administration intestate. On 12th May, 2010, he lodged the summons for confirmation of the grant seeking that the estate be distributed as follows:-

a) ATHWANA/AKITHI/1447 – 2 ½ ACRES

- i. Richard Nturibi Thirinja – 1 ½ Acres
- ii. M'Maitai Kubayia – 1 Acre

b) ATHWANA/AKITHI/1861 – 2ACRES

Gerald Kathiori - Whole

c) ATHWANA/AKITHI/407 – 7 ACRES

- i. David Mwiti Kubania – 3 ½ Acres
- ii. M'Maitai Kubayia – 3 ½ acres

d) ATHWANA/AKITHI/1060 -1 ½ ACRES

- i. Tirisio Mbaabu – 1 Acre
- ii. David Mwiti Kubania – ½ Acre

e) ATHWANA/AKITHI/665 – 1 ACRE

David Mwiti Kubania – whole

5. On 17th July, 2010, an application was made by the applicants for the revocation and annulment of the grant. On 20th March, 2018, the court directed that the application be heard by way of written submissions which were to be filed within 30 days. However, two months later none of the parties had filed the submissions and since the parties were in breach of **section 1A (3) of the Civil Procedure Rules**, the court decided to write the judgment nevertheless.

6. Having considered the entire record, my view is that the issue for determination is whether the grant should be revoked or confirmed.

7. In the application for revocation, the applicants who are widow and son of the deceased, respectively contended that; the deceased had a total of eight children not two as disclosed by the letter of the chief and the petitioner in **Form No. P&A 5**. They disclosed the names of the said children as being **M'Maitai Kubania, David Mwiti Kubania, Beatrice Nkirote, Priscilla Athubatu, Julia Kanono, Kanario Kubania, Kaimenti Kubania and Karwitha Kubania**.

8. The applicants further contended that all the children of the deceased were living on the properties comprising the estate, to wit, **Athwana/Akithi/1447, 407, 1861, 1060 and 665**. That some strangers descended on the land and threatened to evict them. That it is then that they realized that the petitioner had secretly lodged the present succession cause forging their signatures to obtain the grant.

9. The applicants further contended that the majority of the beneficiaries had been left out; that the petitioner had made false statements and the grant had been obtained fraudulently through concealment of material facts. They urged that the grant be revoked and they be appointed as the administrators.

10. The petitioner opposed the application through an affidavit sworn by him on 28th July, 2010. He deposed that; the widow is aged over 85 years and senile; that she was being misled by the 2nd applicant with whom he had agreed that he lodges the succession cause; that the rest of the beneficiaries named are daughters of the deceased who were married long time ago and were not interested in having any share in the estate; that the applicants had sold part of the estate to get money to lodge the succession cause. He denied that he had filed the cause secretly.

11. From the foregoing, it is quite clear that the petitioner admitted that he had left out the daughters of the deceased from the Cause. He alleged that they had been married long time ago and were not interested in the estate. Nothing would have been easier than for the petitioner to file a notice of renunciation if that was the case. I have considered the entire record and I have seen none no such renunciation or a signed consent by the said daughters of the proposed distribution. The fact of their marriage does not amount to renunciation. A renunciation by a beneficiary must be in writing and filed in court.

12. **In re the Estate of the Late George Cheriro Chepkosiom (Deceased) [2017] eKLR** Mumbi Ngugi J stated as follows: -

“The law is that there is no distinction between female and male children of a deceased person, regardless of their marital status. Unless they expressly renounce their interest in the estate, daughters of the deceased cannot be disinherited simply on the basis that they are married. This contravenes not only the provisions of section 38 of the Law of Succession Act, but also the express non-discrimination provisions of Article 27 of the Constitution.”

I fully agree with that proposition.

13. On the issue of the consent, the petitioner did not deny the allegation that none of the applicants had signed the consent which he lodged in court together with the petition. The petitioner included strangers in the petition as liabilities and left out lawful beneficiaries. That won't do.

14. Accordingly, I am satisfied that the petition was lodged secretly without involving those entitled and that the grant was obtained fraudulently through false statements and non-disclosure of material facts. I therefore allow the application. The grant issued to the petitioner on 8th April, 2010 is hereby revoked.

15. I have considered the age of the widow. It was alleged that at the time the cause was being lodged in 2009, she was 80 years old. She might now be approaching 90 years. Due to her advanced age, I find it difficult to appoint her as administrator.

16. Although the conduct of the petitioner has been deplorable and for expedited settlement of this matter, I am minded to appoint both the petitioner and the 2nd applicant as joint administrators.

17. Accordingly, I appoint M'Maitai Kubayia and David Mwiti Kubania as joint administrators of the estate of the deceased.

18. I further grant leave to the administrators to file an application for confirmation of the grant within 30 days of today. They must consult the daughters of the deceased and provide for them or obtain their written renunciation. If the two administrators don't agree on the mode of distribution, either of them is at liberty to file and serve upon the other the application for confirmation. The application should also be served upon the alleged liabilities within 14 days of such filing. Whoever is opposed to any proposed mode of distribution may file his protest within 14 days of service.

19. I have deliberately given strict timelines which should be met because of the age of this matter. The date of confirmation to be agreed upon. This being a family matter, I will make no orders as to costs.

It is so decreed.

DATED and DELIVERED at Meru this 5th day of July, 2018.

A. MABEYA

JUDGE