



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO
MISCELLANEOUS APPLICATION NO. 4 OF 2015
FORMERLY
SUCCESSION CAUSE NO. 38 O 2008

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT KAJIADO

(IN THE MATTER OF ESTATE OF LESIKO SOKORTYE KIRAYIO, DECEASED)

NYOKABI LESINKO LESEROGERERE.....APPLICANT

VERSUS

NAIMUTIE SOKORTE.....RESPONDENT

RULING

Introduction

1. The deceased herein one **Lesinko Sokorete Kiratio** died on 10th October 1996. Before his death the deceased was the registered owner of land Title No. Ngong/Ngong/4124 situated in Kajiado.
2. The deceased was married to two wives; Nyokabi Lesinko Leserogerere and Naimutie Sokorte.
3. Grant of letters of administration of the estate of the deceased was made to Nyokabi Lesinko Leserogerere on the 20th January 2009 by the Senior Principal Magistrates court at Kajiado. On 3rd March 2011 the said grant of letters of administration was amended and Naimutie Sokorte was joined as a co administrator of the estate.

On 22nd May 2014, a certificate of confirmation of grant was issued to both Nyokabi Lesinko Leserogerere and Naimutie Sokorte.

The application

4. By summons filled before this Court dated 29th February 2016, the Applicant herein Nyokabi Lesinko Leserogerere moved the court under **section 27, 29(a), 35, 71, 76, 83(e)(f) (g) of the Law of Succession Act and Rules 7, 40(3) (a)(b), 40 (4), 44 of the Probate and Administration Rules** for revocation or annulment of a grant of probate issued to Naimutie Sokorte and Nyokabi Lesinko Leserogerere on the 22nd May 2014 on the ground that:

1. The proceedings to obtain the grant were defective in substance;

2. 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;

3. The grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant

5. The Applicant depones that grant of letters of administration of the estate of the deceased (Lesiko Sokorte Kirayio) was made to her on the 20th January 2009. However, the said letters of administration were amended on the 3rd march 2011 and Naimutie Sokorte (Respondent) was joined as a co administrator in the estate.

6. She further depones that on 22nd May 2014 a certificate of confirmation of grant was issued to both her and the Respondent.

7. The Applicant depones that by a letter dated 23rd September 2009, a letter emanated from the Chiefs office of Kajiado North detailing the beneficiaries of the estate of the late Lesinko Sorkorte Kirayio. The letter stated further that the previous letter from the Chiefs office was erroneous and had not captured all the beneficiaries to the estate of the deceased. The letter listed the following beneficiaries:

Naimutie Sokorte	70years	Female	1 st Wife
Issaac Saisa Sukurti	32 years	Male	Son
Tubula Sokorte	21 years	Male	Son
Rhoda Nyokabi	72years	Female	2 nd Wife
Patricia Nanyu	47 Years	Female	Daughter (Deceased)
Patrick Seur	45 Years	Male	Son
Joyce Mbama	43 Years	Female	Daughter
Nancy Sirau	42 years	Female	Daughter
Virginia Seleina	40years	Female	Daughter (Deceased)

8. The Applicant avers that on the 10th November 2009 the Respondent filled an objection to the Applicant being issued with grant of probate on the estate of the deceased on the grounds that;

1. She was left out as one of the beneficiaries
2. She was the 1st wife of the deceased
3. Her children were also left out as beneficiaries of the deceased.

9. The Applicant further avers that the objection was filed on behalf of the Respondent by the firm of Sane & Company Advocates and she was not aware that the said objection proceedings were dispensed with without her presence or any other beneficiary while she was the subject matter of those objection proceedings.

10. She avers that she is illiterate and can neither read or write and her advocates on record at that time never informed her of any objection proceedings that required her attendance in Court and it was upon her new advocates on record perusing the file on 6th July 2015 that they discovered that an amendment to the

grant of letters of administration issued on 20th January 2009 was done on 3rd March 2011 and included the Respondent as a co administrator of the estate. She further avers that the said amendments were done without her consent and her children.

11. The Applicant avers that on 6th May 2011 the objector made an Application in the form of summons for confirmation of grant without her knowledge and that of her children who are legitimate heirs. The same was filed by Sane & Company Advocates. In the application it was only Issac Saisa Sukurti and Tubala Sokorte who signed a list that had detailed all the particulars of all the beneficiaries which was not a consent but prepared by the Respondent.

12. She further avers that no consent of all the beneficiaries was given and none of the beneficiaries was required to appear before court for verification purposes. However, the certificate of confirmation of grant dated 6th May 2011 was issued and the application and proceedings emanating thereto were defective thereby rendering all proceedings thereto null and void.

13. The Applicant further avers that on 22nd May 2014 a certificate of confirmation was issued without the knowledge or consent of some of the legal beneficiaries namely;

Nyokabi Sokorte

Patricia Nanyu

Patrick Seur

Joyce Mbama

Nancy Sirau

Virginia Seleina

Naimutile Sokorte's 4 daughters

14. Out of aforementioned beneficiaries two (2) are deceased (i.e Patricia Nanyu and Virginia Seleina) and the objector did not provide proof of their death through her advocate on record or otherwise

15. The Applicant avers that the Letters of grant of administration and certificate of confirmation of grant were obtained without the consent and knowledge of all the beneficiaries thereby making the entire proceedings null and void ad initio.

16. The Applicant avers that Ngong/Ngong/4124 is not the only deceased property as the deceased had told him that he had another piece of land in Narok where the respondent and her children leased that measured 50- 60 acres and that she should stay in Ngong/Ngong/4124 with her children while the Respondent and her children to stay in Narok.

17. She further avers that the Respondent has come to court with unclean hands and if the Respondent could conceal the details of her own children then she had ulterior motives.

Response to the Application

18. The Respondent Naimutie Sokorte swore a replying affidavit dated 20th June 2016 in which she avers that she is a beneficiary and co-administratrix for the letters of administration to the estate of the deceased.

19. She avers that on October 2008, the Applicant applied for letters of administration without involving her children and herself and the applicant listed the following as surviving the deceased:

- a) Nyokabi Lesinko Leserogerere
- b) Patricia Nanyu
- c) Patrick Seur
- d) Joyce Mbama
- e) Virginia Seleina
- f) Nancy Sirau

20. The respondent further avers that the Applicant listed all assets of the deceased at his death as only Ngong/Ngong/4124 and at no time did the Applicant mention that she had a co-wife who also was a beneficiary of the estate of the deceased but nonetheless obtained grant of letters of administration dated 20th January 2009 and further made application for summons for confirmation of grant dated 10th August 2009 and filled on 15th August 2009 without her knowledge.

21. The Respondent avers that she only got to know of the proceedings through a relative who informed her that the estate of her late husband was gazetted on 7th Nov 2008 vide Legal notice No. 10561 and at all this time she was discussing with the co-wife on plans to apply for letters of administration jointly for the benefit of all beneficiaries.

22. She further avers that at some time in November 2009 she instructed the firm of Sane & Company advocates to file an objection to the making of the grant of representation which they did and served the Applicant personally and subsequently the said firm filed a cross petition and answer to petition for a grant. The Applicant was acting in person and service was being affected to her personally and she refused/ignored to attend and when the process server and sons visited the Applicant for service of the suit papers, they were received with hostility and at a time even raised the alarm that they were robbers.

23. The Respondent avers that the grant of letters of administration were amended on 3rd March 2011 and she was joined as a co-administratrix in the estate. And that the Applicant on 14th July 2011 appointed the firm appointed the firm of Naikuni, Ngaah and Miench to act on her behalf in the proceedings. The firm filed an objection to making a grant on 14th July 2011. On 8th September the firm mentioned filed a notice of withdrawal of objection to making of the grant and filed summons for revocation of grant the same day which were subsequently dismissed by the court for lack of jurisdiction.

24. She avers that on 22nd May 2014 a certificate of confirmation of grant was issued to both the Applicant and the Respondent.

25. Further, she avers that on 2nd September 2014 the Applicant appointed the firm of Ongegu & Associates to act on her behalf but later on 16th July 2015 the applicant changed advocates and appointed F.A Badia & company Advocates.

26. The Respondent states that it is not true that the Applicant was not aware of the objection proceedings since she was represented by advocates and that the entire proceedings were aimed at disinheriting her and her children.

27. The Respondent avers that it is not correct that the chief's letter indicated that she only had two children and it's clear in the list of legal beneficiaries of the deceased at the time of his death and that her married daughters were not dependents and therefore not included.

28. She further avers that to the best of her knowledge the only property left by the deceased is Ngong/Ngong/4124 and it's not true that the deceased left another piece of land of 50-60 acres in Narok.

29. The Respondent avers that she lives with one of her sons-in-law in Mau Division, Entotoi location in Sankale village and that the Applicants advocate is aware of this as she visited her at Narok. She says that she lives in the parcel of and because the son –in-law allowed her to cultivate on part of the land.

30. She states that she is aware that the Applicants advocate did make a letter to the district Land Register Narok to establish the existence of the deceased property in Narok and the outcome has not been brought to court. She states that at any time should the applicant confirm the existence of the deceased's property in Narok or elsewhere the law should be followed by making of an application for the amendments of the grant and include the property which was left out and the same should not be used to delay the determination of the succession cause.

31. She states that the matter of another property belonging to the deceased is an afterthought since on filling of the letters of administration the petitioner listed assets of the deceased at the date of his death being parcel number Ngong/Ngong/4124.

32. She states that neither her children nor the officials at the Kajiadi Lands Registry are trying to acquire a new title deed as per the Gazette Notice No. 10425 dated 2nd October 2009 issued by D.M Kyule the then Land Registrar Kajiado district since by that date she was not aware that her co-wife had applied for grant of letters of administration in the estate of the deceased.

33. She further states that before the Applicant secretly applied for the grant of letters of administration they had been actively engaging each other on modalities and it was in her knowledge that the petition was in possession of the original title. She further states that it's only the Applicant who would confirm whether the title deed was lost and not any other.

Submissions

Applicant's submission

34. The Applicants filled their written submissions dated 11th November 2016 arguing that the grant of letters of administration issued on 22nd may 2014 must be revoked as the same were obtained **illegally and unprocedurally**.

35. Counsel relies on the case of **YUSUF GITAU ABDALLAH and THE BUILDING CENTRE (K) LTD & 4 OTHERS; Petition 27 of 2014**

Judge Mohammed Ibrahim of the supreme court of Kenya at page 7: para 16 pronounced that;

“..... this Court will not assume jurisdiction by way of a litigant's pestering. The Court's mandate is to do justice, however that justice can only be dispensed through the laid down legal framework. A party cannot be heard to move a Court in glaring contradiction of the judicial hierarchical system of the land on the pretext that an injustice will be perpetrated by the lower court. Courts of justice have the jurisdiction to do justice and not injustice...”

At page 8 the judge while quoting judge R. N Nambuye's decision in **HASSAN NYANJE CHARO V. KHATIB MWASHETANI AND 3 OTHERS, Application No. 14 of 2014** in which while delivering her ruling in this matter on 6th June, 2008, Nambuye, J wrote thus;

“...The court is also alive to a judicial practice, doctrine to the effect that a court of law is a court of justice and not a court of sympathy. Further that when a litigant chooses to litigate on his own human he should be taken to be competent to comprehend the court procedures and be able to conduct his/her proceedings smoothly and at no time should the standard required to be met by such litigants' papers be less than that required of a litigant assisted by legal advice. That both stand on equal footing before the feet of

justice....”

36. Counsel further submits that in **Civil Application 90 of 2013 (UR 60/2013) *Nguruman Limited v Shompole Group Ranch & Another 2014 eKLR [2014]***

“...Indeed I appreciate the overarching principle of substantive Justice now enshrined in Article 159 of the Constitution of Kenya 2010 is a fundamental principle which this Court cannot lose sight of. Nonetheless, I find nothing in the said principle that authorizes a court of law to ignore clear rules of procedure fortified by principles of case law enunciated by this Court. Such a departure from a well beaten path of procedure would be an affront to the well established principle which is now trite that rules of procedure are not made for cosmetic value. They are meant to provide order, clarity and predictability in the Court process. Holding otherwise would be a clear recipe for chaos in Court processes...”

37. Counsel submits that confirmation of grants is governed by the provisions of **section 71 of the Law of Succession Act which provides that:**

(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—

(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or

(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or

(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or

(d) Postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares

38. The Applicant submits that express and mandatory provisions of the Law of succession were not adhered to by the Respondent from the time she joined the proceedings up to and including the issuance of the certificate of confirmation of grant on 22nd May 2014.

39. The Applicant submits that the Respondent listed only two of her children as beneficiaries and omitted the names of several other children mainly females, and the Respondent deliberately misled the court that all the Applicants children were alive when in essence some of the Applicants as well as the Respondents children are deceased. Counsel further submits that the respondent never produced any proof of the death of the said deceased beneficiaries of the estate.

Respondents' submissions

40. The Respondent submits through her counsel in her submissions dated 5th December 2016 that the

Applicants summons for annulment and revocation of grant dated 29th February 2016 is an abuse of the court process as the revocation as prayed serves no useful purpose in meeting the ends of justice.

41. Counsel submits that the applicant on or about the 20th May 2009 solely to the exclusion of the respondent illegally obtained letters of administration intestate as the sole petitioner with intentions to disinherit the Respondent as by virtue of letters of administration issued to her on 20th January 2009 she failed to disclose all the beneficiaries of the estate of the deceased principally that the deceased had another wife with 11 children. By objection proceedings dated 10th November 2009, the applicant was stopped from continuing with the same.

42. Counsel further submits that the deceased had one property, land title no. NGONG/NGONG/4124 and the property was distributed equally and fairly between the applicant and respondent whereby each party had 50% stake in the property vide confirmation of grant dated 22nd May 2014.

43. Counsel further submits that the countless objection by the Applicant are an elaborate scheme to disinherit the Respondent and that the Applicant is not entitled to orders sought on the following heads:

1. The Applicant is one with dirty hands

2. The disclosure does not constitute material disclosure: the Applicant was not occasioned any prejudice by the non-disclosure

3. Were the proceedings defective in substance to warrant revocation of the grant?

4. Will the ends of justice be met?

44. Counsel submits that a probate court is a court of equity and that the Applicant in a deliberate and selfish move solely to the exclusion of the Respondent knowing very well she was a beneficiary of the estate of the deceased sought to disinherit the deceased by virtue of grant of letters of administration issued on 20th January 2009 in which she was the sole petitioner and failed to disclose other dependents and beneficiaries of the estate including the respondent and her children.

45. Counsel further submits that the Applicant has failed to demonstrate to the Court that she is indeed prejudiced or stands to be prejudiced should the Court fail to grant her the orders sought.

46. Counsel further submits that no material facts were concealed by the Respondent and the nondisclosure was made innocently and not in any way made to disenfranchise the Applicant as the mistake originated from the Office of the President vide the letter dated 25th September 2009. Further, that the Respondents household is more than double that of the Applicant yet the estate of the deceased was distributed equally between the two households. Counsel submits that the non-disclosure worked for the disadvantage of the Respondent and it is not reasonable for the Respondent to deliberately omit material information that should have worked to her advantage.

47. Counsel further submits that the Applicants assertion that the amended letters of administration of 3rd March 2011 issued to her were amended without her knowledge and that of her children as untrue.

Determination and analysis

48. The question therefore that this court must address itself to is whether the certificate of confirmation of grant dated 22nd May 2014 was granted as a result of unprocedural and illegal proceedings.

49. I have considered the application, the witness statements, the verifying affidavit, the documents exhibited, the submissions and authorities cited in this matter.

50. On the issue of an alleged parcel of land located in Narok measuring approximately 50-60 acres that

was allegedly not disclosed by the Respondent, I find that the same cannot be substantiated as no evidence has been presented before this court to prove the existence of any such land and as to the registered owner of the alleged existing parcel of land. I will therefore not make any determination on the same as no proof has been presented to this Court.

51. The second issue is failure to list all the children of the Respondent as beneficiaries and or omitting the names of several other children, mainly females in the list of dependents.

52. Although Counsel for the Respondent submitted that the nondisclosure was made innocently and it did not in any way disenfranchise the Applicant but instead, it worked for the disadvantage of the Respondent as the Respondent's household is more than double that of the Applicant yet the estate of the deceased was distributed equally between the two households, it must be noted that it is trite law that all dependants or other persons who are beneficially entitled to the estate are required to consent in writing to the confirmation. (Rule 40(8) of the Probate and Administration Rules). Where such consents are not obtained the confirmation proceedings would, as stated by Kamau J in ***In the Matter of the Estate of Gathima Chege (deceased) Nairobi HCSC No. 1955 of 1996***, be defective in substance and liable for setting aside.

53. It must also be noted that failure to disclose all the dependents of the Respondent would not disenfranchise the Respondent but the undisclosed children of the respondents. It is therefore immaterial to state that the non-disclosure would work against the Respondent as all the legal beneficiaries of the estate are entitled to a share of the estate.

54. In the matter of the Estate of ***Thereki Wangunyuu*** also known as ***Thareka Wangunyuo HCSUCC No. 1996 of 1999 (Khamoni J)*** where a widow obtained a grant of representation without disclosing one of her stepchildren and some of her own children as beneficiaries, the court held that she merited the revocation of the grant but ordered that instead it would order that the stepchildren left out be included in the list of beneficiaries without interfering with the grant.

55. My conclusion is that the concerns raised about the non-disclosure of all the beneficiaries of the 2nd Respondent and specifically the daughters are legitimate. There is therefore merit in the application dated 29th February 2016 so far as the beneficiaries are concerned. The Applicant asks me to revoke the certificate of confirmation issued to both herself and the Respondent on 22nd May 2014.

56. I am persuaded that there was no fairness in distributing the estate before there was full disclosure of all the beneficiaries of the deceased. I am moved to review the orders of confirmation of the grant made on 22nd May 2014. However, given that this is a Court of equity, and this matter has been in court for close to eight years, cancelling the Certificate of grant would not meet the ends of Justice as Justice must be done and seen to be done.

57. I therefore order that the daughters of the Respondent be included as beneficiaries of the deceased person WITHOUT interfering with the grant issued. Should the daughters want to wave their rights then they must do so in writing.

58. This in effect will pave way for fair distribution of the estate of the deceased. Should the beneficiaries fail to agree on the mode of distribution, then this shall be done through a determination by the court.

Orders

1. That the application dated 29th February 2016 is allowed to the extent of amending the list of beneficiaries to include the Respondent's daughters without interfering with the grant issued on 22nd May 2014.

2. That in view of order 1 above, a fresh consent to distribution of the estate of the deceased be filed with this court.

3. That the matter shall be mentioned after 60 days for compliance; and

4. That this being a family matter there shall be no order as to costs.

5. It is so ordered.

Dated, delivered and signed in open court at Kajiado this 2nd day of February, 2017.

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R NYAKUNDI

JUDGE

Representation:

Ms Badia for the applicant – present

Sankale for the respondent – present

Mr. Mateli Court Assistant