



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE 120 OF 2009

IN THE ESTATE OF JACOB NJIRU MBARIRE (DECEASED)

ALBERT MBARIRE.....APPLICANT

VERSUS

NICHOLAS IRERI.....1ST RESPONDENT

JOHN MIRITI MBARIRE.....2ND RESPONDENT

JUDGMENT

1. The matter for determination before this court is a summons for revocation of grant of letters of administration dated 21.09.2020 issued to the respondents herein.
2. It was the case of the applicant that the 1st respondent /administrator misrepresented facts to this court while filing the succession cause herein and further proceeded to benefit unjustly without informing and or involving the applicant herein. That the deceased is his uncle and that during his lifetime, he had apportioned the suit land herein L.R. KAAGARI/GIKUURI/T.246 - which forms part of the deceased's estate – unto the applicant's mother. That they have lived on that same land for over fifty years or so and so, they deserve the land in question since they have no other place to go and by extension that, they already acquired rights over the land through adverse possession. The applicant's case was further supported by the 2nd respondent/administrator.
3. They therefore urged this court to revoke the grant already issued to the respondents.
4. The 1st respondent on his part submitted that the applicant's mother was married to one Njeru wa Muruanjuki of Nduuri Village but after some time, the marriage broke and so she had nowhere to go and therefore, the deceased took her in. That as time moved on, the deceased herein decided to settle the applicant's mother on L.R. KAAGARI/GIKUURI/T.246 (forming the estate of the deceased herein). That when the applicant's mother passed on, the deceased allowed the applicant to bury his mother on the suit land after which, the applicant and his siblings demolished the house they were living in and went to settle elsewhere. It was his case that the applicant and the 2nd respondent/administrator are only motivated to claim the suit land since this court had apportioned the land to two of the deceased person's grandchildren (Hanny Munene and Yvonne Debenhaum) who live in Germany and Britain respectively. He thus urged this court to dismiss this application with costs.
5. Directions were taken and viva voce evidence was adduced before the court whereby the applicant urged this court to revoke the said grant while the administrator prayed that the application be dismissed with costs.
6. I have considered the application herein together with the evidence in support of the application and further the submissions of the parties and the matter for this court's determination is whether the application seeking for revocation of grant herein is merited.
7. The said application is brought under Section 76 of the Law of Succession Act Cap 160 Laws of Kenya and Rule 44 of the Probate and Administration Rules 1980. Section 76 (a) - (d) provides for revocation of grant and the circumstances under which a grant of representation may be revoked. However, from the perusal of the application herein, the applicant's ground for seeking the revocation is mainly that the respondent did obtain the grant fraudulently.
8. As such, it is clear that the application is premised on the provision of section 76(b) and which provides that a grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an interested party or of its own motion on the grounds either that the grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case.
9. It is trite, however, that the power to revoke a grant is a discretionary power that must be exercised judiciously. This was the court's view

in the case of **Albert Imbuga Kisigwa v Recho Kavai Kisigwa, Succession Cause No.158 OF 2000**). Further, in the case of **Matheka and Another v Matheka [2005] 2 KLR 455**, the court held that for a grant to be revoked/annulled, the grounds as provided for under section 76 ought to be proved with evidence. Even when revocation is by the court upon its own motion, there must be evidence to satisfy the grounds for revocation of grant. As such, any party making an application for revocation or annulment of a grant has a statutory duty to demonstrate the existence of any, some or all the ground(s) which he relies on, in challenging the grant.

10. As I have already noted, the ground in support of the applicant's application is that the 1st respondent/ administrator misrepresented facts to this court while filing the succession cause herein and further proceeded to benefit unjustly without informing and or involving the applicant herein. It was his case that he is also a beneficiary of the estate and as such he deserves a share of the estate herein; and given that he had been dispossessed, the grant thus should be revoked. The applicant's case is premised on the process of confirmation of the grant as depicted in the prayers on the face of the application.

11. The law allows for revocation of grant before or after confirmation. However, the conditions under which revocation can be done are clearly limited to obtaining of the said grant (where the proceedings to obtain the grant were defective in substance; and/or where 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; and/or where 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).

12. The Learned Judge **In re Estate of Juma Shitseswa Linani (Deceased) [2021] eKLR** held that where a person is unhappy with the process of confirmation of grant, such a person ought not to move the court under section 76 for revocation of grant. Instead, the person should file an appeal against the orders made by the court on distribution or apply for review of the said orders. This is because the court confirming a grant largely becomes *functus officio* so far as confirmation of the grant is concerned, and cannot revisit the matter unless upon review.

13. It is not disputed that the applicant is a nephew to the deceased and equally a cousin to the 1st respondent/ administrator. Further, the deceased had housed the applicant's mother on L.R. KAAGARI/GIKUURI/T.246 where upon the applicant and his siblings grew up. It is his case that he buried his mother (deceased's sister) on the suit land. On this information, the applicant believes that the suitland should thus pass to him and his siblings given that the deceased herein never sent them away for all this time and further that he has acquired the land via adverse possession. But that notwithstanding, it is of equal importance to note that the suitland forms part of the estate of the deceased herein and guided by the green card as annexed by the 1st respondent/administrator, it is quite evident that the deceased herein did not transfer the suit land to the applicant's mother. Had he wanted to, then nothing would have been difficult for him so to do, during his lifetime. It is my view that the deceased herein did not intend to gift the suit land to the applicant's mother.

14. In regard to the 2nd administrator who also called for the revocation of the grant in question, this court notes that he was present when the grant was confirmed and during that time, never raised any issue and so it is of no consequence for him to now change his tune that he all along kept quiet to avoid long court battles. I find this to be insincere on his part. Having considered the totality of the material before me, I am unable to find any merit in the application. The applicant has not demonstrated that the grant in this matter was obtained in a manner that rendered the grant defective in substance, or fraudulently by the making of a false statement, or concealment from the court something material to the case, or made an untrue allegation of a fact essential in point of fact to the case.

15. It is my considered view therefore that the averments that the respondent never involved the applicants in the succession process and further that the grant was fraudulently obtained is unfounded.

16. Having considered the application herein, the applicants did not make out a case for revocation of grant issued to the respondent.

17. In regard to the application dated 30/11/2020, the court having declined to grant the application dated 21/09/2020, this court is *functus officio* to make any orders in that application. The same is struck out.

18. In the circumstances, in view of the matters set out herein above I find that:

- i. *The application before me is unmerited and the same is hereby dismissed.*
- ii. *I make no orders on costs.*

19. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF FEBRUARY, 2022.

L. NJUGUNA

JUDGE

.....**FOR THE APPLICANTS**

.....**FOR**

THE

RESPONDENT