



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
IN THE MATTER OF THE ESTATE OF S T M
SUCCESSION CAUSE NO. 1036 OF 1994

J N M.....1ST OBJECTOR

P N M.....2ND OBJECTOR

VERSUS

S S M..... RESPONDENT

RULING

PLEADINGS

S T M (deceased) died on 12th September 1993 as evidenced by the Certificate of Death of serial no. [particulars withheld]. She was domiciled in Kenya and she died Intestate.

S T M son to the deceased filed Petition on 9th June 1993 and Affidavit in Support in this Court for Grant of Letters of Administration Intestate.

According to the Petition and Affidavit in Support thereof, persons who were listed as those surviving the Deceased were:

- I. M N M – Daughter (Adult)**
- II. E S M – Daughter (Adult)**
- III. S S M – Son (Adult)**
- IV. J R K - Son (Adult)**
- V. A N M – Daughter (Minor)**
- VI. E S M – Daughter (Minor)**
- VII. L N M – Daughter (Minor)**
- VIII. J N M – Daughter (Adult)**

IX. P N M – Daughter (Adult)

X. G G– Daughter (Adult);

Consents to the making of Grant of Administration of some of the beneficiaries were also filed alongside the Petition.

The Consents signed were by;

- 1) G G ID [particulars withheld]**
- 2) J N M ID [particulars withheld]**
- 3) L N M ID [particulars withheld]**
- 4) P N M ID [particulars withheld]**
- 5) J R K ID [particulars withheld]**
- 6) M N M ID [particulars withheld]**
- 7) S S M ID [particulars withheld]**

The asset that was listed as having been acquired by the Deceased as at her death was:

I. Title No. Ngong/Ngong/[particulars withheld]; who's estimated value as at that time was Ksh. 400, 000.

According to the Petition, the Deceased did not have any liabilities as at the time of her demise.

The Petitioner S S M on 25th August 1994 was issued with Grant of Letters of Administration Intestate of all the Estate of the Deceased.

The Administrator of the Estate then filed an Application by way of Chamber Summons and an Affidavit in Support dated 17th March 1995 for the Grant of Letters of Administration granted on 25th August 1994 to be confirmed. According to his Affidavit in Support, the proposed mode of distribution was that:

I. Each of the Administrator's Eight (8) sisters to get one Acre of the Property Title No. Ngong/Ngong/[particulars withheld].

II. The Administrator's brother J R K to have the land in Eldoret Town measuring about 60 Acres or thereabout.

III. All the remaining part of the Property Title No. Ngong/Ngong/[particulars withheld] to be transferred to the Administrator.

Accordingly, the Grant was confirmed on 30th March 1995 as per the mode of distribution.

APPLICATION FOR REVOCATION OF GRANT

On 14th October 2014, J N M and P N M filed Summons for Revocation/Annulment of Grant under certificate of urgency. In the Summons, the two Objectors sought orders that,

a. The Grant of Letters of Administration Intestate issued to S S M on 25th August 1994 and confirmed on 30th March 1995 be revoked and for;

b. The preservation of the Estate of the deceased by restraining the Petitioner S S M or his agents from dealing with the land parcels known as TEMBELIO/ELGEIYO/BLOCK 5 (EX-TOOLEY), NGONG/NGONG/[particulars withheld], 10 acre parcel of land within Tugen Estate in Uasin Gishu and two plots within Ongata Rongai Township pending the *inter-partes* hearing of the Application.

The grounds in Support of the Summons for Revocation were that:

- 1) The proceedings to obtain the Grant of letters of Administration Intestate were defective as several properties of the Deceased were left out leaving them un-administered.**
- 2) The Petitioner (Respondent) did not involve all the beneficiaries of the Estate in applying for the grant and subsequently having it confirmed without input of the Applicants and their sisters some of whom were still minors.**
- 3) The said Grant of Letters of Administration Intestate was obtained fraudulently by the Respondent by forging the signatures of the Applicants to purport that they had consented to the mode of distribution he had proposed in his Application and thereafter failing to notify them to attend court when the matter was due for confirmation.**
- 4) The applicants did not execute any document in respect of the Petition herein and that they were not aware that the Succession Cause had been filed earlier by the Respondent herein and their signatures together with those of the other beneficiaries were forged.**
- 5) The Applicants had already filed another Succession Cause in Eldoret High Court Succession Cause No. 342 of 2013 and that is when the Respondent disclosed the existence of this Cause.**
- 6) The Petitioner/Respondent had sold huge parts of the Estate property that was not included in these proceedings and is leasing out others in cohorts with his brother J R and are likely to waste and/or dispose of the same without regard to the Applicants and all the other beneficiaries of the Estate.**
- 7) It is in the interest of justice that the Grant which has been abused by the Respondent for his personal gain at the expense of the Estate be revoked/annulled and a fresh Grant be obtained to take care of the interests of the Estate.**
- 8) Pending the hearing and determination of the Summon, there be interim orders for the preservation of the Estate by way of temporary orders of injunction against the Respondent and his team.**

PROCEEDINGS

On 17th October 2014, the application was stood over generally on the application by the Respondent to file Replying Affidavit.

On 20th January 2015; the same application was made and granted in another Court.

On 29th June 2015, the same application to allow the Respondent file Replying affidavit was made and granted and the matter was to proceed by viva voce evidence

On 17th December 2016, Counsel informed the Court that **Succession Cause 342/2013 Eldoret High Court** was struck off and they wanted to proceed by filing written submissions. The Applicants filed written submissions on 24th January 2017 and the Respondent filed on 14th February 2017. Hence this Court relies on the pleadings, proceedings and written Submissions in the Court file.

APPLICANTS' SUBMISSIONS

By way of a supplementary Affidavit filed on 10th October 2016 and Submissions filed on 24th January 2017 by the Applicants, they stated that the genesis of their application is that they petitioned for grant of letters of Administration Intestate over the Deceased Estate vide Eldoret High Court **Succession Cause No. 342 of 2013**. When they sought confirmation of grant and it was then that the Respondent disclosed the existence of this Succession Cause 1036 of 1994.

Relying on the Supporting affidavit filed on 14th October 2014 to the application; the Applicants alluded that the said grant and confirmation of grant were made secretly without involving all the beneficiaries. They were not involved during confirmation of grant and they did not consent and were not summoned to appear in Court.

Indeed 3 of the daughters of the deceased, E, A and E were minors and the grant should not have been issued to a single administrator but more than one beneficiary where there are minors.

The petition for issue of grant obtained on 25th August 1994 and confirmed on 30th March 1995 listed one property **NGONG/NGONG/[particulars withheld]** but in the confirmation of grant was included "a parcel of land in Eldoret" which was purported to be allocated to J R K.

There are properties that were left out by the Respondent; they are:

I. 2 plots in Kware, Ongata-Rongai, Kajiado County which he had leased out to a school and does not give an account of the proceeds

II. Land Title No. Ngong/Ngong/[particulars withheld] in Kajiado County measuring 5 acres

III. Tembelio/ElgeiyoBorder/Block 5 (Ex-tooley)/[particulars withheld] comprising of 60 acres which is being partly occupied and partly leased out by one J R and;

IV. 10 acres in Tugen Estate, Uasiin Gichu County leased out by J R.

G G redeemed **Ngong/Ngong/[particulars withheld] in Kajiado County** and paid the loan of Ksh 60,000/- that was left by the deceased against a charge on the said property. She gave the title documents to the Respondent and to date she has not been refunded or obtained any benefit from the deceased's estate.

The Applicants pursued and ensured that the suit property **Tembelio/ElgeiyoBorder/Block 5 (Ex-tooley)/[particulars withheld]** was transferred and registered in the deceased's name in 2011 and yet J R resided on the said land. They attached a copy of the receipt marked **STM2**.

The administrator did not facilitate the education of the minor siblings even after he obtained the grant. They were brought up and educated by G G and J N.

The 2 sons of the deceased S Si and J R sold 40 acres of **NGONG/NGONG/[particulars withheld]** and did not fully comply with the 1 acre each to each of the daughters of the deceased's allocation as per the defective confirmed grant.

Some of the siblings; L N, A N and E S have been transferred to the remote part of Naro-Moru where an acre of land is Ksh 1000,000/- while the Respondent and their other brother continue to hold and sell the Ngong property at Ksh 12m an acre. E S; daughter of the deceased has not been allocated any property of the deceased.

They further submitted that these properties that were left out have been misappropriated by the Respondent and his brother J R to their exclusion. They deponed that the grant was fraudulently obtained and that the mode of distribution provided in the Summons for confirmation was vague in that the acreage

of what the beneficiaries were to get particularly the Petitioner and his brother was not given.

In seeking to revoke the grant pursuant to **Section 76 of the Law of Succession Act, Cap 160**, the Applicants argued that in light of the grounds in support of their Application for revocation, the Petitioner (Respondent) failed to disclose material facts and the property was not divided equally amongst all the surviving children as required under **Section 38 of the Law of Succession Act, Cap 160** and thus the grant should be revoked.

To fortify their position, the Applicants relied on the following authorities;

A) On the issue of revocation of grant under Section 76 of the Law of Succession Act

PENINAH AKUMU NYABOLA vs ROBERT MBAI NYABOLA (2011) eKLR

MARY RUGURU NJOROGE vs PETER MURIITHI GICHURU (2016) eKLR

B) on the issue of distribution of the estate of the deceased to children of the deceased (without discrimination of the male and female child);

FRANCIS MWANGI THIONGO & 4 OTHERS Vs JOSEPH MWANGI THIONGO (2015) eKLR (Court of Appeal decision)

C) On the requirement of a Continuing trust where there are minors involved;

P.A.O.vs C.A.O [2016] eKLR

LUCY WANJIRU KIBABA & ANOTHER Vs LUCY WANJIRA MUCHENE [2013] e KLR

RESPONDENT'S SUBMISSIONS

The Respondent did not file Replying affidavit to the application but put in his reply by way of submissions which were filed on 13th February 2017. He submitted that the Applicants who alleged that their signatures were forged should provide proof of that allegation as required by Law. He denied knowledge of any of the properties that he was alleged to have been left out save for property **Ngong/Ngong/[particulars withheld]** which he admitted to have left out because it was encumbered at the time of filing the Petition and thus not available for distribution.

He argued that contrary to what has been deponed by the Applicants, the mode of distribution was agreed to by all the beneficiaries of the estate and thus the Application is an abuse of the Court process. He further submitted that the Applicants had not denied the fact that they were given a portion of the estate.

They contended that the Respondent has been in possession of the Grant of Letters of Administration Intestate for quite a long time and no one had raised an issue on how the estate was been administered before filing of the **Succession Cause No. 342 of 2013**.The Respondent indicated that of the properties he disposed off he shared proceeds with all beneficiaries and they are greedy for more and that is why they are in Court.

In a bid to persuade the Court not to revoke the grant, the Respondent relied on the arguments highlighted above and further submitted that the allegations relied on in seeking to revoke the grant were lacking in evidence and do not meet the criteria for revoking a grant under **Section 76 of the Law of Succession Act**.

DETERMINATION

The issue for the Court to determine is whether the grant issued on 25th August 1994 and

confirmed on 30th March 1995 ought to be revoked or not.

Section 76 of the **Law of Succession Act** provides for the annulment and revocation of Grants. It states that:

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 has ordered or allowed; 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

(iv) That the grant has become useless and inoperative through subsequent circumstances.

The deceased died in 1993 and her estate is governed by provisions of Law of Succession Act which came into force in 1981. From the evidence on record the grant was obtained with consents of some of the beneficiaries and not all beneficiaries as required by **Part VII Rule 26 of Probate and Administration Rules**. Although, there were some beneficiaries who were minors at the time, still from the list of beneficiaries there is an adult who did not give consent namely; **E S M**.

Therefore, even if it is assumed that the other beneficiaries gave consents and their signatures were not forged as alleged; in the absence of any explanation why the beneficiary was left out, the grant was not obtained regularly and legally.

The Respondent submitted that if the Applicants claim that their signatures were forged, they ought under Section 107 of the Evidence Act to provide evidence to prove the same. If this requirement was to be fulfilled, it would only be through an oral hearing, which both parties waived in favor of filing written submissions. Therefore, the Respondents are estopped by their consents to forgo *interpartes* hearing from seeking the above proof of forgery.

In **M R N case** supra; the Applicant sought revocation of grant on the basis that her consent was not obtained on the mode of distribution and the grant was confirmed in her absence and the grant was revoked.

From the Court record, there are no pleadings to confirm that the beneficiaries signed written consents to the proposed mode of distribution outlined in the summons for confirmation of grant. There is no evidence on record that they were summoned and appeared in Court to confirm their consents to the proposed mode of distribution and confirmation of grant so as to satisfy the Court as to the respective identities and shares of all persons beneficially entitled as provided by the proviso of Section **71 of Law**

of Succession Act Cap 160.

In the case of Francis Mwangi Thiongo supra the Court relied on **Article 27 of the Constitution** that the **Law of Succession Act** does not discriminate between male or female. In the instant case the mode of distribution of the deceased's estate; unless otherwise agreed by all beneficiaries in the absence of both parents ought to be as provided by **Section 38 of Law of Succession Act Cap 160**; the estate is shared equally by all children of the deceased. If the beneficiaries did not consent to the proposed mode of distribution in the summons for confirmation of grant how, why and from where did the Respondent as administrator determine that each daughter would get 1 acre of the suit property and the rest was his? How much was the rest? Was it at least equitable if not equal compared to the share of each of the other beneficiaries?

The petition for grant of letters of administration filed on 9th June 1993 confirmed from the list of beneficiaries that there were minors and therefore by virtue of **Section 58, 71 (2A) and 84 of Law of Succession Act Cap 160** it was and is mandatory that there ought to have been appointed more than 1 administrator to be trustees of the minors beneficial interests in the deceased's estate.

From the evidence on record, property **Ngong/Ngong/[particulars withheld]** among other properties listed above were left out of the declared estate of the deceased. The Respondent did not comment on the properties listed as left out save for this property which he alleged was encumbered. It is deposed by the Applicants that the loan was paid by G G who gave him the title documents. He ought to have called all beneficiaries to discuss how to distribute the asset now that it was free and file an application in Court to confirm and/or amend and rectify the confirmed grant to include the agreed proposed distribution of the new discovered asset. Instead he chose to keep the matter secret. There are other assets that are listed above that were omitted from the list of assets that comprise of the deceased's estate. In the absence of evidence to the contrary, this Court is satisfied that these assets belong to the deceased and ought to be included and available for distribution to all beneficiaries.

After the Respondent as administrator obtained the confirmed grant; he seems to have abandoned the family especially raising and providing upkeep of the minor children and instead dealt with distributing the suit property **NGONG/NGONG/[particulars withheld]** declared available for distribution; He pursued sale and disposal of chunks of land for his own benefit and to the detriment of other beneficiaries.

From the issues considered above, this Court is satisfied that the proceedings to obtain the grant were defective in substance; that the grant issued on 25th August 1994 and confirmed on 30th March 1995 was obtained fraudulently by concealing material facts and by untrue allegation that all beneficiaries were informed, involved and gave their consents to the issuance of the grant and confirmation of grant respectively which facts are not borne out by the Court record. Some of the assets were not disclosed and the mode of distribution was not agreed by all beneficiaries. Therefore since the grant was obtained in contravention of **Section 76 of Law of Succession Act Cap 160**; it is hereby revoked and annulled forthwith. This Court is persuaded by the following case on the remedy of revoking a grant or not.

In **IN RE ESTATE OF DAVID KYULI KAINDI (DECEASED), SUCCESSION CAUSE NO. 3403 OF 2005**, it was pointed out that:

***“[18] The most potent remedy in the hands of a beneficiary is that of calling personal representatives to account. Beneficiaries who are not personal representatives have no control over the estate. The property of the deceased does not vest in them. They have no power over it; neither do they have any obligations with respect to it. When aggrieved by the manner the estate is being run their remedy lies in seeking accounts from the personal representatives, and, in extreme cases of maladministration and misconduct by the personal representatives, in applying for revocation of the grant.*”**

DISPOSITION

1. The grant issued on 25th August 1994 and confirmed on 30th March 1995 is hereby

revoked.

2. A new /fresh grant shall issue in the following names;

1. J N M

2. P N M

3. G

4. J R

3. They shall jointly exercise their statutory mandate under Section 83 of Law of Succession Act Cap 160.

The properties left out shall be included as assets that comprise of the deceased's estate available for distribution.

There shall be no further sale, subdivision, disposal, alienation or in any other way deal with the suit properties with intention to dispose of the same before confirmation of grant.

The Respondent shall account to Court and all beneficiaries on the sale, disposal, sub division and alienation contrary to the former confirmed grant.

In default he shall obtain his beneficial interest in the deceased's estate taking into account what he disposed off and not accounted for.

Any aggrieved party may apply or exercise right to appeal

Each party to bear its own costs.

DELIVERED DATED & SIGNED IN OPEN COURT ON 3RD APRIL 2017.

M. W. MUIGAI

JUDGE

In presence of:-