



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 346 OF 2005

IN THE ESTATE OF KATHENDU MUNTU WANJOYA (DECEASED)

PATRICIA GICUKU MIKA (Legal representative

of the estate NJERU MWATA (Deceased).....1ST APPLICANT

KINYUA NJUE.....2ND APPLICANT

VERSUS

ISAAC NJAGI NJUE.....RESPONDENT

JUDGMENT

1. The matter for determination before this court is a summons for revocation of grant dated the 29.05.2006.
2. It was the applicant's case that the respondent/administrator caused the sub division of Land Parcel No. KAGAARI/KANJA/ 4806 measuring one(1) acre and failed to transfer the same to the 1st applicant but rather introduced a stranger by the name Nyaga Munene through a fresh certificate of grant confirmed on 30.11.2005. That the respondent/administrator entered into a sale agreement dated 16.01.2006 with Nyaga Munene. That during the pendency of this case, the applicant Njeru Mwata passed on and so his widow Patricia Gicuku substituted him. It was their case that the respondent/administrator substituted a beneficiary with a purchaser without involving the applicants thereby disinheriting the 1st applicant. That the respondent was bound to summon the applicants in court and even produce the will purported to have been written by the deceased. He proceeded to submit that the respondent/administrator fraudulently obtained the reviewed certificate of confirmation of grant contending that there was a will; and that the law provides for a procedure where there is a will which in this case, was never followed.
3. Directions were taken and viva voce evidence was adduced before the court whereby the applicants urged this court to revoke the said grant.
4. PW1, Patricia Gicuku stated that, she is the widow to Njeru Mwata who was a son to Kathendu Muntu Wanjoya. She proceeded to adopt her statement together with the list of documents dated 07.10.2019. It was her case that she claims an acre to be excised out of the Land Parcel No. KAGAARI /KANJA/4806 which rightfully belonged to the deceased husband. It was her prayer that the grant be revoked since her late husband had been excluded from the estate.
5. PW2, Kinyua Njue stated that the deceased herein was his father and that the respondent is his brother. He adopted his statement dated 07.10.2019 as his statement in chief.
6. I have considered the application herein together with the evidence in support of the application and further the submissions of the 1st applicant given that the respondent never participated in these proceedings despite having been served.
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 obtained 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 Kawai Kisigwa, Succession Cause No.158 OF 2000**). Further, in the case of **Matheka and Another v Matheka [2005] 2 KLR 455**, wherein 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 on 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 applicants' application is that the respondent/administrator substituted beneficiary(deceased husband of the applicant) with a purchaser and thereafter made an application for the grant already issued to be amended without involving the applicant, thereby disinheriting him; the respondent/administrator fraudulently obtained the amended certificate of confirmation of grant contending that there was a will; that the law provides for a procedure where there is a will and that procedure was never followed and as such, the grant should be revoked. The applicant's case is premised on the process of confirmation of the grant herein 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. It is not in dispute that the husband to the 1st applicant was a son to the deceased. In an application dated 10/01/2005 and filed the same day, one Isaak Njagi Njue moved the court seeking orders to strike out or substitute the name of Njeru Mwata with that of Nyaga Munene in the schedule of distribution of the confirmed grant. One of the grounds in support of that application was that the deceased namely Kathendu Muntu Kanjoya had made a will to the effect that Njeru Mwata was not entitled to any portion of his estate.

13. In a replying affidavit to the application sworn on the 23/11/2005, Njeru Mwata deposed that he had no objection with his name being substituted from the grant with that of Nyaga Munene. He further deposed that he wished to follow the will of his deceased father providing that he should not acquire any portion of land out of land parcel No. KAGAARI/KANJA/ 4806. He further stated that he was contented with his portion at Kararitiri.

14. Thereafter, the respondent did on 10.11.2005 move the court to review the orders dated 11.01.1999 and substituted the applicant with one Nyaga Munene which orders were granted. From this, I find that the husband to the 1st applicant had conceded to being satisfied with the piece at Kararitiri and so seeking to revoke the said grant for Land Parcel No. KAGAARI/KANJA/4806 is definitely not warranted.

15. 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.

16. The 1st applicant argues that the respondent never informed him or served him with the chamber summons dated 10.11.2005 reviewing the certificate of confirmation of grant issued 11.01.1999 thereby substituting the 1st applicant's name with that of Nyaga Munene, through the fresh certificate on 30.11.2005; but having considered the totality of the material before me, I am unable to find any merit in the application. The 1st 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 concealed from the court something material to the case, or made an untrue allegation of a fact essential in point of fact to the case.

17. It is my 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.

18. Having considered the application herein, the applicants did not make out a case for revocation of grant issued to the respondent. In the circumstances, in view of the matters set out above I find that:

i. The application before me is unmerited and it is hereby dismissed.

ii. Costs to the respondent.

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