



REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

PROBATE AND ADMINISTRATION CAUSE NO.33 OF 2014

IN THE MATTER OF THE ESTATE OF:

DINA NAMBENGELE WANYAMA.....DECEASED

BETWEEN

DAVID WANJALA WANYAMA.....APPLICANT

AND

SAID WEKULO.....RESPONDENT

JUDGMENT

1. Before court for determination is an application dated 1st October, 2014 brought pursuant to Section 76 of the Law of Succession Act Cap.160 of the Laws of Kenya seeking for the following orders:

1. That this Honourable Court be pleased to revoke or annul the limited grant of letters of administration ad litem issued herein on 3/2/2014 to Saidi Wekulo the Respondent above named.
2. That the same be re-issued to the Applicant and or such other person this court may deem fit to appoint.
3. That all the transactions or actions carried out on the basis of the grant issued herein on 3/2/2014 be nullified.
4. That the Respondent be condemned to pay costs of this application. The said application is supported by the affidavit of Saidi Wekulo.

2. The application is based on the grounds that; the Respondent obtained the grant by concealment and/or non-disclosure of material facts; failing to obtain the consent of all the beneficiaries of the Estate of Dina Nambengele, the Respondent has used the grant fraudulently and has entered into a consent in P. M. CC No.39 of 2012 contrary to the wishes of the deceased and in gross breach of his duty and obligation as a trustee of the Estate of the deceased and all the beneficiaries. In his supporting affidavit the Applicant depones that he financed the deceased in defending in the suit mentioned above, he therefore ought to have been the administrator; the Respondent acted in secrecy without involving the family or obtaining consent of the family and the consent filed in court in this matter is null and void.

3. The Respondent opposed the application through a replying affidavit dated 26th January, 2015. He

deponed that he applied for limited grant *ad litem* for purposes of defending suit P. M. CC No.39 of 2012 with the consent of all beneficiaries and with the full knowledge of the Applicant and therefore the application is bad in law and must be dismissed. He confirmed that no succession proceedings have been filed so far.

4. I have considered the pleadings and arguments by both sides. The facts of the case are that; the deceased died interstate on the 10th of September, 2013 and left behind 8 survivors including the parties herein. She left behind property number Ndivisi/Ndivisi/784. In her life time the deceased Dina Nambengele Wanyama had been sued in PM CC No.39 of 2012 where she filed a defence denying that she had entered into an agreement to sell a portion of 1 acre to the Plaintiff in the said suit. Upon her death the Respondent obtained a limited grant *ad litem* to defend the suit. On or about the 19th of March 2014, the Respondent entered into a consent comprising the suit mentioned in the following terms:

“1. That the Plaintiff will be given the one (1) acre piece of land he bought from the land registered Ndivisi/Ndivisi/784.

2. That the Plaintiff will be given ½ acre from the registered land which will be compensation/damages/costs that he has incurred in this suit.

3. That during the process of succession and distribution of the said estate, the Plaintiff will be listed as one of the beneficiaries of the said estate.

4. That the case file shall remain open until when the Plaintiff will receive the title deed for the said land and file its copy in court for the conclusion of the case”

The above consent triggered the filing of the application before court.

5. It is not a dispute that the Respondent applied to this court for a limited grant *ad litem* on the 27th day of January, 2014. He gave his reasons as his wish to defend the suit in PM CC No.39 of 2014. He gave the asset of the deceased as Land title Number Ndivisi/Ndivisi/784. He also gave details of 7 of his siblings two of who are deceased. The chief of the area, one Samuel N. Chenonoi issued a letter giving details of some of the beneficiaries and indicated that the deceased's family had appointed the Respondent being the eldest son as the family administrator. No consent was obtained from the other beneficiaries at the time of the application. Section 55 (1) Cap 160, Law of Succession Act provides:

“55 (1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by section 77.”

6. Section 67 (1) provides:

“67 (1) No grant of representation, other than a limited grant for collection and presentation of assets; shall be made until there has been published notice of the application for the grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication and the period so specified has expired.” (Emphasize mine)

7. From the law above cited, it is clear that no assets of an estate can be distributed or divided until confirmation of the grant. Secondly, the powers conferred by a limited grant is only to collect and preserve the estate.

8. It is clear from the above that the action of the Respondent unilaterally taken without involvement of other beneficiaries. The consent he entered into does not fall within the requirement of the law either. The Respondent, in my view having failed to conduct himself within the confines of the law any consent he may have entered into, is as such null and void.

9. It is also my view that he is in the circumstances not a fit person to administer the Estate not even with limited powers earlier granted to be in the circumstance of this case, I revoke the limited grant issued to the Respondent on the 3rd day of February, 2014.

10. I hereby re-issue the same and appoint the Applicant David Wanjala Wanyama and his sister Nabwaya Wanyama as administrators with limited powers *ad litem* to protect and preserve the estate. I further direct the two to petition the court for full grant of letters of administration within 30 days of the date hereof. The Respondent do pay costs of this application.

Dated and delivered at Bungoma this 3rd day of March 2015.

ALI-ARONI

JUDGE