



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION CAUSE NO. 367 OF 2008

IN THE MATTER OF THE ESTATE OF CHARO SANGA LUGUKIA (DECEASED)

JUDGMENT

1. The deceased herein Charo Sanga Lugukia died intestate on 18th November 1996. He was alleged to have been survived by four grandchildren namely; Lennox Nyamawi Sanga, Chrispus Muye Sanga, Danson Lugua Mazuri and Lugua Eric Gambo. According to form P and A 5, the deceased's estate comprises one asset known as Kilifi/Mtwapa/774 formally plot 473 containing four acres.
2. On 3rd December 2008, one Chrispus Muye Sanga petitioned for a grant of representation. The same was made on 6th July 2019 and issued on 16th July 2009. Later, under a summons for confirmation of grant, Lennox Nyamawi Sanga was on 16th October 2019 added as a joint administrator and the grant issued afresh. Vide summons dated 30th September 2019, the petitioner prayed for confirmation of the grant the expiry of six months notwithstanding.
3. The grant was confirmed on 16th October 2009. The court ordered that 5 acres of the land to be subdivided and sold to a third party and the proceeds be divided between the beneficiaries equally.
4. Subsequently, one Florence Dean Karimi (hereafter the applicant) filed a summons for revocation dated 2nd November 2020 claiming that the certificate of confirmation of grant was obtained without her knowledge and with the concealment from the court of material facts. That she had bought a portion of land known as Plot No 473 Mtwapa settlement area from the deceased at a consideration of kshs72, 000 vide a sale agreement dated 2nd March 1986.
5. The application is anchored on grounds stated on the face of it and averments contained in the affidavit in support sworn on 23rd November 2020 by the applicant. It is the applicant's case that, sometime on 6th March 1986, she entered into a sale agreement with the deceased for the purchase of six acres of land to be excised out of Mtwapa settlement scheme plot No 473 consisting 12 acres or thereabouts. That she paid the purchase price amounting to kshs 72,000.
6. She averred that after making full payment, she took possession of the land as per the sale agreement and developed the same by planting trees and building a temporary house. That the deceased died before he could process and transfer title to her.
7. It was further averred that the petitioners and the other beneficiaries were much aware of the sale transaction. That upon the death of the deceased, the petitioner and his co-beneficiaries encroached on his land and started cultivating. As a consequence, she instituted civil case No 3521/2009 Mombasa CM's court against the four beneficiaries of the estate seeking orders for the deputy registrar to execute necessary documents to facilitate transfer of the purchased portion of land to her.
8. That on 1st April, 2016, the court delivered its judgment in her favour. Subsequently, the petitioners/administrators appealed against the lower court decision vide civil appeal No 8 /2016. It was stated that the court upheld the said appeal thus declaring the sale agreement between her and the deceased void for want of a land control board consent.
9. She further stated that the grant was improperly confirmed before the expiry of six months without involving her as a beneficiary (creditor) hence concealment of material information pursuant to section 76 of the law of succession Act. In response, the petitioners/administrators filed a replying affidavit sworn on 27th October 2021 by Chrispus Muye Sanga with authority from the co-administrator one Lennox Nyamawi Sanga. They averred that the application was an abuse of the court process on grounds that; the applicant had filed a suit seeking specific performance but the claim was dismissed by the ELC on appeal; that the applicant has since filed another suit being ELC 231/2020 (O.S) in which she is claiming the subject property through adverse possession.
10. They denied allegations of non-disclosure of material information as the applicant was not a beneficiary in the first place. That the applicant's claim has fully been litigated upon by a court of competent jurisdiction and a determination made hence this court cannot be called again to adjudicate upon the same subject.
11. It was further contended that the suit has been filed belatedly and in bad faith the applicant having had knowledge of the succession

cause proceedings since 2009 and subsequently filed civil suit No. 3321 of 2009 culminating to a judgment delivered on 1st April 2016 on appeal and a fresh O.S in ELC No 2031 of 2020 filed long after the previous suit had been determined on appeal.

12. When the matter came up for hearing, parties agreed to dispose of the suit through written submissions.

13. The applicant through the firm of Gikandi and Co.Advocates filed her submissions on 15th June 2021 thus adopting the averments contained in the affidavit in support. Mr. Gikandi submitted that failure by the petitioners to disclose that the deceased had disposed a portion of the subject asset of the estate to the deceased is sufficient ground to allow or revoke the grant. To buttress this position, reliance was placed on the holding in the estate of **Julius Ndubi Javan (deceased) (2018) e KLR** where the court found that failure by the petitioners to disclose that the deceased had sold part of the land comprising the estate amounted to non-disclosure of material information hence the grant was revoked.

14. Counsel contended that vide rule 41 of the P&A rules, a probate court cannot confirm a grant and distribute the estate before ascertaining that the property constituting the estate is free for distribution.

15. Mr Gikandi further contended that when the deceased sold part of his land and handed over possession to the applicant, he created a constructive trust. To justify that argument, Counsel referred the court to the holding in the case of **Twalib Hatyan & Anor vs Said Saggar Ahmed al -Heidy and others (2015) e KLR**.

16. Counsel further submitted that the petitioners are guilty of non- disclosure of the fact that the applicant was a purchaser hence a creditor and beneficiary to the estate of the deceased. He opined that there is a pending suit before the ELC which must be determined before the subject property can be distributed.

17. On their part, the petitioners/respondents filed their submissions through Mwakireti Advocates on 22nd July, 2021 thus adopting the content contained in the affidavit in reply.

18. According to the petitioners, the dispute over the subject property has since been determined by the ELC court in their favour on appeal. They contended that the filing of a fresh suit is a matter yet to be determined by the ELC court and not this court hence the summons is misplaced.

Determination.

19. I have considered the summons herein, affidavit in support and the response thereof. I have also considered submissions by both counsel. The only issue that arise for determination is whether the applicant has met the threshold for revocation of the grant.

20. It is trite law that for a grant to be revoked or annulled, the applicant making such application must establish the grounds set under Section 76 of the law of succession Act which provides that;

“Revocation or annulment of 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 way 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 has ordered or allowed; 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 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

21. It is therefore incumbent upon the applicant to prove the grounds stated under Section 76 of the law of succession. This position was held in the case of **Matheka and another vs Matheka (2005) e KLR** 455 and **Jesse Karanja Gitimu Vs Mary Wanjiku Githinji (2014) e KLR**

22. However, the power to revoke or not revoke a grant is purely a matter of discretion bestowed upon the presiding Judge. See also

Wangeci Kimita and another vs Mutahi wa Kibiru C.A 80/1995 (UR)

23. The instant application is anchored on the ground of non- disclosure of material information that the deceased had sold part of the land comprising the estate to the applicant. The second ground is that the grant was irregularly confirmed before the expiry of six months.
24. I would like to start with the second ground contesting the fact that the grant was confirmed before the expiry of six months. From the record, the original grant was issued on 16th July 2009. On 5th October 2009, an application was filed seeking confirmation of the grant before the expiry of six months. The reasons cited were that there was no objection from any dependant and that all beneficiaries had consented.
25. Under section 71 (3) of the law of succession Act, a court has the discretion to confirm a grant before the expiry of six months. The prayer to confirm the grant before the expiry of six months was considered by the court and an order made on merit. This court cannot overturn its orders in an appellate capacity. To ask the court to set aside the orders will be tantamount to appealing against the impugned order. In the circumstances, I do not find that to be a ground of revocation. In any event, Section 76 of the law of succession Act does not include earlier confirmation of a grant as a ground to revoke a grant. To that extent, that ground fails.
26. As regards concealment of material information, the applicant is claiming that the petitioners were aware that he had bought land from the deceased a fact which was denied by the petitioners.
27. The question that arises for determination is, were the applicants aware of the sale agreement hence the existence of a creditor? If the answer is in the affirmative, were they under obligation to notify the applicant of the pending succession proceedings.
28. Under section 66 of the law of succession Act, a grant of letters of administration intestate is issued in order of priority starting with the deceased's surviving spouse; if not, children; if not other beneficiaries entitled under intestacy with priority according to their respective beneficial interest as provided by part V; if not, the public trustee and if not; accreditor.
29. From the above provision, the applicant herein ranks last in the order of priority. By all standards, the petitioners were entitled to take a grant of representation being the closest relatives to the deceased in order of consanguinity.
30. Was the applicant entitled to notification? According to the applicant, she came to learn of the existence of these proceedings the year 2009 when she filed civil suit No 3321/2009 claiming the right to specific performance.
31. However, despite that knowledge, no application for revocation of the grant was filed until 21st December 2020 after the hearing of a dispute over ownership of the same land up to the appeal level where the applicant's claim on ownership of part of the land constituting the estate was dismissed.
32. From the evidence on record, it would appear that the petitioners were treating the applicant as a trespasser. This claim was vindicated by the ELC in appeal No 8 /2016 where the court dismissed the claim for specific performance.
33. There is no proof that the petitioners were aware of the sale transaction between the deceased and the applicant. It is trite that he who alleges must prove. In the absence of any proof, the petitioners cannot be said to have concealed material information. To that extent, that ground fails and therefore the grant cannot be revoked.
34. However, I note from the sale agreement attached that the applicant bought land from the deceased a fact that is not specifically denied in these proceedings. Considering that there is a pending civil suit No 231/2020 before the ELC and further considering that what is in issue is ownership of land, this court has no jurisdiction to determine it with finality the same. As to whether the issue has already been determined by a competent court or not, that is a matter for ELC to determine.
35. Whether distribution of the estate was properly done or not to warrant setting aside or annulling of the certificate of confirmation of grant to include the applicant as beneficiary, I will leave it in abeyance until the civil suit pending before the ELC court is heard and determined.
36. In the event the ELC court determines the suit in favour of the applicant, then the applicant will come back seeking to review the confirmed grant to be included in the list of beneficiaries as a creditor. In exercise of this court's powers under Section 47 of the Law of succession Act and rule 73 of the P and A rules which gives this court jurisdiction and inherent powers to make any orders it deems fit for the ends of justice to be met, I will stay any further execution of the grant confirmed herein on 16th October 2009 pending the hearing and determination of ELC case No 231/2020.
37. Accordingly, the status quo obtaining shall be maintained till the conclusion of the ELC case. I decline to revoke the grant but stay further execution of the confirmed grant until the orders of the ELC in the pending civil suit.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 28TH DAY OF FEBRUARY, 2022

J N ONYIEGO

JUDGE