



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 180 OF 2011

IN THE MATTER OF THE ESTATE OF DENA CHIRINGA(DECEASED)

MENZA KIRINGA DENA.....APPLICANT

VERSUS

KARISA DENA MOPE

AROME KARISA DENARESPONDENTS

RULING

1. The deceased to whose Estate the proceedings herein relate is Dena Chringa (“the Deceased”), who died intestate way back on 17.7.74 at Bandora Kambe. The record shows that a Grant of Letters of Administration was issued to Karisa Dena Mope and Arome Karisa Dena, son and grandson respectively, of the deceased and the Respondents herein, on 7.3.12. The said Grant was confirmed on 26.3.13.

2. In their Affidavit in support of Petition for the Grant, the Respondents claimed that the Deceased was survived by the following:

Karisa Dena Mope	son
Salama Karisa Dena	granddaughter
Arome Karisa Dena	grandson
Said Karisa Dena	grandson
Tsungula Karisa Dena	grandson
Zawadi Karisa Dena	granddaughter
Hamisi Karisa Dena	grandson

3. In the Certificate Confirmation of Grant, the estate of the Deceased comprising of Title No. Mbwaka/Maereni/86 (“the suit property”) was to be shared equally among the above listed beneficiaries of the estate save for Salama Karisa Dena who for reasons not unexplained in the record, was excluded.

4. By the Summons dated 14.7.16 Menza Kiringa Denda the Applicant seeks:

i) Spent;

ii) That the grant of letters of administration intestate issued to the Petitioners by this Honourable Court on 16th February 2012 and confirmed on 25th March 2013 be varied to exclude the property namely Mbwaka/Maerani/86 which is jointly owned by the Objector, Dena Chiringa – Deceased and Kahindi Chiringa – deceased.

iii) That the proceedings in Kaloleni PMCC No. 7 of 2015 Karisa Dena Mope and Arome Karisa Dena v Philex Kahindi Chiringa be stayed pending the hearing and determination of this Application.

iv) That costs of this application be provided for.

5. The Applicant claims that he is the only surviving registered owner of the suit property and he was not included as one of the beneficiaries of the estate of the Deceased. He also claims that Sammy Kahindi Kiringa and Philex Kahindi Chiringa, the administrators of the estate of Kahindi Chiringa Dena were also excluded. The Applicant alleges that the Deceased died not having married nor having any children during his lifetime. That the Respondents are therefore neither the son nor grandson respectively of the Deceased and are in fact the son and grandson respectively of Dena Mope a distant relative of the Deceased and thus have no locus standi in obtaining the Grant herein.

6. The Applicant further claims that the Grant was obtained fraudulently by concealment of facts material to the case. That it was he and Sammy Kahindi Kiringa and Philex Kahindi Chiringa, the administrators of the estate of Kahindi Chiringa Dena and not the Respondents who had the locus standi to apply for the Grant of Administration in respect of the estate of the Deceased. The Grant issue to the Respondents ought therefore to be revoked. He claims that the reason he did not take out letters of administration in respect of the estate of the deceased is that as the surviving joint owner of the suit property, and given that the Deceased had no wives or children, the Deceased's share automatically became his.

7. The Applicant depones that he became aware of the Grant herein when Philex Kahindi Chiringa was served with pleadings in Kaloleni RMCC No. 7 of 2015 filed by the Respondents seeking subdivision of the suit property so they could get a portion thereof.

8. To support the Applicant, Philex Kahindi Chiringa, a nephew of both the deceased and the Applicant swore an affidavit on 14.7.16. He depones that the Respondents fraudulently obtained the Grant herein in that they failed to disclose that the suit property belonged to the Applicant, the deceased and to the father of Philex. He claims that his name and that of the Applicant ought to have been listed as beneficiaries. He further claims that the Respondents and all the persons listed in the Certificate of Confirmation of Grant are not beneficiaries of the estate of the Deceased. They are not the son and grandchildren of the Deceased but of Dena Chiringa.

9. In response to the Application, the Respondents in their Replying Affidavit sworn on 2.8.16, concede that the suit property is registered in the names of Menza Kiringa Dena, the Applicant, the late Dena Chiringa, the Deceased and the late Kahindi Chiringa Dena. That of the three, only the Applicant is still alive. That Philex Kahindi Chiringa and Sammy Kahindi Chiringa obtained a grant of letters of administration in respect of the estate of their father Kahindi Chiringa Dena while they obtained a grant in respect of the estate of Dena Chiringa.

10. The Respondents further deponed that Philex Kahindi Chiringa and Sammy Kahindi Chiringa failed to persuade the Court that the Respondents were not related to the Deceased and withdrew their application for revocation of grant. The Respondents aver that the Applicant had not supported his claim with any evidence to persuade the Court that they are not related to the Deceased. That the area Chief has confirmed by his letter that the Applicant's claim that the Deceased never married and had no children are untruthful. The Respondents pray that the Application be dismissed and further prayed that the Land Registrar, Kilifi County be directed to proceed with the subdivision of the suit property to enable them settled down once and for all and to utilize their portion without further interference.

11. In his submissions, the Applicant argues that the Applicants did not seek his consent or that of the

administrators of the estate of Kahindi Chiringa Dena in applying for grant of letters of administration herein. It was further argued that the 1st Respondent's father's name is Dena Chiringa Mope and not Dena Chiringa Dena. That all the documents from the chief to obtain the grant were given fraudulently as the chief is a brother in law of the 1st Respondent and was in school in 1974 when the Deceased died and could not therefore know the true position of the family. It was further submitted that the Respondents obtained the Grant fraudulently as they are not the son and grandson respectively of the Deceased but of a distant relative known as Dena Chiringa Mope. As such the Respondents had no locus standi to apply for the grant as only a limited class of people are allowed to so apply.

12. It was further submitted for the Applicant that the grant should be revoked as the same was obtained fraudulently by making a false statement and concealment of facts material to the case. That the Applicant had established sufficient grounds as required by Section 76 of the Law of Succession Act. It was also argued that the Applicant being the surviving joint owner of the suit property was entitled to the whole by Section 108 of the Registered Land Act (now repealed). The Applicant cited Section 49 of the Land Registration Act and the case of *Rose Ndhiwa Ouko v Maurice Guya Odindo* [2016] eKLR.

13. The Respondents submitted that the Application is an attempt by the Applicant to rob the Respondents of their right to ownership of property that rightfully belonged to their father/grandfather. That the Applicant has not produced any documents to support his claim that the 1st Respondent is not a son of the Deceased and that therefore the Grant herein was obtained fraudulently. The Respondents concede that the suit property is jointly owned by the three brothers but contend that they obtained a Grant in respect of the estate of the Deceased on of the registered owners. They contend that the reason they did not inform the Applicant when they applied for the Grant is that each of the brothers has his own portion and what they were concerned with was the deceased's portion. The Respondents further submit that Dena Chiringa and Dena Mope is one and the same person. The Respondents urged the Court to dismiss the Application as it was an afterthought, lacks merit and is a waste of the Court's time.

14. I have carefully considered the Application and submissions in support of and in opposition to the Application herein.

15. The issue for determination are:

- i) Whether the confirmed grant should be reviewed to exclude the suit property therefrom.
- ii) Whether the grant herein should be revoked.
- iii) Whether the Applicant being the surviving registered owner of the suit property is entitled to the same to the exclusion of the other co-owners.

Whether the confirmed grant should be reviewed to exclude the suit property therefrom

16. Section 51(2)(a) – (i) of the Law of Succession Act provides for the information that should be included in every application for a grant. Clause (f) thereof states thus:

“51. Application for grant

(2) Every application shall include information as to—

(f) a full inventory of all the assets and liabilities of the deceased;”

17. In their Affidavit in support of Petition for the Grant sworn on 3.5.11, the Respondents listed the suit property Title Number Mbwaka/Maereni/86 as the only asset of the Deceased. It was further indicated in the schedule to the Certificate of Confirmation of Grant issued on 25.3.13 that the said Title Number Mbwaka/Maereni/86 was to be shared equally amongst the listed beneficiaries.

18. It is not disputed that the suit property was jointly owned by the three brothers, namely the Applicant,

the Deceased and the late Kahindi Chiringa Dena. The copy of title produced confirms this. The Respondents have also conceded to this fact.

19. It was submitted that

20. On the claim that since the Applicant and his brothers the deceased and Kahindi Chiringa Dena were jointly registered as owners of the suit property he and the administrators of the estate of the Kahindi Chiringa Dena ought to have been listed as beneficiaries, I disagree. Co- ownership of a property does not necessarily equate entitlement under intestacy. Where co-owners are not beneficiaries of the estate of the deceased person within the meaning of Part V of the Law of Succession Act, then such joint owners would not be included in the grant in respect of the estate of the deceased joint owner.

Whether the Applicant being the surviving registered owner of the suit property is entitled to the same to the exclusion of the other co-owners

21. The suit property is registered in the names of the Applicant and his two brothers who are both deceased. The Applicant argues that the property is jointly owned and that upon the death of his brothers, he as the surviving registered owner takes the entire suit property.

22. It is noted that the suit property is registered under the Registered Land Act which has since been repealed by Section 109 of the Land Registration Act 2012. The Title Deed in respect of the suit property is by virtue of Section 105 of the Land Registration Act deemed to be registered under the Act. Section 105(1)(a)(i) provides:

“105 Transiting title documents

(1) On the effective date, the following provisions shall apply in respect of every parcel of land, the title to land which is already registered under the repealed Acts—

(a) if the title to a parcel of land is comprised in a grant or certificate of title registered under the repealed Registered Land Act—

(i) the grant or certificate of title shall be deemed to be a certificate of title or certificate of lease, as the case may be, issued under this Act;”

23. A look at the title deed in respect of the suit property reveals that the shares of the 3 registered owners is not indicated. Section 91(2) of the Land Registration Act provides:

“Except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares”.

24. As provided in the above provision, the Applicant and his 2 brothers are presumed to hold the interest in the suit property as tenants in common in equal shares. Consequently the provisions of Section 61(1) of the Act apply

“If a sole proprietor or a proprietor in common dies, the proprietor’s personal representative shall, on application to the Registrar in the prescribed form and on the production to the Registrar of the grant, be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after the representative’s name of the words “as executor of the will of [deceased]” or “as administrator of the estate of [deceased]”, as the case may be”.

25. Given the above provisions, the position taken by the Applicant is not backed by law. Rather, the correct position is that the Respondents being the personal representatives of the Deceased by virtue of the Grant issue to them herein are entitled to be registered by transmission as proprietor in the place of the deceased.

Whether the grant herein should be revoked

26. The Applicant has submitted that the Grant was obtained fraudulently and that the same ought to be revoked. He contends that the Deceased neither married nor had any children and hence the Respondents are neither son nor grandson respectively of the Deceased and therefore had no locus standi to apply for the Grant. Should the Grant therefore be revoked? The answer is in the negative simply because there is no application before me for revocation. It is instructive to note that Sammy Kahindi Kiringa and Philex Kahindi Chiringa, the administrators of the estate of Kahindi Chiringa Dena and nephews of the deceased herein had filed a summons of revocation of the grant herein dated 14.1.16. The grounds were that the grant was obtained fraudulently as the Respondents who had no *locus standi* as the Deceased had neither married nor did he have any children of his own. The said summons was however withdrawn prior to the hearing thereof by a notice of withdrawal dated 15.7.16. It is not clear why they chose to withdraw the said summons.

27. The case of *Rose Ndhiwa Ouko v Maurice Guya Odindo* [2016] eKLR relied on by the Applicant is inapplicable as the same relates to an application for annulment of grant whereas the instant application is for review of the certificate of confirmation of grant issued herein.

28. Even if there was before an application for revocation of grant, the Applicant had an obligation to prove the alleged fraud. He who alleges must prove. Other than the claim by the Applicant that the Deceased died without having married and had no children during his lifetime, no cogent evidence was tendered to satisfy this Court that this was so. The burden of proving that the Respondents are neither son and grandson respectively of the Deceased lay with the Applicant as per Section 107 of the Evidence Act which provides:

“107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

The Applicant he failed to discharge the burden and his assertion fails.

29. The Applicant contends that as the surviving brother of the Deceased, it was he and not the Respondent who was entitled to apply for a grant of representation in respect of the estate of the Deceased. Section 39 of the Law of Succession Act clearly states the place of brothers in intestacy thus:

“39. Where intestate has left no surviving spouse or children

(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) ...”

30. Brothers of a deceased intestate come after spouse, children and parents in that order. Having found that the Applicant has failed to prove that the Respondents are neither son nor grandson respectively of the Deceased, I find that the Applicant ranks after the Respondents in priority of entitlement to the Deceased's estate. This claim also fails.

31. As stated above, it is not disputed that the suit property was jointly owned by the three brothers, namely the Applicant, the Deceased and the late Kahindi Chiringa Dena. Consequently the asset of the estate of the deceased available for distribution is a 1/3 portion of the suit property. It was wrong therefore for the Respondent to list the entire suit property as forming the estate of the Deceased an error they acknowledge. I therefore agree with the Applicant that the certificate of confirmation of grant ought to be reviewed. However, the review is not to exclude the entire suit property but to reflect the correct portion thereof that forms the estate of the Deceased.

32. Having made the above finding, I now turn to the prayer that the proceedings in Kaloleni PMCC No. 7 of 2015 Karisa Dena Mope and Arome Karisa Dena v Philex Kahindi Chiringa be stayed pending the hearing and determination of this Application. It is the view of this Court that justice will be better served if the said proceedings are stayed.

33. In the circumstances, I partially allow the Application and make the following orders:

- a) The Certificate of Confirmation of Grant issued on 25.3.13 is hereby reviewed to provide that the asset of the estate of the Deceased herein is 1/3 share of Title Number Mbwaka/Maereni/86.
- b) The said Title Number Mbwaka/Maereni/86 be subdivided so that the Respondents get their 1/3 share thereof for distribution amongst the beneficiaries of the estate of the Deceased.
- c) Each party to bear its own legal costs.
- d) Liberty to apply.

DATED, SIGNED and DELIVERED in MOMBASA this 19th day of January, 2017

M. THANDE

JUDGE

In the presence of: -

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

..... **for the Respondents**

..... **Court Assistant**