



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 70 OF 2016

IN THE MATTER OF THE ESTATE OF LATE TIMOTHY OLE IJAKAA (DECEASED)

ISHIVA CLAUDIA OLEAPPLICANT

VERSUS

PHILEMON OLE IJAKAA.....RESPONDENT

RULING

1. The deceased herein Timothy Ole Ijaka (the Deceased) died on 6.3.94 at Rwatama Sub location which is in Teso North, Busia County. On 29.2.16, Philemon Ole Ijaka, the Respondent filed a petition for a grant of letters of administration in respect of the estate of the Deceased in his capacity as a son. The Respondent stated that the Deceased was survived by himself and 2 other sons Jonas Otiya and Zebed Iyaite who are both deceased. The estate comprises on 1 property namely North-Teso/Aboloi/437 (the suit property). A grant of letters of administration (the Grant) was issued to the Respondent on 14.4.16 and confirmed on 30.1.17. In the certificate of confirmation of grant issued on 31.1.17, the estate was to devolve upon the Respondent as the sole beneficiary.

2. By a Summons dated 17.3.17, Ishiva Claudia Ole, the Applicant, a daughter of the Deceased seeks revocation of the Grant. She also prays that the matter be transferred to Busia Law Courts for hearing and determination. Her grounds are that the proceedings to obtain the Grant were defective in that the mandatory 6 months between obtaining the Grant and confirmation was not observed. Further, the Respondent obtained the Grant fraudulently by concealment of the existence of Busia CMCC Succession Cause No. 25 of 2016 which was filed earlier in time. A grant was issued on 20.6.16. The Grant was also obtained by concealment of the total number of beneficiaries. The Deceased left the following surviving him:

- i) Lydia Inyang'a Ole deceased
- ii) Jonas Otia Ole deceased
- iii) Agnes Mary Anyaa Ole deceased
- iv) Rachael Imoni Ole deceased
- v) Philemon Ole
- vi) Eunica Adionyi Ole
- vii) Ruthe Ateng'es Ochieng
- viii) Zebedi Iyaite Ole deceased
- ix) Ishiva Claudia Ole

3. The Applicant avers that in 2007 after their mother had died in 2005, the Respondent started claiming the suit property and destroyed permanent houses put up by his nephews. The Applicant accused the Respondent of wanting to benefit from the estate alone. Yet their deceased siblings left their families who are entitled to the estate. The Applicant claims that all family members authorised her to be the administrator of the estate of the Deceased. All signed the necessary documents save for the Respondent who refused to participate and vowed to use other means to get a grant. The Applicant then filed an application for a grant of representation in Busia CMCC Succession Cause No. 25 of 2016 and grant was issued to her on 20.6.16. The Applicant is apprehensive that the Respondent will sell the suit property as he has already transferred the same to himself. He has threatened to evict everyone from the suit property and wants to keep 10 acres for himself. The Applicant states that she only seeks a fair distribution of the suit property and denies that the Deceased divided the land in his

lifetime.

4. In his response, the Respondent denies that the Grant was confirmed before the 6 month period. The Respondent further denies that he was aware of the existence of Busia Succession Cause No. 25 of 2016. He did not give his consent in the same as he was not involved. The Applicant failed to attend a clan meeting that was called to discuss how succession would be handled and even refused with the Deceased's death certificate. The clan therefore granted him permission to proceed with the succession cause. He accused the Applicant of selling off the personal effects and livestock of the Deceased. The suit property was divided by the Deceased between him and his 2 brothers and all took possession of their respective portions. That is the reason why he only indicated his late brothers and their children and wives as beneficiaries of the estate. He further states that the Grant issued in Busia should also be revoked as it was issued without his consent and obtained fraudulently. He resides in Mombasa and therefore has discretion to obtain Grant in Mombasa High Court which has superior jurisdiction to the Busia Chief Magistrate's Court. The only asset of the estate is the suit property which was distributed by the Deceased in his lifetime. He prayed that the Application be dismissed with costs.

5. On her part, Ruth Ateng'e Ochieng' another daughter of the Deceased averred that all efforts to sit as siblings to agree on the distribution of the suit property in a civil manner failed due to the hostility of the Respondent. She too stated that the Respondent intends to benefit alone from the suit property and has prevented other beneficiaries from carrying on any development on the same.

6. At the hearing the Applicant and the Respondent gave vent to the averments in their respective affidavits. I have considered the Application the evidence tendered in Court as well as the parties' respective submissions

7. The jurisdiction of the Court to revoke and annul grants of representation is contained in Section 76 of the Law of Succession Act (the 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)...

8. The Applicant's case is that the Respondent obtained the Grant without the involvement of the other family members. 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 assets and liabilities of the deceased; and

(i) such other matters as may be prescribed.

9. The record and the testimony show that in addition to the Respondent, the Deceased was survived by the Applicant and other siblings and children of siblings who are now deceased. A grant may be revoked if the same was obtained fraudulently by the making of a false statement and concealment from the court of something material to the case. In the instant case, the Respondent did make a false statement in his petition for the Grant. He stated on oath that he was the only surviving beneficiary of the Deceased a fact he knew to be false. All the Deceased's other children were excluded. Also excluded are children of the deceased children of the Deceased. He concealed to the Court the existence of all the other beneficiaries of the Deceased. He failed to indicate the names and addresses of the said beneficiaries as required by Section 51(2)(g) of the Act. It is therefore clear that the Respondent obtained the grant fraudulently by the making of a false statement and

concealment from the Court of facts material to the case. In the premises, the Court finds that the statutory grounds for revocation of the Grant have been established.

10. In the result I make the following orders:

- i) The Grant of Letters of Administration issued to Philemon Ijaka on 14.4.16 and confirmed on 330.1.17 be and is hereby revoked.
- ii) *Status quo ante* be restored and Title No. North-Teso/Abolo/437 do revert to the deceased Timothy Ole Ijaka.
- iii) The Applicant is at liberty to apply for confirmation of Grant issued to her in Busia CMCC Succession Cause No. 25 of 2016
- iv) This being a family matter each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 14th day of December 2018

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**