



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 663 OF 2011

IN THE MATTER OF THE ESTATE OF MARIKO NJERU MIGWI- DECEASED

ANTONY KARUKENYA NJERUAPPLICANT

VERSUS

THOMAS M. NJERURESPONDENT

J U D G M E N T

The applicant Antony Karukenya Njeru through an application dated 16th November, 2011 filed pursuant to Section 76 of the Law of Succession Act and Rule 44(1) of the Probate and Administration Rules seeks an order that the temporary letters of administration granted upon the respondent Thomas M. Njeru on 3rd May, 2011 be revoked or annulled on the grounds that:-

1. *That the proceedings to obtain the said grant before the subordinate court were defective in substance.*
2. *That the court to which these proceedings were filed had no jurisdiction to determine the matter under the provisions of S.48 of Cap.160-in view of the enormity of the value of the estate of the deceased.*
3. *That all the deceased estate has not been included in the succession cause.*
4. *That the grant was obtained by means of untrue allegation of fact essential in point of law namely-the devaluation of the estate.*

The application is supported by the applicant's affidavit dated 16th November, 2011 in which it is deponed that the deceased Mark Njeru Migwi passed in 1999 and temporary grant of letters of administration was issued to the respondent on 3rd May, 2011. That the court which issued the grant lacked jurisdiction in view of the value of the estate of the deceased which comprised of:

- a. *L.R No.S.Tharaka/Tunyai/512,513,514,878,and 879.*
- b. *L.R. Nkuene/Nkumari/1678.*
- c. *L.R. Marimanti/2148*
- d. *Plots Nos 27 and 38 Tunyai marked*
- e. *Plots Nos. 2,17 and 150 Ciakariga market*
- f. *Motor Vehicles Reg. No.KVE 549(Land Rover) and Reg. No.KSM 411(Lorry).*

The applicant further deponed that the respondent in his affidavit of support in his petition dated 31/1/2011 had estimated the value of the deceased estate at Kshs.200,000/- which is still beyond the

jurisdiction of the Principal Magistrate's court. He further contended the respondent did not list and/or include all known assets of the deceased. The applicant further deponed that he is son to the deceased and that he is seeking that he be appointed jointly with the respondent as joint administrators.

The applicant in his further affidavit dated 7th February, 2014 deponed that the respondent is a person who cannot be trusted to jointly administer the deceased estate as he has already sold off part of the estate even before confirmation is done, including a plot at Tunyai and a vacant plot at Ciakariga market to one Njau and the lorry registration No.KSM 481 and is yet to account for the proceeds. The applicant further deponed that in November, 2013 he was preparing a portion of land No.S.Tharaka/Tunyai/513 which he occupies for cultivation when the respondent assaulted the tractor driver and told him not to till any land pursuant to applicant's instructions. The applicant concludes by averring that the respondent's intent is to benefit from the deceased whole estate at the exclusion of other beneficiaries. The applicant further deponed that he and the respondent comes from different households and as such it will be prudent for the court to appoint him as a joint administrator to ensure the interest of other beneficiaries who may be disadvantaged by the administration of the respondent are protected.

The respondent is opposed to the applicant's application. The respondent through a replying affidavit dated 16th April, 2013 deponed that he listed all deceased properties known to him at the time of petitioning for the grant but have since discovered other properties of the deceased. He admitted properties listed by the applicant in his supportive affidavit belong to the deceased with the exception of plot No.38 Tunyai Market and L.R. Tunyai 878 which has been subdivided into various portions of land and transferred to 3rd parties and are subject of litigation in Marimanti Civil Case No. 7 of 2011. The respondent further deponed there is a motor vehicle Reg. No.KQJ 293 Land Rover which is in the custody of the applicant. The respondent contends that the applicant has been a big problem to the family and will make the administration of the deceased estate very difficult if he is appointed a joint administrator. He further contends that he intends to faithfully administer the estate and distribute the estate fairly to all beneficiaries including the applicant. The respondent insists the administration of the deceased estate will be difficult to administer if the applicant becomes an administrator and opposes his appointment as a joint administrator.

When the application came up for hearing both counsel made their respective submissions based on the contents of their respective clients affidavits. I have very carefully considered the counsel opposing positions, the contents of the application, and the affidavits in support and the replying affidavit in opposition to the application as well as the law related to the subject matter before me.

The issue for determination in this case can be summarized as follows:-

- a. **Whether the court to which the respondent had filed the petition had jurisdiction to determine the estate of the deceased herein in view of the enormity of the value of the estate of the deceased.**
- b. **Whether the proceedings to sustain the grant before the subordinate court were defective in substance and whether grant had been obtained by means of untrue allegation of fact essential in point of law, namely, the devaluation of the estate?**
- c. **Whether temporary letters of administration granted upon the respondent on 3rd May, 2011 should be revoked or annulled?**
- d. **Who should be appointed as the administrators?**

The applicant in his affidavit has listed several properties that comprised of the deceased estate. The properties include several agricultural lands, commercial properties and vehicles. The applicant did not give the value of the said properties; but contends there value is above the Principal Magistrate's court in succession matters. The respondent does not deny that the properties belong to the deceased estate save plot No.38 at Tunyai Market and LR Tunyai 878. He also admits other properties of the deceased estate have been excluded as per the list of the assets made by the applicant. He has even in his replying affidavit conceded M/V Reg. NO. KQJ 293 Land Rover which he did not list belonged to the deceased estate.

Section 48 of the Law of Succession Act provides:-

“48. (1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a resident magistrate shall have jurisdiction to entertain any application other than an application under section 76 and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings:

Provided that for the purpose of this section in any place where both the High Court and a resident magistrate’s court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act.....”.

In view of the above-mentioned section it is expressly clear that a Magistrate court has no jurisdiction to deal with a succession cause in respect of an estate whose gross value exceeds Kshs.100,000/-. The listed assets of the deceased estate though no valuation had been filed being lands, plots and motor vehicle by all means are worthy more than Kshs.100,000/=. The respondent in Form P&A 5 gave the value of the deceased estate at Kshs.200,000/= notwithstanding he had omitted to include L.R. Marimanti/2148, Plots Nos 27 Tunyai market, Plots Nos 2, 17 and 150 Ciakariga market, and all motor vehicles Reg. No.KVE 549, KSM 411 and KQJ 293. Taking all the above into account the gross value of the deceased estate would be above Kshs.100,000/-.

The upshot is that the subordinate court to which the respondent had filed the petition lacked jurisdiction to entertain and determine the issues related to the administration of the estate of the deceased in view of the enormity of the gross value of the estate of the deceased. The subordinate court acted without jurisdiction and all proceedings before the said court were and are a nullity.

The second issue for consideration is whether the proceedings to obtain the grant before the subordinate court were defective in substance and whether the grant had been obtained by means of untrue allegation of facts essential in point of law namely the devaluation of the estate.

The respondent in Form P&A 5 gave the value of the deceased estate at Kshs.200,000/=. He did not controvert the applicant’s application that he had omitted to include all deceased estate. He did not challenge the applicant’s contention on the court’s lack of jurisdiction nor did he deny that he had devalued the gross value of the deceased estate. These were material facts within the respondent’s knowledge yet he deliberately proceeded to petition for a grant of letters of administration of the deceased estate and obtained a temporary grant by means of untrue allegations of fact essential in point of law. Furthermore a quick perusal of the forms filed at the subordinate court it is revealed that the respondent did not file Form 38 which is mandatory by virtue of Rule 26(a) and (2) of the Probate and Administration Rules which provides:-

26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”

The respondent was required to file Form 38 as per provisions of Rule 26(2) of the Probate and Administration Rules which mandates a petitioner to obtain consent to the making of the grant of administration intestate to person of equal or lesser priority. The applicant who is of equal priority by virtue of Rule 26(2) of the Probate and Administration Rules did not execute any consent in favour of the respondent nor did he renounce his rights to petition for the grant and as such the proceedings to obtain grant before subordinate court were defective in substance and grant was obtained by means of untrue allegation of facts essential in point of law.

The respondent in Form P&A 80 stated that every person having an equal or prior right to a grant of representation had consented or renounced such right or has been issued with a citation to renounce such right and apply for a grant of representation and not done so. Are the contents of the Form P&A 80 which duly signed by the respondent true? The answer is obvious. The Form has untrue allegation and it is clear the respondent is in breach of Rule 26(2) of the Probate and Administration Rules. He lied to the court to obtain grant of letters of administration of the deceased estate.

On the issue number three, having found that the proceedings to obtain grant before the subordinate court were defective in substance and that the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently; I am satisfied the grant ought to be annulled.

The last issue is on who should be appointed as the administrator or administrators to the deceased estate. **Section 66 of the Law of Succession Act** gives this court final discretion as to the person or persons to be granted letters of Administration; giving preference to certain persons to administer estate where the deceased died intestate:

Section 66 of the Law of Succession Act provides:-

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

(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 interests as provided by Part V;

(c) the Public Trustee; and(d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”

I have carefully considered the respondent's and applicant's affidavits and their counter accusations and the fact that none of them is without blame in the way they have handled the deceased estate. I have noted that both are persons of equal priority by virtue of Rule 26(2) of the Probate and Administration Rules. That each feels there would be no fairness if one is allowed to administer the estate alone. That the two come from two different houses and apart from their conflicting affidavits no other affidavits have been filed by any of the other listed 14 beneficiaries in support or in opposition of the two parties. Each claims to be fighting for the interest of the other beneficiaries. The most important thing in a success cause may be not who is the administrator, though a dishonest administrator may intermeddle with the deceased estate especially where beneficiaries are not on the lookout, but the distribution of the estate in which all beneficiaries must consent to the distribution or file protest on the distribution or their scheme of distribution for determination by the court.

Having stated the above and in the interest of justice the applicant's application is allowed as it is merited and I proceed to make the following orders:-

- a. ***The temporary Grant of Letters of Administration issued to the respondent Thomas M. Njeru on 3rd May, 2011 was issued by court without jurisdiction and the same is annulled.***
- b. ***The proceedings to obtain the grant issued on 3rd May, 2011 to Thomas M. Njeru before Subordinate court were defective in substance and the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant and the same is annulled.***
- c. ***The applicant Antony Karukenya Njeru and Thomas M. Njeru are appointed joint administrators of the estate of the deceased Mark Njeru Migwi(Deceased).***

- d. *The appointed administrators do petition a fresh for grant of letters of administration intestate in respect of the estate of Mark Njeru Migwi(deceased).*
- e. *The applicant and the respondent are step-brothers and the estate in question is their late father's estate I order therefore that each party to bear its own costs.*

DATED, SIGNED AND DELIVERED AT MERU THIS 12TH DAY OF MARCH, 2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

1. Mr. V. P. Gituma with Mr. Kahumbi for applicant
2. Mr. Murango Mwenda for the respondent

J. A. MAKAU

JUDGE