



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

SUCCESSION CAUSE NO. 571 OF 2015

IN THE MATTER OF THE ESTATE OF MAGAIGWA NYAMBURI MARAMA (DECEASED)

-between-

PATRICIAH ROBI MAGAIWA.....APLICANT/PLAINTIFF

-versus-

JOSEPH K. MAGAIWA ...PETITIONER/RESPONDENT/DEFENDANT

RULING

1. By the Summons for revocation dated 10/08/2015 and filed in Court on 21/08/2015, the Applicant herein applied for the revocation of the grant of the representation in respect of the estate of **MAGAIGWA NYAMBURI MARAMA** (hereinafter referred to as '**the deceased**') which was issued to **JOSEPH K. MAGAIWA**, the Respondent herein who was the Petitioner before the then Senior Resident Magistrate's Court's at Kehancha in Succession Cause No. 4 of 2012.
2. That grant was eventually confirmed by this Court on 22/06/2015 and the then sole property forming the estate of the deceased devolved to the joint names of **Joseph K. Magaiwa** and **Magaiwa Chacha Peter**. Two months later, that is on 13/08/2015, the Respondent filed a Notice of Motion evenly dated seeking to include another parcel of land as part of the estate of the deceased. That application is still pending.
3. The application for revocation is opposed by the Respondent.
4. Directions on the hearing of the application were taken to the effect that the application be heard by way of oral evidence since the Respondent could not understand the nature and rigors of hearing by way of Affidavits and submissions moreso given that he appeared in person. For purposes of the hearing, the Applicant was deemed as the Plaintiff whereas the Respondent was deemed as the Defendant. I shall in this judgment refer to the parties as the Plaintiff and the Defendant respectively.
5. The Plaintiff testified and did not call any witness. The Plaintiff is the second wife of the deceased who was blessed with 9 children with the deceased. She contends that the Defendant fraudulently disinherited her from the estate of the deceased in this cause. Since the application dated 13/08/2015 to include another property as part of the estate of the deceased had not been filed, the estate of the deceased comprised of the parcel of land known as **BUGUMBE/MABERA/1006** (hereinafter referred to as '**the land**'). It is this land that devolved to the Defendant and one Magaiwa Chacha Peter on confirmation. This land was then sub-divided to 22 portions forming the parcels of land known as **BUGUMBE/MABERA/1514-1536**. It is alleged that the land is currently in the process of being transferred to third parties to the exclusion of the Plaintiff and all her children. The Plaintiff now seeks to

revoke the Grant and to cancel all the sub-divisions and that the land reverts to the name of the deceased for fresh and proper confirmation since she never took part in the process towards the confirmation of the grant.

6. The Defendant in opposition to the application testified and called 3 witnesses. The witnesses were **Samson Marama Magaiwa (DW1)**, **David Mauti Musa (DW2)** and **Miriam Murama Magaiwa (DW3)**. DW3 was the first wife of the deceased. DW1 was the first-born son of the deceased from DW3 and DW2 was a purchaser of part of the land having bought it from DW3.

7. The Defendant together with his witnesses admit that the Plaintiff is a wife to the deceased and as such a beneficiary to the estate as well as all her children. The alleged sub-divisions of the land are also admitted. However, the Defendant and all his witnesses deny the contention that the Plaintiff was never involved in the entire process leading to the issuance of the grant, confirmation thereof as well as the sub-divisions of the land. They jointly took the Court through instances where family meetings were called and the matter was discussed and that the Plaintiff asked the Defendant to proceed on with the succession as she had no problem with the Defendant whom she considered as her son and moreso that the Defendant is a Pastor. The Defendant further contends that the Plaintiff even appended her finger prints on all sub-division documents.

8. To the Defendant, the perceived problem in this cause is by the Plaintiff who sold a portion of the land to two different purchasers who are now on her neck and the way out for the Plaintiff to wade off the pressure is to allege that she was disinherited. The Defendant further testified that the Plaintiff's share of the estate remains intact and he holds it on her behalf waiting for the Plaintiff to raise the sub-division fees to complete the process. Indeed, the Defendant and all his witnesses were surprised by the Plaintiff's allegations. The Defendant prays that the application be dismissed as to pave to the finalization of the administration.

9. This Court carefully observed the witnesses as they testified. From the totality of the evidence, there is no dispute that the Plaintiff was the second wife of the deceased and that she had children with the deceased. There is as well no dispute that the Plaintiff and her children are entitled to benefit from the land. I am satisfied that the family of the deceased held meetings and discussed this matter severally. I have seen copies of the minutes of those meetings pointing out that the Plaintiff also attended as a member of the family. However, the point of departure is that no Attendance Sheets were availed duly signed by the Plaintiff as evidence that she indeed attended the meetings. I say so because the Defendant understood that the Plaintiff had taken the position that she was not involved in the entire process.

10. I have also looked at the documents in support of the Petition before the lower court. Those documents do not even mention the Plaintiff's name and there was no consent filed on her behalf. Likewise, the confirmation proceedings before this Court on 22/06/2015 reveal that it was only the Defendant and one Magaiwa Chacha Peter who were present. I also did not see any evidence that the Plaintiff was duly served.

11. The Defendant did not annex evidence of who the beneficiaries to the land are in support of his position that the Plaintiff's interests remain secure. This Court is at a loss as to who the people likely to benefit from the land are and how they will so benefit. There is also the unsettled issue of the other parcel of land, **BUGUMBE/MABERA/1010**, allegedly belonging to the deceased which was not part of the earlier proceedings.

12. The foregone therefore reveal that the proceedings from the lower court to this Court were contrary to law in many aspects. **Sections 51 and 71** of the **Law of Succession Act**, Chapter 160 of the Laws of Kenya as well as **Rules 7, 26, 40 and 41** of the **Probate and Administration Rules** were severely flouted. I am hence persuaded that the remedy thereof is in **Section 76** of the Law of Succession Act such that all parties are given an opportunity to take part in the process.

13. Resulting therefrom and in consideration of the provisions of **Section 66** of the Law of Succession Act and with a view to attain a quicker determination of this matter which undoubtedly involves so many

beneficiaries and interested parties, this Court now makes the following orders: -

(a) The Grant of Letters of Administration made to JOSEPH K. MAGAIWA and MAGAIWA CHACHA PETER on 22/06/2015 and the resultant Certificate of Confirmation be and are hereby revoked and a Fresh Grant shall issue in the joint names of JOSEPH K. MAGAIWA, MAGAIWA CHACHA PETER and PATRICIAH ROBI MAGAIWA.

(b) The registration of the parcel of land known as BUGUMBE/MABERA/1006 in the names of JOSEPH K. MAGAIWA and MAGAIWA CHACHA PETER be and is hereby cancelled alongside the sub-divisions BUGUMBE/MABERA/1514 - 1536 and the parcel of land shall revert to the name of MAGAIGWA NYAMBURI MARAMA.

(c) The Administrators and/or any of them shall file an application for confirmation of the fresh grant within 21 days of its issuance.

(d) As the matter involves family members and it is still on-going, each party shall bear its own costs of the application.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 15th day of June 2017.

A. C. MRIMA

JUDGE