



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION CAUSE NO. 360 OF 2015

IN THE MATTER OF THE ESTATE OF PETER MOENGA MOGAKA (DECEASED)

-AND-

**IN THE MATTER OF PETITION FOR GRANT OF LETTERS OF ADMINISTRATION
INTESTATE**

BETWEEN

JOAN FRANCISKA ONDARI (alias BOCHERE)OBJECTOR/APPLICANT

AND

ABOSHIRO WILLIAM TUMBOPETITIONER/RESPONDENT

RULING

1. The grant of letters of Administration Intestate respecting the estate of the late Peter Moenga Mogaka (deceased) was herein issued on the 10th November 2016, in favour of Aboshiro William Tumbo (Petitioner) in her capacity as a daughter in law of the deceased.

2. However, on the 2nd December 2016, the present application for revocation of the grant was filed by Joan Francisca Ondari also known as Bochere (applicant), who is also a daughter in law of the deceased.

The grounds in support of the application are laid down in the supporting affidavits dated 2nd December 2016 and 21st February 2017.

3. With the approval of the parties, the court directed that the application be argued by way of written submissions and in that regard, the same were filed by the firm of **M/s Ochoki & Co. Advocates**, on behalf of the applicant and the firm of **Bosire Gichana & Co. Advocates**, on behalf of the petitioner/respondent.

4. This court having given due consideration to the application in the light of its supporting grounds and those in opposition thereto as laid down in the petitioner's replying affidavit dated 9th January 2017 and also in the light of the rival submissions holds that the basic issue for determination is whether any of the grounds for revocation and/or annulment of grant as stipulated under S.76 of the Law of Succession Act has been established by the applicant against the Petitioner.

5. Such grounds apply "inter-alia" where the proceedings to obtain the grant were defective in substance or where 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 or where 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 is made in ignorance or inadvertently.

6. Herein, the applicant alleges and/or implies that the grant was fraudulently obtained by the petitioner in as much as she failed to obtain the applicant's consent prior to filing the necessary petition for grant of letters of administration. This allegation was denied by the petitioner who contended that a daughter of the deceased called Esther Moracha Moenga who was first in priority allowed her to petition for the grant, a fact which the applicant was aware of but showed disinterest even after being served with a mention notice to appear before the Deputy Registrar of this court.

7. The said consent from the daughter of the deceased is annexed to the replying affidavit of the petitioner and is marked as exhibit "AWT – 1". It is a valid consent which was commissioned by a notary public in Minnesota U.S.A and is most importantly, not disputed by the applicant.

Indeed, the deceased's daughter in relation to the applicant and petitioner who are the deceased's daughters in law was in terms of the degree of consanguinity the person entitled to petition for the grant as the only surviving daughter of the deceased.

8. The applicant and the petitioner being daughters in law of the deceased do not feature anywhere in the table set out in the second schedule made under Rule 7(1)(e)(iii) of the Probate and Administration Rules 1980. They come in as beneficiaries through their late husbands who were sons to the deceased. Their respective claim to the estate of the deceased is thus pegged on their late husbands' interest and in that case it would be presupposed that they already have grants of letters of administration respecting the estates of their late husbands and if they do not have them it is doubtful whether any of them was legally entitled to apply for the grant respecting their late father in law.

9. Be that as it may, the consent given to the petitioner by the deceased's surviving daughter to apply for the grant was in accordance with Rule 26(2) of the Probate and Administration Rules 1980. The preceding Rule 26(1) provides that letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant. It is on the basis of this rule that the applicant contends that her consent was not sought by the petitioner prior to or while applying for the grant.

10. However, in the further affidavit dated 21st February 2017, the applicant implies in paragraph four (4) that she was aware or became aware that the petitioner was in the process of applying for the grant but was yet to give her consent.

Paragraph 7 of the same affidavit implies that the applicant withheld her consent simply on ground that the petitioner intended to solely apply for the grant yet a family agreement made it clear that the grant was to be sought jointly by all the daughters-in-law of the deceased. A fact which was confirmed in the chief's letter to the court dated 2nd April 2015 (Annexure marked Exhibit "JFO 1" in the further affidavit).

11. A further letter by the chief dated 24th June 2016 and filed herein on 28th June 2016, indicates that it was recommended that the three daughters-in-law of the deceased i.e the petitioner, the applicant and one Florence Kemunto Onsongo, be allowed to jointly apply for the grant but to appear before the Deputy Registrar to determine who among them should actually be the administrator of the estate of the deceased. As it were, the three were required to nominate or elect one of them to apply for the grant.

12. It is instructive to note that the chief's letter dated 24th June 2016 was actually prompted by the order of the Deputy Registrar made on 20th June 2016, to the effect that the petitioner holds a meeting with the area chief together with her two sisters in law and furnish the court with the necessary report. Further, a fresh chief's letter to include all the beneficiaries was to be filed.

The aforementioned letter dated 24th June 2016, was indeed the fresh letter from the chief, but before it was made the petitioner had already on the 9th June 2015, filed the application for grant of letters of administration intestate respecting the estate of the deceased.

13. It would appear that the application was made after the filing of the initial chief's letter dated 2nd April 2015, which had recommended that the three daughters in law of the deceased including the petitioner and the applicant be the joint administrators of the estate of the deceased. That being the case, the application ought not have been made solely by the petitioner but jointly by herself and her two sisters-in-law.

However, the chief's letter dated 24th June 2016, superseded that one made on 2nd April 2015 and even the one dated 10th September 2015, which included the only surviving child (daughter) of the deceased.

Most importantly, the letter superseded the application for the grant filed on 9th June 2015, by the petitioner alone and effectively invalidated it.

14. The court record does not show that the order of the Deputy Registrar made on 20th June 2016, was complied with save for the fresh letter from the chief. There is no indication that a meeting with the chief was held and the necessary report filed in court. Such a report is non-existent thereby implying that no meeting took place or that the report was overlooked or that the fresh letter from the chief was to serve as the report. Whichever way one looks at it, it is very clear that the parties had not agreed among themselves that the petitioner would solely apply for the grant and therefore become the sole administrator of the estate of the deceased.

15. It would follow therefore, that the impugned grant dated 10th November 2016, was prematurely and/or erroneously issued to the petitioner on the basis of the invalidated application dated 9th June 2015. For this reason alone and without holding that the petitioner acted fraudulently but rather on ignorance and mistaken belief that she could go ahead and apply for the grant on her own, this present application by the applicant, must and is hereby allowed to the extent that the impugned grant dated and issued by this court on 10th November 2016, is now revoked. And, in order to avoid a repetition of the whole process of applying for grant, a fresh grant shall forthwith issue in favour of the only surviving child/daughter of the deceased, **Esther Moracha Moenga**, and the eldest child of each of the three departed sons of the deceased who are the grandchildren of the deceased only if they are already adults.

Each party shall bear their own costs of this application.

Ordered accordingly.

[Read and signed this 6th day of April 2017].

J.R. Karanjah

Judge

In the presence of

Mr. Bosire for Petitioner but Mr. Okenye holding brief

Mr. Ochoki for Applicant but M/s Shilwatso holding brief

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