



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION CAUSE NO. 26 OF 2014

IN THE MATTER OF THE ESTATE OF THE LATE SICHENGA OMULEMA (DECEASED)

AND

ANNAH BEFREY OPATI

MELKIZADECK IMENDE ASUNGA.....PETITIONERS/RESPONDENTS

AND

LUCIANA NYAHELA OMULEMA OBJECTOR/APPLICANT

JUDGMENT

The deceased to whose estate these proceedings relate is Sichenga Omulema who died on 15th November 1995. Letters of administration were on 9th October 2012 issued to Annah Befrey Opati and subsequently confirmed on 8th January 2013 and the entire estate devolved to one Melkizadeck Imende Asunga. On 16th January 2014 Luciana Nyahela Omulema the applicant filed a summons for revocation and/or annulment of grant which is what is now for determination. It is her prayer that once the grant is revoked the transfer of LR West Bunyore/Ebusiekwe/1485 to the 2nd Respondent be canceled and the title to the said land be vested in her as the only beneficiary of the deceased.

The gist of her application is that the grant was obtained fraudulently; That the Petitioner/1st Respondent deliberately and intentionally falsely stated that she was a widow of the deceased and that the deceased had no other beneficiaries. Secondly that the value of the estate exceeded the jurisdiction of the Maseno Principal Magistrate who issued the grant and that the proceedings were defective in substance as well in law. Further that he 2nd Respondent has entered the land to the detriment of the real beneficiaries.

In her supporting affidavit, the applicant deposes that the 1st Respondent falsely stated that she was a widow of the deceased whereas she is only a step sister in-law; that she herself is the real sister of the deceased and hence ranks higher in priority to the 1st Respondent yet her name was never listed as a beneficiary and that amounts to fraud. She confirms that the deceased had no wife or child(ren) and points out that the 2nd Respondent was himself not listed as beneficiary yet he inherited the whole estate without disclosing his interest. She also deposes that confirmation of the grant was done before the expiry of the stipulated 6 months so as to frustrate the legal heirs.

In a replying affidavit sworn on 2nd March 2014 the 1st Respondent deposes that she petitioned as a sister in-law of the deceased; that the deceased did not marry and had no children; that he had prior to his death bequeathed the land in question to her and her children and that with the full knowledge of their area chief and Assistant chief which information was relayed to all who attended the deceased's burial. She disputes that upon the death of her own husband she remarried as alleged by the

applicant and denies that she concealed any material facts from the Court. She contends that she and her children have equal rights on intestacy with the applicant and that therefore the revocation of the grant will not serve any purpose. She further contends that the applicant herself is married and is therefore not entitled to a share in this estate. She also discloses that it is she who sold this land to the 2nd Respondent and used the money on medication and other requirements and further disputes that the value of the estate exceeded the jurisdiction of the magistrate who issued the grant and thereafter confirmed the grant. She then names one Joseph Mbira Andebe as the instigator of these proceedings.

Interim conservatory orders for the preservation of the estate were issued on 11th March 2014 and thereafter directions were given that the summons be canvassed by way of viva voce evidence. However despite being duly served with hearing notices neither the respondents nor their advocate attended and the matter finally proceeded ex parte.

In her evidence the applicant stated that she was the real sister of the deceased who had three other siblings and that the 1st Respondent was married to their step brother with whom she begot 5 daughters but who is also now deceased. She stated that upon the death of her step brother the 1st Respondent went to live with her in-laws and has since remarried. She contended that upon the death of the deceased in this case she left the deceased's land to the 1st Respondent but with an intention to utilize it later. She however learnt that the 1st Respondent had sold the land to the 2nd Respondent who had no kinship with the deceased. She stated further that she did not know if the information the 1st Respondent gave to the Maseno Court was false but stated that she, the 1st Respondent, is not entitled to a portion of the land, as her husband had been given land upon which she resides by their father. She urged this Court to give this land to her.

Written submissions were received from Mr. Nyanga, Advocate for the applicant but not from the respondent. This judgment was to be delivered on 21st January 2016 but was deferred to 11th February 2016 as it was not ready due to pressure of work. The delay is nevertheless regretted.

The grounds upon which a grant whether confirmed or not may be revoked or annulled are set out in section 76 of the law of Succession Act and include a defect in the proceedings to obtain the grant, fraud by the making of a false statement or by the concealment from the Court of something

material to the case, or 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.

A petition for letters of Administration intestate is commenced by way of Form P & A 80. In that form it is required that the Petitioner state the capacity in which she has petitioned. In the instant case the respondent has stated that she presents the petition in her capacity as wife/widow of the deceased. In Form P & A5 which is an affidavit in support of the petition it is required that the survivors of the deceased be disclosed at paragraph 4. Here the respondent has listed herself and one Sarah Yvonne Tuno as the survivors. It is also a practice that a letter from the chief of the locality where the deceased was domiciled be filed together with the petition. The purpose of that letter is to confirm the relationship of the petitioner to the deceased and whether or not there were other survivors. The letter filed by the respondent is dated 7th August 2012 and has described her relationship to the deceased as sister in-law and that of Sarah Yvonne Tuno as a niece. The respondent nevertheless admits that the applicant in this case is her sister in-law and a real sister of the deceased. That the deceased was survived by a sister was never disclosed to the Court either in the affidavit in support of the petition (P & A5) or in the chief's letter. This amounts to concealment from the Court of something material to the case. The respondent was all along aware of the existence of the applicant and has offered no explanation for not disclosing this to the Court. Section 66 of the Law of Succession Act sets out the order of preference which should act as a guide when issuing letters of administration intestate. That order is as follows:

"(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their

respective beneficial interest as

provided by part v;

(c) the Public Trustee;

(d) Creditors"

Section 39(1) of the Act on the other hand lays down the order of priority (to succeed) where an intestate has left no surviving spouse or children, as in this case. From that order it can be seen that the respondent who is a real sister to the deceased ranks higher than the applicant who is a sister in-law but whose husband would have ranked equally with the applicant. The respondent therefore ranks slightly lower in the order of preference under Section 66 of the Act.

Now the procedure for petitioning for grants is set out in the Probate and Administration Rules. Rule 7(7) of those rules provides:-

"(7) where a person who is not a person in the order of preference set out in Section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the Court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the Court that every person having a prior preference to a grant by virtue of that section has-

(a) renounced his right generally to apply for a grant; or

(b) consented in writing to the making of the grant to the applicant; or

(c) been issued with a citation calling upon him to renounce such right or to apply for a grant" (underlining mine).

It is to be noted that the instant case does not fall under any of the exceptions set out in rule (9). Rule 26(1) of the Probate and Administration Rules is emphatic that Letters of administration should not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant. However as provided in section 66 of the Act discretion as to who is issued with a grant lies with the Court. The written consents of those that require to give consent are provided in Form 38 or 39 and where renunciation or written consent is not given rule 26(2) requires the application of an applicant entitled in a degree equal to or lower than that of any other person to be supported by an affidavit of the applicant and such other evidence as the court may require.

As stated earlier the respondent did not disclose that the deceased was survived by a sister as a person not in the order of preference set out in section 66. She did not satisfy the court that this sister who ranked higher or equally with her had renounced her right; which she in fact did not, or that she had consented in writing to the making of the grant. Not only was she guilty of concealment from the court of something material to the case but this also rendered the proceedings to obtain the grant defective. Perhaps it was so as to cover up for this that she describes herself as a wife/widow of the deceased which clearly is fraudulent, as the same amounts to making a false statement. She was a sister in-law not a wife. To make matters worse she rushed the process by seeking confirmation before the lapse of six months and this without any good explanation at all. She then bequeathed the estate to a person who was not even named in the petition as a beneficiary. Proviso (I) to section 82 (b) of the Act prohibits the sale of immovable property before

confirmation of the grant. Before the grant was confirmed the respondent had no interest in the land which she could pass to anybody. I find merit in the summons for revocation of the grant and allow it with an order that the grant and the subsequent certificate of confirmation be and are hereby revoked. The property forming the estate of the deceased if it has passed to any other person shall be reverted to the name of the deceased and the parties herein shall be at liberty to apply this time being careful to follow the procedure provided in the Act and the rules. As for costs I shall order that each party shall bear their own this being a family matter. It is so ordered.

Signed, dated and delivered at Kisumu this ..11th. day of .February.. 2016

E. N. MAINA

JUDGE

In the presence of:-

N/A for Petitioners/Respondents

Mr. Nyanga for Objector/Applicant

CC: Felix Magutu