



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION CAUSE NO. 274 of 2014

IN THE MATTER OF THE ESTATE OF LATE WILLIAM MABISHI MITSUNGURU (DECEASED)

1. FENI WILLIAM SHAKE

2. MOI PETER MABISHI

3. FREDRICK MWANGOMBE.....APPLICANTS

VERSUS

1. HENRY KENGA MABISHI

2. ANNAH KAMENE WAMBUA.....RESPONDENTS

RULING

1. The proceedings herein relate to the estate of William Mabishi Mitsunguru (the Deceased) who died on 11.6.13. A grant of letters of administration in respect of the estate of the Deceased (the Grant) was issued to Henry Kenga Mabishi (the 1st Respondent), a son of the Deceased. By a summons dated 26.3.15, Annah Kamene Wambua (the 2nd Respondent) sought the revocation of the Grant on the grounds that she is a widow of the Deceased and was not involved in the process of obtaining the Grant. The summons was compromised by way of consent dated 13.10.15 and the 2nd Respondent was included as a beneficiary of the estate together with the 1st Respondent on equal basis.

2. Thereafter Feni William Shake the 1st Applicant, Moi Peter Mabishi the 2nd Applicant and Fredrick Mwangombe the 3rd Applicant filed an application by way of summons, seeking the revocation of the Grant. They claim that as the mother and brothers of the Deceased, they were excluded in the process of obtaining the Grant. The 1st Applicant, the mother of the Deceased claims in her affidavit sworn on 19.11.15 that the Respondents are not related to the Deceased. She further claims that she is old and solely depends on the income from the estate of the Deceased for her upkeep. The Respondents intend to deny her of her rightful inheritance and have advertised for sale the assets of the estate. They also sold all the Deceased's musical instruments.

3. The 2nd Applicant a brother of the Deceased in his affidavit sworn on 19.11.15 averred that he has since childhood depended on the Deceased for his upkeep. He lives in the Nyali house of the Deceased together with his family. The Respondents are busybodies and are not related to the Deceased. The Applicants stand to suffer if the assets of the estate are sold by the Respondents. The 3rd Applicant in his affidavit sworn on 29.6.16 averred that he stayed in the Deceased's house as caretaker until his return from Germany. The 1st Respondent has never stayed with the Deceased. The 1st Respondent was chased away from the premises. When the Deceased was ailing, he chased him away from his hospital bed. The 2nd Respondent was a house help in the Deceased's neighbourhood. There was no formal marriage between her and the Deceased. The Respondents are not dependants of the Deceased and have sold almost all the assets of the estate. He was not aware of the filing of the petition for the Grant and the same should be annulled.

4. Peter Sombo a cousin of the Deceased stated in his affidavit sworn on 29.6.16 that he stayed with the Deceased at his house in Nyali until 2006 when he moved to Mishomoroni. The Deceased had a full set of musical instruments and a recording studio. According to him, the Respondents are not entitled to the estate of the Deceased. They unlawfully sold all the moveable assets of the estate of the Deceased.

5. In his replying affidavit sworn on 27.11.15, the 1st Respondent confirmed that the 1st Applicant is the mother of the Deceased while the other Applicants are his 2 brothers. According to him however, he and the 2nd Respondent, a wife of the Deceased are the only heirs of the Deceased. The Deceased purchased 2 properties for the 1st Applicant in Mariakani and Taita from which she earns rental income. These properties do not form part of the estate herein and the 1st Respondent has no interest therein. He prayed that the Application be dismissed with costs.

6. For her part, the 2nd Respondent in her replying affidavit sworn on 11.1.16, averred that the Deceased was her husband and the 1st

Respondent was their son. The Deceased during his lifetime provided the 1st Applicant with rental properties in Mariakani and Taita which properties do not form part of the estate of the Deceased. She and the 1st Respondent are the only heirs of the Deceased. She denied advertising for sale any of the properties of the estate. She further states that there is no income derived from the estate for the Applicants to depend on neither do they reside in the houses as claimed. The Application is made in bad faith and she prays that the same be dismissed.

7. During the hearing, the 1st Applicant told the Court that the Deceased was the first among her 4 children. He was married to a German woman named Eddah and they lived in Germany. Eddah however died before him. The Deceased had a house in Nyali and cars. She stated that the 1st Respondent was not a son of the Deceased and the Deceased disowned him. The 1st Respondent started stealing from the Deceased and he chased him away. The 1st Respondent's mother is Joyce who lives in Mariakani. The 2nd Respondent cohabited with Deceased but have no children together. No dowry was paid for her and the 1st Applicant does not know the home of the 2nd Respondent. The people who live in the house in Nyali are the 1st Applicant and the Respondents. She lives in Taita but stays in the house in Nyali when she visits. The 2nd Applicant lives in the servant's quarters with his wife and son. She concedes that the 2nd Respondent took care of the Deceased during his illness. The 3rd Applicant used to live in the Deceased's house as a caretaker when the Deceased was away in Germany but left upon the Deceased's return.

8. The 1st Applicant stated that she is over 70 years old and depended on the Deceased. He used to send her money for her upkeep while in Germany and even when he returned to Kenya. Upon his demise however, she was ordered to leave the Deceased's home. The Respondents sold the property of the Deceased including his saxophone, piano and fridge. She would like the property be divided between her and the other Applicants. She further stated that the Deceased gave her money to buy a plot in Mariakani that has a house with 3 rooms. She denied that the Deceased gave her money to buy the farm in Taita. She lives in a house she built in her father's piece of land. She further stated that she and the 2nd Respondent went to see a lawyer to sue the 1st Respondent but the 2nd Respondent turned against her.

9. In his Testimony, the 3rd Applicant reiterated his averments in his affidavit. In particular, he stated that he is not related to the Respondents. He denied that the 1st Respondent is a child of the Deceased. He met the 2nd Respondent in 2007 when the Deceased employed her as a maid and the Deceased was to educate her son. He stayed at the house in Nyali as a caretaker since early 1990s until 2000s when the Deceased returned from Germany. When he left, the Deceased was staying with a girlfriend known as Frida Gitau, the 2nd Applicant and a cousin. The Deceased supported the 1st Respondent in education but kicked him out of the house for stealing. He returned when the Deceased died. The Deceased had other property in Germany. The Applicants receive money from Germany every 6 months. The Deceased bought property for the 1st Applicant. The 3rd Applicant was not dependant on the Deceased and is able to take care of his own needs. The 1st and 2nd Applicants depended on the Deceased.

10. The 2nd Applicant stated that he used to live in the servant's quarters in the Deceased's house in Nyali for 11 years. He does not know the Respondents. The Deceased lived alone. He began to see the 2nd Respondent at the home of the Deceased in 2000. She never spent the night there. He got to know that they obtained the Grant and were to sell the house. He opposes the sale of the house because their mother, the 1st Applicant was not involved. He did not know the 1st Respondent. He first saw him after the demise of the Deceased. The Deceased used to pay fees for the 1st Respondent. The 1st Applicant has a house in Taita and Mombasa. The Deceased used to assist the 1st Respondent. The Deceased knew the Respondents. He knew the 2nd Respondent between 2000 and 2013. The 2nd Applicant's interest is that his mother should be given the house in Nyali. He has no problem with other property being given to the Respondents.

11. The jurisdiction of the Court to revoke and annul grants of representation is contained in Section 76 of the Law of Succession Act which provides:

“ 76 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;

(d)...

12. The Applicants complaint is that the Grant was obtained without involving the Applicants who are the mother and brothers of the Deceased. Section 51(2) of the Act stipulates the information that shall be included in an application for a grant as follows:

(2) Every 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 of all the assets and liabilities of the deceased; and

(i) such other matters as may be prescribed.

13. A grant may be revoked if the same was obtained fraudulently by the making of a false statement and concealment of from the court of something material to the case. In the instant case, the Respondent made a false statement on oath in his petition for the Grant, that he was the only survivor of the Deceased. It however emerged from Application and the evidence adduced in Court that the Deceased was survived by his mother the 1st Applicant and his 2 brothers the 2nd and 3rd Applicants. It is therefore clear that the 1st Respondent obtained the grant fraudulently by the making of a false statement *to wit* that he was the only survivor of the Deceased. He further concealed from the court of something material to the case *to wit* that the Deceased was survived by his mother and brothers. He failed to indicate the names and addresses of the mother and brothers of the Deceased as required by Section 51(2) of the Act.

14. The Applicants further claim that the Respondents are not related to the Deceased. The 1st Respondent did not in his replying affidavit in opposition of the Application exhibit any document such as a birth certificate showing that he is a son of the Deceased. The 1st Applicant did not testify nor did he attend the hearing of the case. It strikes me as strange that a son of the Deceased would fail to attend Court to testify in a matter where the issue of his paternity and entitlement to the estate of a person whom he claims to be his father is at stake.

15. As regards the 2nd Respondent, her claim that she was the wife of the Deceased was denied by the Applicants. She too did not testify at the hearing. She did not provide any evidence of the fact or nature of her marriage to the Deceased. The 2nd Respondent and the Deceased may have had a relationship but I am not persuaded that she was a wife of the Deceased.

16. In view of the foregoing, the Court is satisfied that the statutory grounds for revocation of grant have been established. Section 66 of the Act provides that the the court shall 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. In exercise of the said discretion, I now make the following orders:

- i) The Grant of Letters of Administration issued to Henry Kenga Mabishi on 5.11.14 be and is hereby revoked.
- ii) Feni William Shake and Frederick Mwangombe are hereby appointed administrators of the estate of the Deceased William Mabishi Mitsunguru.
- iii) Each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 16th day of November 2018

M. THANDE

JUDGE

In the presence of: -

..... for the Applicants

.....for the Respondents

.....Court Assistant