



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

SUCCESSION CAUSE NO. 10 OF 2015

IN THE MATTER OF THE ESTATE OF MUTEMI KAVIU WANYUA..... DECEASED

PAUL MUTEMI ADMINISTRATOR/RESPONDENT

V E R S U S

RHODAH MUTEMI APPLICANT

RULING

The succession matter herein was filed, heard and determined in the Senior Resident Magistrate's court at Mwingi as No. 43 of 2013. The court delivered its ruling on the 25th March 2015 confirming the Grant of Letters of Administration, and certificate of Confirmation of Grant subsequently issued and signed on 25/3/2015 stating that the Grant of representation of Letters of Administration issued to Paul Mutemi on the 25th March 2015 was confirmed pursuant to the provisions of section 71(1)(3) of the Law of Succession Act. The assets indicated in the certificate of confirmed Grant was only one, ie Land Parcel No. Mwingi/Mbondoni/940 which was ordered to be registered in the name of Paul Mutemi the administrator herein for himself.

The applicant has now come to this court through a summons for annulment/revocation of grant of letters of Administration dated 16th April 2015 and filed on 22nd April 2015 by Mulinga Mbaluka and Company Advocates.

The summons has been brought under section 47, 48 and 76 of the Law of Succession Act (Cap 160), and Rule 44 (1)(2) and Rule 73 of the Probate and Administration Rules and seeks to the following orders:-

“1. That the court be pleased to make an order to preserve the estate and to prohibit the administrators/respondents or any third party from disposing or transferring to themselves or any third party or in any other manner dealing with land parcel No. Mwingi/Mbondoni/940.

2. That the court be pleased to issue an order restraining the administrators/respondents or third party from forcibly evicting the applicant from all or any land parcel No. Mwingi/Mbondoni/490 and all an order for the status quo pending hearing and determination of this summons.

3. That the court be pleased to issue an order restraining and or prohibiting the District Land Registrar Mwingi from registering any dealings with regard to all or the land parcel named in 1 above pending hearing and determination of this summons.

4. That the Grant of Letters of Administration made to the administrators/respondents on 18th March 2014 and confirmed on 25th March 2015 be revoked and or otherwise annulled.

5. That the costs of this application be awarded to the applicant.”

In response to this application the respondent, who has been represented by Nzili & Company Advocates, relied on a replying affidavit sworn and filed in the subordinate court on 5th May 2015 and sworn on 1st May 2015 and annexures thereto. (In my view the year was actually 2014, as Confirmation of Grant was done on 25th March 2015 and as such there were no further proceedings in the magistrate's court.

It was agreed by the parties counsel Mr. Mbaluka for the applicant and Mr. Nzili for the respondent, that the hearing of the application would proceed by way of written submissions after 25th March 2015).

The written submissions of the applicant were filed on 26th October 2015, in which counsel emphasized that the respondent misled the court by withholding or not disclosing important information in the succession cause relating to the beneficiaries of the deceased. According to counsel, it all started with the chief's letter in which only one wife of the deceased was mentioned without disclosing that there was another wife (the applicant) and other surviving beneficiaries.

Counsel added that the respondent also swore a false affidavit to support the application for Grant of Letters of Administration in which he stated in November 2013 that the deceased had died intestate leaving behind only Paul Mutemi as the sole survivor. It was also argued that the said affidavit was not dated and as such the court wrongly admitted the same as part of the record while it was an improper document.

According to counsel, the concealment of information by the administrator was deliberate and intended to mislead the court to make a decision in ignorance of the true facts. It was reiterated that the applicant was a widow of the deceased with children who were all entitled to a share of the estate. In counsel's view the chief's letter dated 4th October 2014 was not intended to assist in the inheritance of the deceased's assets but to be a vehicle of granting ownership of the parcel of land No. Mwingi/Mwingi/940 to the respondent, and that that was the reason why the said letter was deliberately worded ambiguously.

Counsel submitted further that the allegation by the respondent that the deceased had divorced the applicant was untrue, unfounded and baseless, as there was no official divorce record. It was also contended that the deceased did not purchase the land specifically on behalf of the respondent. Counsel maintained that the land was left behind by the deceased to be shared among beneficiaries and interested parties including the applicant.

Reliance was placed on Nairobi High Court Succession Cause No. 1236 of 2011 in the matter of the estate of Loise Nduta Muiruri alias Rose Nduta Muiruri (Deceased), Nyeri High Court Misc. Application 298 of 2002 in the matter of the estate of Fredrick Gatimu Kathiru (Deceased), and Nakuru High Court Succession Cause No. 244 of 1992 in the matter of the estate of Kipyegon Chepngeno (Deceased). Counsel urged this court to allow the application.

The respondents counsel, C. K. Nzili and Company Advocate filed their written submissions on 22nd February 2016.

Counsel relied on documents filed in the magistrate's court and the proceedings therein. Counsel contended that all legal processes during the issuance and confirmation of the Grant of Letters of Administration were adhered to. It was contended by counsel that the applicant was aware of the progress of the succession proceedings but slept on her rights and as such was coming to equity too late and without clean hands. In counsel's view the applicant should have disclosed why she did not act in time to pursue her interests. Counsel wondered why the applicant did not pursue her interest in the magistrate's court while she was in fact a party to the succession proceedings therein. According to counsel, the applicant had not proved to the required standard that there was fraud on the part of the petitioner.

Counsel also said that prayer 1, 2, and 3 of the application were for grant of injunctions on land and that this court did not have jurisdiction to grant such orders. According to counsel the said prayers were

brought in the wrong forum as they are for the Environment and Land Court. Counsel also argued that the applicant had not demonstrated that there were other beneficiaries as no other affidavits had been filed by the said beneficiaries. It was also counsel position that on the supplementary affidavit, she had established possession of applicants other parcels of land including Kiomo/Mbondoni/2139 where she was the sole beneficiary.

Counsel contended further that ignorance of the law was not a defence and added that there were no defects, false statements and false allegations in the lower court documents filed by the administrator. Counsel emphasized that the trial court heard viva voce evidence before confirming that the respondent was the correct beneficiary of the only asset, after the appellant choose to waive her participation in the succession proceedings and also failed to comply with the courts orders on time.

Counsel contended lastly that the case authorities cited by the applicant's counsel were clear that this court had jurisdiction or power to revoke or annul Grant of Letters of Administration. However counsel distinguished the cases from the present case, as the distribution of assets herein was fair in that the applicant had other parcels of land shared to her by the deceased before his demise.

I have considered the application, document filed, and submissions on both sides.

This is an application for revocation or annulment of confirmed Letters of Administration. Under section 76 of the Law of Succession Act (cap.160), this court has jurisdiction to revoke or annul Letters of Administration whether or not the same have been confirmed. There are several considerations or grounds listed under the section each of which can be the basis for revoking or annulling a Grant of Letters of Administration.

Subordinate courts do not have power to revoke or annul letters of administration and an application for revocation or annulment of Letters of Administration from the subordinate court has to be made in the High Court in accordance with Rule 44 of the Probate and Administration Rules. However for matters that are determined by the High Court, the same High Court has powers to entertain, hear, and determine an application for revocation or annulment of Grant of Letters of Administration.

In my view, the applicant has come to this court correctly under the procedure provided under the law. This court therefore has jurisdiction and powers to hear and determine the present application.

It has been argued by counsel for the administrator or respondent that the applicant has come to this court with unclean hands, as she failed to pursue her cause in the succession trial court, though she was a party therein. I have perused the succession proceedings and documents filed in the subordinate court. The applicant herein Rhoda Mutemi filed a Notice of Motion as an objection to the grant of Letters of Administration to the administrator. She was then listed as an interested party in the succession proceedings together with Musyoka Mutemi and Wavaa Muli.

The application dated 27th November 2014 and filed by Nyamu and Nyamu Advocate was later on 10/12/2014 struck out on a technicality by the court on the ground that it was filed by Nyamu and Nyamu advocate who had not filed a Notice of Appointment. The evidence by the administrator was taken by the succession court the same day. It cannot thus be said that the applicant failed to pursue her interests in the subordinate court. The failure or default appears leading to the striking out of the application for objection to have been on the side of the Advocates Nyamu and Nyamu advocates.

With regard to the arguments by counsel for the administrator about wrong prayers for injunctions on land matters, it cannot be right to say that this court has no powers or jurisdiction to grant injunctions or restraining orders on matters that are before it relating to land. Section 47 of the Law of Succession Act (Cap 160), is clear that the jurisdiction of the High Court is quite broad in succession matters. It provides as follows:-

“47. The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decree and to make such orders therein as may be

expedient. Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

In my view therefore, the succession court has powers to grant restraining or injunctive orders in succession matters that are before it, whether or not the subject matter is land.

Coming to the merits of this application, it is clear to me that the respondent did not disclose the applicant either as a widow of the deceased or an interested party in the succession cause. The Law of Succession Act requires such disclosure. The forms that are filled under the Succession Rules are themselves worded in such a way that such disclosure is mandatory. In addition the law requires disclosure of all survivors and dependents who include former wives-see section 29 and 39 of the Law of Succession Act.

It is upon such disclosure that the issue of who is entitled to inherit or not to inherit will be determined factually by the court. The chief's letter to be filed with the application for Grant of Letters of Administration was meant to support or supplement this disclosure.

Instead of disclosing all the beneficiaries in the application for grant of Letters of Administration, the respondent Paul Mutemi named those people verbally as Simon Mutemi, David Mutemi, John Mutemi, Charles Mutemi, Joram Mutemi, Teresia Mutemi, Fredrick Mutemi, and Paul Mutemi on the 10/12/2014 when he testified for Confirmation of Grant. That was a great mistake in the proceedings because all those named were people who were required by the law to be disclosed in writing and to give consent to his being appointed the administrator and also give their consent to the Confirmation of Grant as well as the proposed distribution of the assets. The failure of the administrator to comply with the law means that even now this court is not certain whether all the survivors or beneficiaries are known and whether they consented to him being appointed administrator and also the Confirmation of Grant of Letters of Administration and his being made the sole beneficiary of the subject land.

The hearing of the succession case which was conducted on 10th of December 2014 also appears to be irregular as there was no contestant therein after the striking out of the objection which would have necessitated such a hearing. The proper procedure in my view, should have been to ask all survivors and interested parties to attend court and confirm whether or not they agreed to the Confirmation of Grant and proposed mode of distribution and only if one or the other of them objected, then there would be a hearing or taking of evidence in order to ascertain the validity or otherwise of that objection. As it is the proceedings were erroneously conducted as a civil case and in my view, did not comply with or serve the purposes of a succession matter for inheritance under intestacy.

As a result, of the above errors, committed by the administrator and the succession court, I find that the proceedings before the trial court were irregular. I thus revoke both the Letters of Administration issued to the administrator and the Confirmed Grant of Letters of Administration.

Consequently, I order as follows:-

1. In the interest of justice I grant the orders sought under prayer 1 of the application
2. In the meantime, I appoint both PAUL MUTEMI and RHODA MUTEMI as joint administrators of the estate of the deceased under section 66 of the Law of Succession Act. A certificate of Grant of Letters of Administration in their joint names will issue forthwith from this court.
3. The two joint administrators appointed by this court above either jointly or separately will within six months file a schedule of assets and schedule of beneficiaries to the deceased estate and proposed mode of distribution of the assets for the court to consider confirmation of grant.
4. I will fix a mention date hereafter for the joint administrators to confirm compliance with the above court orders.

Dated and Delivered in Garissa this 13th July, 2016.

GEORGE DULU

JUDGE