



In re Estate of Josiah Ngache Titiha alias Ngache Didia (Deceased) (Succession Cause 481 of 2008) [2024] KEHC 10570 (KLR) (26 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10570 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 481 OF 2008
SC CHIRCHIR, J
AUGUST 26, 2024
IN THE ESTATE OF THE LATE JOSIAH NGACHE
TITIHA ALIAS NGACHE DIDIA (DECEASED)**

BETWEEN

LUCAS NGACHE ALUCHIO PETITIONER

AND

JEREMIAH KOTIA NGACHE 1ST OBJECTOR

JOHN NGACHE TITIHA 2ND OBJECTOR

SOLOMON . O INGUTIA 3RD OBJECTOR

ERIAS A. MWAYA 4TH OBJECTOR

LIVINGSTONE MANDILA 5TH OBJECTOR

RULING

1. This Succession Cause relates to the Estate of Josiah Ngache Titiha (Deceased) who died on 2nd June 1991 at Matiha sub-location, kakamega county.
2. Two of his sons Lucas Ngache Aluchio, the petitioner, and Jeremiah Kotia Ingache ,the 1st Objector, were granted letters of administration intestate on 17th May 2010 by this court(Hon. Justice I. Lenaola, (as he then was)).
3. On the Application for confirmation of grant , there were some variations on the proposed mode of distribution of land parcel Botsoso/ ingotse/ 447 .(The suit property) The the 1st objector/ administrator listed 16 beneficiaries. He proposed equal distribution of 2.5 acres each of the suit property.



4. In a ruling dated 18th October 2011, Hon. Justice Lenaola (as he then was) ordered that the suit property be divided equally amongst the beneficiaries and the grant was confirmed on those terms and a certificate issued.
5. By a Notice of motion dated 22nd October 2012, sought an order directing the District land registrar and the district surveyor visit the land parcel No. Butso/Ingotse/477 (suit property)and demarcate it accordance with the shares allocation in the certificate of confirmation of Grant. Those orders were granted.
6. On 8th October 2014, the the 3rd , 4th and 5th objectors/ Applicants, herein filed summons for revocation of grant dated 4th October 2014 . The objectors further seek that a fresh grant be issued to the 1st and 2nd objectors. It is this summons that is coming up for determination.
7. Although, the court had earlier directed that the summons be prosecuted by way of oral evidence , on 03/10/2023 the parties requested to proceed by way Affidavit and submissions only. This prayer was granted.

The Applicants' case

8. The grounds upon which revocation is sought is that : the grant was obtained fraudulently by making of false statement of facts and by concealment from the court weighty and material matters; that the proceedings were defective in substance in that the dispute is actually between the petitioner and the 1st objector relating to some 10 acres disputed piece of land; that the grant has been implemented illegally, fraudulently and unfairly leading to protests and fights in the family; and finally that the distribution has omitted some of the beneficiaries.
9. In an Affidavit sworn by the 5th Objector the Applicants state that though the succession proceedings were commenced on the basis of a letter from the chief of their location, the said chief has now realised he was misled on the number of the beneficiaries; that the same chief has now done another letter which reflect the true position; that the chief has also stated that the deceased had sub- divided his land , a fact which the petitioner failed to disclose to the court.
10. He further states that their deceased father had already demarcated the suit property, measuring 16 hectares into 18 portions and had even applied to the land control board for approval on 28/9/1984. He prays that the grant be revoked on the ground that there was fraud and misrepresentation.

Respondent's case

11. In response, the petitioner states the Applicants herein were well aware of the succession proceedings and were present in court when the grant was confirmed.; that since the certificate of confirmation of grant was issued, the demarcation has been done and the beneficiaries have since moved into their allocated portions of the suit property
12. The respondent further states that the objectors ought to have moved to the court of Appeal if they were not satisfied with Justice Lenaola's orders of 18/ 10/ 2011, confirming the grant.
13. The petitioner asserts that it is not the mandate of the chief to try and reverse an order of the court. Further, while pointing out that the Application before court is in no way a review, there is nothing new that has come up since the grant was confirmed that would warrant a review of Justice Lenaola's orders in any event
14. The petitioner further states that , in any event the issues being raised by the Applicants were raised and considered during the hearing of the confirmation of grant.



15. It is further the petitioner's case that even though the Applicants have pleaded fraud, the particulars of the alleged fraud have not been set out; that the heirs which were allegedly left out of the distribution have not been disclosed .
16. The petitioner finally points out that the distribution that has been done is as per the certificate of confirmation and the Objectors can not purport to allege fraud when the basis of distribution was an order from the court.
17. The 1st objector filed a supplementary affidavit in support of revocation of grant. He states that his brother the petitioner had earlier sued him because of some 10 acres of land which he had bought from the deceased. That following the sale, he was issued with the title deed of land parcel No. Butso/ Ingotse/478 which Title is in his name.
18. He further states that he had objected to the initial subdivision as their father had, during his life time ,subdivided the land to all his sons and a portion to his late brother Ingutia Titiha who is the 3rd objector(sic).
19. He claimed that on 7th January 2023, the petitioner brought private surveyors to dismantle the boundaries and this has brought conflicts in the family, leading to an injury of one of the beneficiaries.
20. He finally prays that the summons for revocation of the grant be granted.

Applicants' submissions

21. The Applicants chose to address two issues in their submissions , namely:
 - a. Whether the grant of administration issued on 18/10/2011 should be revoked
 - b. Whether the deceased had distributed his estate before his death and how.
22. On the first issue the Applicants have submitted that there was an agreement to the effect that the grant need not be revoked. There were no submissions on this issue therefore.
23. On the 2nd issue , applicants submit that the deceased had distributed his land; that there is evidence that a consent had been obtained from the Land control board on 28th September 1984 and that the deceased had made all the necessary interventions for distribution including marking out the portions and the boundaries. It is further submitted that the deceased divided the land into 18 parts and left one acre for himself.
24. According to the applicant, the respondent has not brought forward any evidence to counter the evidence of the Applicants to the effect hat the deceased had sub- divided his land, and that all the heirs of the deceased , save the petitioner are in agreement with the position taken by the Applicants.
25. It is further submitted that the wishes of the deceased to distribute his estate among his sons during his life time should be adhered to and respected . In this regard the Applicants have relied on the case of Joseph wairuga Migwi vs. milikelina Ngina Munga (2016) eKLR and Grace Chebet Sisimwo & 4 others vs. Everlyne Cherukut Sisimwo & another (2019) e KLR where the court held that express wishes of the deceased ca not be ignored.

Respondent's submissions

26. It is the respondent's submission that the issues raised by the Applicants were adjudicated by the court and determined through the ruling delivered on 18/10/2011; that the distribution done was in



accordance with the said Ruling and that accordingly it can not be said that the distribution was done fraudulently, when the basis of it was a court order.

27. According to the respondent, the application was not for review of the orders or an appeal and such it should be dismissed for want of merit.
28. The respondent finally submits that from the registrar's report dated 11/10/ 20219 it was evident that the discontent on the ground was caused by some of the heirs who want to take up larger portions than those allocated to them during the confirmation of grant. To the Respondent, what remains is the full implementation of ruling of the court delivered on 18 /10/ 2011.

Determination

29. I have considered the summons, the various Affidavits and the parties submissions. I have identified the following issues for determination:
 - a) whether the grant issued on 18th may 2010 should be revoked.
 - b) Whether the mode of distribution should be altered.

Whether the grant should be annulled or revoked

30. The grounds for annulment or revocation of grant are set out under section 76 of the [Law of succession Act](#). It provides as follows: "76. Revocation or annulment of grant

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
31. The Applicant's case is that the respondent failed to disclose to the court the fact that the deceased had sub- divided his property to his children, and that some beneficiaries were left out of the distribution.
 32. Thus the real complain is against the manner in which the property was distributed and not how the grant was obtained. The Applicant has no complain in the manner that the petition for the grant was brought to court and / or prosecuted. Indeed the Applicants in their submissions have intimated that they have no issue with the Grant .That being the case, then there is no ground for the Grant to be revoked.
 33. However , I wish to point out that section 76 of the [Law of succession Act](#) deals with the annulment or revocation of grant, not the certificate of confirmation of Grant. The certificate of confirmation simply deals with the distribution of the Estate and where a beneficiary feels aggrieved with the mode



- or any other issue on distribution, his or her remedy lies elsewhere , but not revocation. I have noticed for instance that the Applicant has complained that a beneficiary by the name Juma Ngache was left out of distribution. A remedy for that is certainly not an Application for revocation.
34. Further , though not directly disclosed , it is apparent that the Applicants were dissatisfied with Justice Lenaola's ruling on the distribution of the property. My observation is based on the fact that though the Application dated 22/10/ 2008 was brought by one Jeremiah Kotia Ngache, who is the 1st objector herein, and the present one has been brought by the , 3rd to 5th objectors, the issues are basically the same namely; whether or not the deceased had distributed his property prior to his demise. That issue was determined by Justice Lenaola. It is instructive that the supplementary affidavit in support of the present Application is sworn by the said Jeremy the 1st objector herein.
 35. The said 1st objector , in the supplementray affidavit sworn in support of revocation insist that indeed the property had been distributed. This is the undated affidavit filed in court on 26th June 2018. However in the earlier affidavit sworn on 07/6/2010, in support of the confirmation of grant , the he had supported equal distribution of the suit property. It is this distribution that was adopted by Justice Lenaola.
 36. It is obvious to me therefore that the present Application is an attempt by the 1st Objector to circumvent the orders of Justice Lenaola, albeit through persons who were not directly parties to the Application dated 22/10/2008. However the 3rd to 5th objectors were beneficiaries . If any one of them was not satisfied , the remedy would have been to move to the court of Appeal or immediately seek for a review. What the Applicants are doing , are abusing and misusing of the court process
 37. Nevertheless , back to the prayers in the Application , there is no tangible evidence that the objectors herein did not participate in the succession proceedings.
 38. Further the grant was confirmed in October 2011, in which the Applicants were each allocated 2.5 acres of the suit property. There is no explanation as to why they woke up about 3 years later to realize that a certain portion of the suit property had been allocated to them in a particular manner. Their present move , in my view is devoid of sincerity and good faith.
 39. Further, am in agreement with the Respondent that there is no evidence showing that the deceased had distributed his property. The consent from the land control board is one for sub- division, not distribution of the suit property.
 40. The summons dated 4th October 2014 has no merit , it is hereby dismissed with no orders as to costs.

DATED , SIGNED AND DELIVERED AT NAIROBI, VIA MICROSOFT TEAMS, THIS 26TH DAY OF AUGUST 2024.

S. Chirchir

Judge .

In the presence of:

Godwin- court Assistant.

