



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

SUCCESSION CAUSE NO. 214 OF 2015

IN THE MATTER OF THE ESTATE OF JOYCE MWIHAKI KIEMA (DECEASED)

HENRY ITHEA KIEMA 1ST APPLICANT

ANNE MUMBI HINGA 2ND APPLICANT

VERSUS

SOLOMON KIEMA IBIA 1ST RESPONDENT

SAMSON MWATHI KIEMA 2ND RESPONDENT

RULING

1. By way of a General Summons for revocation of a grant, **Henry Ithea Kiema** and **Anne Mumbi Hinga**, the Applicants herein through the firm of **Anne N. Kiusya & Company Advocates** filed the application dated the **18th day of November, 2014** seeking revocation of the grant of Letters of Administration (grant) made to **Solomon Kiema Ibia** and **Samson Mwathi Kiema** in respect of the Estate of **Joyce Mwhaki Kiema** on the **14th day of August, 2013** and a subsequent Certificate of Grant issued on the **9th day of June, 2014**.

2. The application is premised on grounds that the Principal Magistrate's Court at Kitui had no jurisdiction to confirm the grant; That the grant was obtained fraudulently by the making of false statements and concealment from court of material facts; That the grant was obtained by means of untrue allegations of facts essential in point of law to justify the grant notwithstanding that the allegations were made in ignorance or inadvertently and that the property of the Deceased's Estate has not been properly distributed.

3. The application is supported by an affidavit deponed by **Henry Ithea Kiema**, the 1st Applicant who avers that the property of the Deceased exceeds **Kshs. 7,000,000/=** the value which is above the pecuniary limit of the jurisdiction of the Magistrate's Court, Kitui; That they were never informed of the intended application for letters of Administration of the Estate of the Deceased. As Applicants they did not consent to the appointment of the Respondents as Administrators of the Estate and the Confirmation of the Grant; The Respondents lied to the court by concealing the fact that part of the Estate had already been distributed amongst all children prior to the death of their father **Paul Kiema Ibia**. That their Deceased father had distributed all his property – wit **Land Parcel No. 756 – Kitui** among all his children and that the mode of distribution is the one that should be followed. **Solomon Kiema Ibia** has entered into a portion shown to the 1st Applicant by the Deceased father when he already occupies the portion he was shown by their late father.

4. Further, he stated that funds held at their late father's account at the **National Bank of Kenya Account No. [Particulars withheld]** were not properly distributed since all of them were to get equal shares. His sisters are not interested in the property as their late father had already distributed some of his property to them and the only property they have interest in is **Parcel No. Limuru/Kamirithu/1017**, shares at **Kenya Commercial Bank of Kenya** and shares at **East African Breweries LTD**.

5. The Respondents have intermeddled with the Estate of the Deceased and squandered a large amount of money that has not been accounted for. Having learnt of the intended Confirmation of Grant in late **January, 2014** the Applicants instructed the firm of **J. K. Mwalimu and Co. Advocates** to file a caveat in the matter who erroneously filed in **Succession Cause No. 112 of 2013**. As a result of the error the grant was confirmed without notice to the Applicants.

6. In response thereto the 1st Respondent, **Solomon Kiema Ibia** swore an affidavit in reply on his own behalf and that of the 2nd Respondent. He deposed that after the demise of their mother on **27th November, 1993** it took them **20 years** to file the Succession Cause because the 1st Applicant was not co-operative and all along he started using part of the Estate before going through the Succession Process; filing of the Succession Cause was not done secretly and/or fraudulently. Both Applicants were present when the decision to file the Succession Cause was reached at a family meeting. Thereafter the Applicants were invited at a family meeting on **27th April, 2013** but they declined to attend. Those in attendance mandated the Respondents to file the Succession Cause. After the Succession Cause was filed and Gazetted the consent of the Applicants was sought but they declined to give for no apparent reasons therefore the process proceeded. All other siblings except the

Applicants agreed on equitable distribution of the Estate making provision for the cost, expenses and charges for the legal fees, Court fees and subdivision of the properties. Having instructed an Advocate to represent them was evidence of having known the existence of the Succession Cause. Money held at the bank was distributed to the Applicants in the sum of **Kshs. 35,400.30cts** and cheques issued were received by Applicants. That their father's Estate was distributed in Succession Cause No. 16 of 1998. That the High Court could take over the process and make a finding that the distribution done was fair just and equitable then affirm it.

7. By consent of both parties the application was to be canvassed by way of *viva voce* evidence.

8. At the hearing the Applicants had changed Advocates. They were represented by the firm of **Wanjohi & Wawuda Advocates**. In his testimony the 1st Applicant stated that the Respondents are his biological siblings. Their mother died in 1993 having inherited land from her parents, **three (3) acres in Limuru**. In the course of distribution of their late father's Estate their mother inherited their ancestral land: **Kyangwithya/Musewani/1401, Kyangwithya/Musewani/977 and Plot 98**.

9. His brother **Solomon Kiema** intended to disinherit him. When he learnt of the Succession Cause he engaged an Advocate **Mr. Mwalimu** to act who however did not file a caveat in the correct file. In **2013** his sisters **Betty** and **Juddy Kaindi** dropped a letter (**Annexure 5K12** to the Replying Affidavit). The notice for the family meeting was too short therefore he did not attend. He requested **Solomon** to postpone the meeting – through his Lawyer but the meeting went on. None of the Administrators notified him of what transpired.

10. Having mentioned other causes that the Court had to refer to, the case was adjourned so that the files could be brought up. When the matter came up on the **6th October, 2016** the 1st Applicant notified the Court that he had differences with his Lawyer. He sought a month to resolve their differences. The 1st Applicant was granted time to sort out the issue of legal representation. When the matter came up for further hearing on the **8th December, 2016** the 1st Applicant and 2nd Applicant did not turn up. Their case was deemed closed.

11. The 1st Respondent stated that the family met and agreed to share their late mother's assets and liabilities. Both Applicants did not attend the meeting held in **1994**. On **27th April, 2013** they met and agreed to implement the resolutions of the meeting held in **1994**. **Kyangwithya/Misewani/140** was subdivided amongst them. Six (6) of them got equal shares of **0.188ha** each while **Moses Musembi** the last born got **0.22ha**. The grave yard being part of the parcel was taken into account and is accessible to all of them. **Kyangwithya/Mutuve/977** was subdivided and each beneficiary got **0.218ha**. **Limuru/Kamirithu/1017** was subdivided equally – each beneficiary got **0.14ha**. The shares at **Kenya Commercial Bank** and **East African Breweries** were shared equally. Costs and legal expenses were taken into consideration. He called upon the Court to find that the application was meant to delay the process of distribution.

12. **Moses Kiema**, a beneficiary of the Estate stated that the Applicants have been problematic and have hindered them as family from proceeding with distribution of the Estate. He supported the proposed distribution.

13. **Florence Betty Malonza**, stated that as a family they mandated the Respondents to proceed and finalize the distribution of the Estate of their mother because the Applicants were not co-operating.

14. **Juddy Kaindi Kiema** supported the step taken by the Respondents in distributing the Estate.

15. The 2nd Respondent stated that it took them long as a family to file the Succession Cause because the Applicants were not co-operating. He supported the mode of distribution of the Estate adopted.

16. A Grant of Letters of Administration may be revoked in circumstances provided for in **Section 76** of the **Law of Succession Act** that provides thus:

“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) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow;
or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

17. The grant herein was issued and confirmed by **A. G. Kibiru** a Senior Principal Magistrate. The Magistrate derived the jurisdiction to hear the Succession Cause from the provision of **Section 48(1)** of the **Law of Succession Act** that provided thus:

“(1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49 of this Act, a Resident Magistrate shall have jurisdiction to entertain any application other than an application under section 76 of this Act and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings: (Emphasis mine).

Provided that for the purpose of this section in any place where both the High Court and a Resident Magistrate’s Court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act.”

18. The Petitioners filed an affidavit in support of the Petition for the Letters of Administration intestate dated the **19th** day of **June, 2013** where the total value of assets was estimated at **Kshs. 100,000/=**. The Certificate of Confirmation of Grant issued on the **4th** day of **November, 2014** has a schedule of properties that were distributed having formed the Estate of the Deceased which were as follows:

“Land Parcel No. Kyangwithya/Misewani/1401 to be shared as follows:

- a) Anne Mumbi Hinga.....0.188ha*
- b) Solomon Kiema Ibia.....0.188ha*
- c) Samson Mwathi Kiema.....0.188ha*
- d) Florence Betty Malonza.....0.188ha*
- e) Henry Ithea Kiema.....0.188ha*
- f) Moses Musembi Kiema.....0.222ha*
- g) Judith Kaindi Kiema.....0.188ha*

Land Parcel No. Kyangwithya/Mutune/977 to be shared as follows:

- a) Anne Mumbi Hinga.....0.218ha*
- b) Solomon Kiema Ibia.....0.218ha*
- c) Samson Mwathi Kiema.....0.218ha*
- d) Florence Betty Malonza.....0.218ha*
- e) Henry Ithea Kiema.....0.218ha*
- f) Moses Musembi Kiema.....0.218ha*
- g) Judith Kaindi Kiema.....0.218ha*

Limuru/Kamirithu/1017 Shared as follows:

- a) Anne Mumbi Hinga.....0.14ha*
- b) Solomon Kiema Ibia.....0.14ha*
- c) Samson Mwathi Kiema.....0.14ha*
- d) Florence Betty Malonza.....0.14ha*
- e) Henry Ithea Kiema.....0.14ha*
- f) Moses Musembi Kiema.....0.14ha*

g) *Judith Kaindi Kiema*.....0.14ha

Kenya Commercial Bank Shares to be shared as follows:

a) *Anne Mumbi Hinga*.....380

b) *Solomon Kiema Ibia*.....380

c) *Samson Mwathi Kiema*.....380

d) *Florence Betty Malonza*.....380

e) *Henry Ithea Kiema*.....380

f) *Moses Musembi Kiema*.....380

g) *Judith Kaindi Kiema*.....380

East Africa Breweries LTD Shares to be shared as follows:

a) *Anne Mumbi Hinga*.....170

b) *Solomon Kiema Ibia*.....358

c) *Samson Mwathi Kiema*.....174

d) *Florence Betty Malonza*.....358

e) *Henry Ithea Kiema*.....170

f) *Moses Musembi Kiema*.....527

g) *Judith Kaindi Kiema*.....271

Funds at National Bank of Kenya A/C No. 012435169900 to be shared as follows:

a) *Anne Mumbi Hinga*.....Kshs. 35,401.30

b) *Solomon Kiema Ibia*.....Kshs. 50,401.30

c) *Samson Mwathi Kiema*..Kshs. 35,401.30

d) *Florence Betty Malonza*..Kshs. 35,401.30

e) *Henry Ithea Kiema*.....Kshs. 35,401.30

f) *Moses Musembi Kiema*....Kshs. 35,401.30

g) *Judith Kaindi Kiema*.....Kshs. 35,401.30

The funds held at the **National Bank of Kenya** Account No. [Particulars withheld] *per se* stood at **Kshs. 262,809/=**. That was beyond the jurisdiction of the learned Magistrate.

19. The **Magistrates' Courts Act, 2015** amended **Section 48** of the **Law of Succession Act** where a Magistrate would have jurisdiction to hear such a matter depending on the pecuniary limit prescribed. The value of the other assets listed was not given therefore to date this Court would not tell which Court would have jurisdiction to deal with the case.

20. It is apparent that the Magistrate in the instant case had no jurisdiction to determine the matter.

21. In the matter of the **Estate of Karanja Kukonyo Mwaniki – Deceased** where a party sought revocation of a grant on grounds of fraud. The Court revoked the grant on its own motion on a different ground – That the grant was null and void as it was made by a Resident Magistrate who exceeded his pecuniary jurisdiction. It was granted over an Estate whose value was **Kshs. 240,000/=**.

In the case of **RE Exparte Samina Investments Limited – Misc. Civil Application No. 562 of 2007**, **Nyamu J.** stated thus:

“1. A nullity is a nullity and always remains a nullity.

2. If nullities are condoned by the Courts of Law, they are capable of clogging the justice system, erode its effectiveness and respect of the Rule of Law.

3. Failing to act in the circumstances would be serious abdication of the seat of justice.

4. The principle to be observed is if a litigant should be allowed to benefit from irregularities or nullities since these would be against the policy of Rule of Law.

5. Nullities are defects and cobwebs in our legal system which if allowed to remain would discredit and litter, derail the administration of justice in accordance with the Law.

6.

7.

8. It cannot be good law to allow a party to benefit from a blatant violation of the Law.”

22. It was the duty of the Magistrate to interrogate this fact prior to confirming the grant. Assets of the Estate having been estimated at **Kshs. 100,000/=** was a deliberate false statement.

23. Both Applicants did not sign the consent to the Confirmation of the Grant. From their demeanor, the 2nd Applicant never ever appeared in Court while the 1st Applicant disregarded the Court order to appear in Court.

24. That notwithstanding the grant cannot stand having been null and void. In the result the grant issued on **14th August, 2013** and confirmed on **4th November, 2014** be and is hereby revoked. Each party shall bear their own costs.

25. It is so ordered.

Dated, Signed and Delivered at Kitui this 17th day of January, 2017.

L. N. MUTENDE

JUDGE