



REPUBLIC OF KENYA



KENYA LAW
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**Njue & another v Nderi & another (Civil Appeal 13 of 2020)
[2022] KEHC 3151 (KLR) (26 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 3151 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 13 OF 2020
LM NJUGUNA, J
APRIL 26, 2022**

BETWEEN

JAMES NJERU NJUE 1ST APPELLANT

ALFRED NJAGI RUKUNGI 2ND APPELLANT

AND

DAVID NJUE NDERI 1ST RESPONDENT

GITHUMBU NJERU 2ND RESPONDENT

JUDGMENT

1. The appeal herein arises from the ruling of Hon. C. Kirira RM in Senior Principal Magistrate's court at Runyenjes in Succession Cause No. 11 of 2017 delivered on the 20th February, 2020.
2. The said ruling was in respect to the application dated 27th day of June, 2016 which was brought by the appellants herein, seeking the following orders;
 1. That the grant of letters of administration made to David Njue Nderi, on the 14th January, 2016 and confirmed on the 15th January, 2016 in Runyenjes PMCC Succession Cause No. 147 of 2015 be revoked and/or annulled and the estate be distributed afresh.
 2. The court be pleased to issue a prohibitory order against land parcel Kyeni/Kigumo/4386 now registered in the name of the interested party, the 2nd respondent herein.
 3. That land parcel Kyeni/Kigumo/4386 do revert in the name of the deceased for fresh distribution.
 4. That the Deputy Registrar of this court be authorized to avail to this court Runyenjes PMCC Succession Cause No. 147 of 2015 to facilitate the hearing and determination of the instant cause.



5. Costs of the application be provided for.
3. The application was premised on the annexed affidavit of James Njeru Njue, the 1st appellant and on the grounds on its face.
4. The deponent avers that the letters of administration intestate made to the 1st respondent herein as stated hereinabove were confirmed before the expiry of statutory six months. That the 1st appellant's interest in the estate was that of a purchaser of LR. Kyeni/Kigumo/4386 which he had purchased from the deceased which interest the respondents were aware of, given that he has buried his mother in the said parcel of land yet the 1st respondent did not engage or involve him in the succession cause.
5. He further deposed that the deceased had taken him to the Land Control Board with a view to transferring the said land to him. On the other hand, he averred that the interest of the 2nd appellant in the estate was that the deceased had gifted him Kyeni/Kigumo/4387 on account of the 2nd appellant having taken care of him from 1980 – 2015; having paid Kshs. 65,000/= to one Daglous Njoka being refund of purchase price and interest thereon for a rescinded agreement between the deceased and the said Daglous and paying a fine for the deceased after he was convicted of stealing. Further that the deceased having no child or any other relative had always told the 2nd appellant that land parcel Kyeni/Kigumo/4387 was his.
6. The 1st appellant contended that the procedure by which the 1st respondent obtained letters of administration was procedurally defective in substance and form in that, the interested persons were not involved or engaged despite the 1st appellant having been named in the chief's letter. Further that the 1st respondent is not a son of the deceased and he has never lived with or cared for the deceased during his life time.
7. It was the appellants' case that the 1st respondent has already disposed off Kyeni/Kigumo/4386 which he has sold to the 2nd respondent but Kyeni/Kigumo/4387 remain intact as the 2nd appellant has placed a restriction on the said parcel of land. That the 1st respondent lied to the Land Registrar that title deeds for the suit land had been lost when he knew that the deceased had given them to the 2nd appellant. They urged the court to grant the orders sought in the summons.
8. The 1st respondent opposed the summons vide a replying affidavit that he swore on the 25th August, 2016 on his own behalf and that of the 2nd respondent. He averred that the deceased had subdivided land parcel No. Kyeni/Kigumo/4386 into different portions and one of them being Kyeni/Kigumo/3433 had been transferred to the 1st appellant and land parcels Kyeni/Kigumo/3435 and 4388 had been transferred to the 2nd appellant. He alleged fraud on the part of the appellants. Further that since the deceased died on 18th August, 2015, he could not understand how he could take the 1st appellant to the Land Control Board on 6th November 2015 for transfer of land parcel No. Kyeni/Kigumo/4386. That the 1st appellant having been given Kyeni/Kigumo/3435 and 4388, they have no legal basis to claim land parcel Kyeni/Kigumo/4386 and 4387 but are only keen on claiming twice, the estate of the deceased. He urged the court to dismiss the application.
9. The learned magistrate heard the summons by way of submissions and dismissed the same. The appellants having been dissatisfied with the ruling have moved this court by way of the memorandum of appeal dated 6th day of March 2020 wherein they have listed ten (10) grounds of appeal.
10. When the appeal came up for hearing, the court gave directions on filing of submissions but only the appellant complied with the directions. The matter was listed for mention on the 6/12/2021. Before the said date counsel for the respondents wrote the letter dated 27/01/2021 requesting for a mention



date to enable the respondents file their submissions but even after the court gave them the opportunity to do so, they did not file any submissions.

11. The court has carefully considered the grounds of appeal and the submissions filed by the appellants. The court has also considered the application that culminated to the ruling the subject of this appeal, together with the affidavits both in support and in opposition to the same plus the annexures.
12. The said application was mainly brought under Section 76 of the *Law of Succession Act* Cap. 160 Laws of Kenya and Rules 44, 49 and 73 of *Probate and Administration Rules*. 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, the appellants ground for seeking the revocation is mainly that the procedure by which the 1st respondent obtained letters of administration were procedurally defective in substance and form in that, all the interested persons were not involved in the process of obtaining the grant. Further that, the 1st respondent obtained letters of administration (grant) by concealing material facts to the making of the grant particularly that the petitioner was not a son of the deceased and that the appellants had vested interest over the estate of the deceased in that the 1st appellant was a creditor whilst the 2nd appellant had been given some title deeds as a reward for having taken care of the deceased from 1980 to 2015.
13. 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 a false statement or by the concealment from the court of something material to the case. It is trite, however, that the power to revoke a grant is a discretionary power that must be exercised judiciously but the grounds as provided for under Section 76 ought to be proved with evidence – see the case of *Imbuga Kisigwa Vs Recho Kawai Kisigwa*, Succession Cause No. 158 of 2000. Further, even when the revocation is by the court on its own motion, there must be evidence to satisfy the grounds for revocation of the grant – see the case of *Matheka & another v Matheka* [2005] 2KLR 455. It is the duty of the party making the application for revocation or annulment of a grant to demonstrate the existence of any, some or all the grounds which he relies on in challenging the grant.
14. As I have already noted, the ground in support of the application was that the 1st respondent concealed material facts and that all the interested parties did not participate and/or were not involved in the process of obtaining the grant.
15. 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 grant were defective in substance; and/or where the grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case; and/or where the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.
16. The appellants in their submissions contended that despite the 1st respondent knowing that the appellants had an interest in the estate, he failed to disclose that fact to the court. In considering this ground of appeal, the court notes that in the introduction letter by the chief, the 1st appellant in named as a creditor to the estate. The 1st appellant avers that he was not involved in the process in any way yet the 1st respondent was aware of his interest in the estate of the deceased. Under Section 76 of the *law of Succession Act*, the court is empowered to revoke or annual a grant on the application of any interested party or of its own motion.



17. As the court of appeal observed in Civil Appeal No. 2 of 2014 (Kisumu) *Musa Nyaribari Gekone & 2 others vs Peter Mijenda & another*, the expression “any interested party is wide enough to cover a person who claims to have purchased an asset of the estate”.
18. In his replying affidavit to the summons for revocation of the grant dated the 27th June, 2016, the 1st respondent in paragraph 9 admitted that the appellants had been given land parcels Kyeni/Kigumo/3433 for the 1st appellant and land parcels Kyeni/Kigumo/3435 and 4388 for the 2nd appellant and therefore, according to him they had no right to claim Kyeni/ Kigumo/4386 and 4387. This is a clear admission that the appellants have an interest in the estate of the deceased and therefore qualify as interested parties under Section 76 of the *Law of Succession Act*.
19. The other ground of appeal is that the learned magistrate fell into error by failing to find that the grant was unprocedurally confirmed having been issued on 14th January, 2016 and confirmed on 15th January, 2016 which was the following day. Under Section 71(1) of the *Law of Succession Act*, a grant of representation ought to be confirmed after the expiration of a period of six months or such shorter period as the court may direct under subsection (3) which provides that the court may on the application of the holder of a grant of representation, direct that the grant be confirmed before the expiration of six months from the date the grant was issued if the court is satisfied with the conditions given under subsection 3. In the case herein, the 1st respondent did not make an application for confirmation of the grant of letters of administration before six months and no reasons were given why it was confirmed before that statutory period. It is therefore clear that the grant was obtained unprocedurally.
20. The appellants also complained that the trial magistrate fell into error by treating the pleadings and submissions of the parties as a full hearing while according to them all what was required of the trial court was to make a finding and hold that either any of the grounds or none of the grounds set out in Section 76 had been proved. In regard to this ground, the court has perused the record of the proceedings before the trial court and has noted that when the summons came up for hearing, parties by consent agreed to dispose off the same by way of written submissions and both complied by filing of the same. The learned magistrate therefore cannot be faulted for proceeding the way he did. However, in my considered view, with the material that was before the court, the trial magistrate could not have been in a position to comprehensively deal with the issues before him in proceeding by way of submissions. It could have helped if he had taken viva voce evidence as some of the evidence and facts could have come out clearly, and that way; he could have been able to interrogate the evidence in a clearer way.
21. Having made the above observations and analyzed the matter as hereinabove, I come to the conclusion that the appeal has merits and I hereby allow the same.
22. The ruling of the trial magistrate dated and delivered on the 20th February 2020 is hereby set aside and is substituted with an order revoking the grant issued to the 1st respondent on the 14th January 2016 and confirmed on the 15th January, 2016.
23. Each party shall bear its own costs of the appeal.
24. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF APRIL, 2022.

L. NJUGUNA

JUDGE

.....for the Appellants



.....for the respondents

