



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
SUCCESSION CAUSE NO.68 OF 2009

IN THE MATTER OF THE ESTATE OF NYABUTO MONDA – DECEASED

AND

RICHARD GEKONGE NYABUTO.....PETITIONER/RESPONDENT

VERSUS

CHRISTOPHER ONCHAGA NYABUTO.....APPLICANT

RULING

1. On 23rd January 2009, the Petitioner/Respondent applied for grant of letters of administration intestate in respect to the Estate of **NYABUTO MONDA – DECEASED**.
2. On 3rd June 2009, grant of letters of administration intestate was issued to the Respondent herein which grant was confirmed on 30th April 2010. The only property belonging to the deceased that was the subject matter of the Succession Cause was LR. No.**Nyaribari Chache/Boburia/3647** measuring **1.11 HA** (*hereinafter in this ruling referred to as the “suit land”*).
3. The said property was at confirmation of grant distributed equally to all the 5 listed beneficiaries with each of them receiving 0.56 Ha.
4. By a Chamber Summons application dated 11th March 2015, the applicant herein now seeks the revocation and/or annulment of the said grant confirmed on 30th April 2010 on the main grounds that:
 - i. **The grant was obtained fraudulently by making of a false statement and or by concealment from the court that the applicant has an interest as a son on the portion of land parcel No.Nyaribari Chache/Boburia/3646.**
 - ii. **That the orders sought by the interested son will assist the court to properly determine issues on trial and effectively meet the ends of justice.**
 - iii. **That the filling of this application has been urgently made since there is a purchaser on the ground and has blocked access entry to my plot which issue I have reported to Kisii Police Station OB/33/20/11/2014.**
 - iv. **That the grant of orders to this application will not prejudice the applicant/petitioner herein in any manner whatsoever.**

- v. **That this application has been brought in good faith, without malice and in the interest of justice.**
- vi. **That letters of administration therein were obtained by concealment, misrepresentation and concealed through facts to the court and obtained the grant for selfish ends of selling and misusing our father's estate.**
- vii. **That the grant was obtained fraudulently, making false statements, signature and by concealment from the court of something material to the case reason therefore I pray for revocation of the grant.**
- viii. **That the cost of the application be provided for.**

5. The application was not opposed by the Respondent who did not file a replying affidavit despite having been duly served with the application. On 12th June 2015, the applicant filed a further affidavit in support of his application in which he reiterated the grounds he had stated in his earlier affidavit in support of the application and added that his signature was forged in the pleadings filed in court and further, that his name was misrepresented as **Joseph Onchaga Nyabuto** instead of **Christopher Onchaga Nyabuto**.

6. In the further affidavit, the applicant added that the grant was unlawfully obtained with intent of selling the suit land to one **Augustine Memba** to whom he alleged, the Petitioner had sold the whole of his (Petitioners) portion of land.

7. On 19th June 2015, the court ordered that this application be canvassed by way of written submissions. The Applicant filed his submissions on 2nd October 2015.

8. The Applicant submitted that the Respondent did not act in good faith when applying for the grant of letters of administration as he (*respondent*) failed to cater for the interests of all the beneficiaries to the estate. The Applicant contends that he was never informed about the Succession case and he never signed any document in respect to the said cause and therefore, any document that was presented to have been signed by him was a forgery-intended to lock him out as a beneficiary.

9. The Applicant maintained that he never signed any consent document in respect to the Succession Cause and that his name was intentionally omitted and misspelled as JOSEPH ONCHAGA NYABUTO instead of CHRISTOPHER ONCHAGA NYABUTO which misspelling will have the effect of denying him a share of the estate as a beneficiary.

10. The Applicant further stated that the Petitioner had already sold his share of the estate to a third party who had blocked his (*applicant's*) access road to his land and that the Respondent obtained the grant with the sole intention of selling his whole share to one Augustine Memba who was a purchaser. In the Applicant's further affidavit he alleged that the Respondent had sold the whole of his share of the estate to a third party.

11. **Section 76 of the Law of Succession Act** provides as follows:-

"A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion:

- a. **That the proceedings to obtain the grant were defective in substance;**
- b. **That 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;**
- c. **That 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 was made in ignorance or inadvertently;**

- d. **That the person to whom the grant was made has failed, after due notice and without reasonable cause either:-**
- i. **To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or**
 - ii. **To proceed diligently with the administration of the estate; or**
 - iii. **To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of Section 83 or has produced any such inventory or account which is false in any material particular; or**
- e. **That the grant has become useless and inoperative through subsequent circumstances.”**

The failure to comply with mandatory provisions renders the process defective, while the non-disclosure or concealment of a material fact such as the number of the beneficiaries amounts to misrepresentation.

12. From the Applicant's pleadings and submission I note that the main basis of the Applicant's application for revocation of grant is **firstly**, that his name was omitted/misspelt in the application for grant and **secondly**, that the Respondent had sold off his (*respondent's*) share of the estate. What this court has to determine is whether the misspelling of the Applicant's first name as Joseph, instead of Christopher, amounted to an act of fraud thereby excluding him from inheriting the estate of the deceased.

13. I am not satisfied that the misspelling of applicant's name in the succession pleadings amounted to fraud or misrepresentation. The applicant has not stated that he was completely omitted or left out of the succession proceedings. All he says is that his correct name was not presented as it was stated as Joseph Onchaga Nyabuto instead of Christopher Onchaga Nyabuto.

14. I have perused the chief letter dated 9th February 2009 that was used in the application for grant of letters of administration and I note that in the said letter, the applicant's name appears as Joseph Onchaga Nyabuto I/D No.0303985 while in annexure "CON4" to this application, the applicant's identity card reads Christopher Onchaga Nyabuto I/D No.0303985. Clearly, and in view of the fact that the identity card numbers are the same, it can safely be said that the name Joseph refers to the Applicant herein and it could have been a genuine mistake on the part of the chief who wrote the initial letter identifying the beneficiaries to the deceased's estate and was not meant to disinherit the applicant his rightful share of the estate.

15. To my mind, the mere of misspelling of names in the certificate of confirmation of grant does not warrant the revocation of the entire grant as the error can be corrected through the filing of summons for rectification of certificate of confirmation of grant.

16. On the ground of forgery and fraud on the part of the Respondent, I similarly find that this ground has not been proved so as to warrant the revocation of the grant, the reason being that at the confirmation of grant each of the beneficiaries has received an equal share of the deceased's estate as follows:

- i. **Richard Gekonge Nyabuto - 0.56 Ha.**
- ii. **John Bichage Nyabuto - 0.56 Ha.**
- iii. **Joseph Onchaga Nyabuto - 0.56 Ha.**
- iv. **Simon Onsano Nyabuto - 0.56 Ha.**
- v. **Teresa Nyaboike Monda - 0.56 Ha.**

I find that the above mode of distribution was fair to all the beneficiaries including the applicant herein. In any event, the applicant does not say if he was entitled to a larger portion of the estate or if the Respondent got a larger share as compared to the rest of the beneficiaries.

17. I find that the mere fact that the Respondent could have sold part or the whole portion of his inheritance, after the confirmation of grant, does not constitute fraud as any beneficiary is at liberty, upon receiving his rightful share of the estate, to deal with it any manner that he deems fit including selling it.

In any event, the allegation of sale of part of the suit land was not proved by the Applicant in his affidavit in support of the application.

18. Lastly, the Applicant's claim that a purchaser has blocked the access road to his land is a claim that falls within the investigative and prosecution arm of the government through criminal proceedings if a crime is established or alternatively, the institution of separate civil proceedings for appropriate orders against the offender. Blocking of an access road is not one of the grounds, provided for under **Section 76 of the Law of Succession Act**, for the revocation of grant.

19. In the end, I find that revocation and/or annulment of grant would be merely an academic exercise that would not serve any useful purpose whatsoever other than protracting and re-opening a succession cause that had long been concluded more than 5 years ago. I reiterate that the most appropriate application would have been for the applicant to seek a rectification of his names on the certificate of confirmation in view of the fact that he was allocated an equal share of the estate as all the other beneficiaries.

20. In the end, I disallow the applicant's said application dated 11th March 2015 with no orders as to costs.

Dated, signed and delivered in open court this 6th day of November, 2015.

HON. W. OKWANY

JUDGE

In the presence of:

- N/A for the Petitioner/Respondent
- M/S Mbaka for the Applicant
- Mr. Ogega: court clerk