



In re Estate of Kari Jacobs Ruedin (Deceased) (Succession Cause 421 of 2014) [2022] KEHC 12763 (KLR) (24 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12763 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 421 OF 2014**

**JN ONYIEGO, J
AUGUST 24, 2022**

IN THE MATTER OF THE ESTATE OF KARI JACOBS RUEDIN(DECEASED)

BETWEEN

**SHEILA NKATHA MUTHEE (AS ADMINISTRATOR OF THE ESTATE OF
KARI JACOBS RUEDIN- DECEASED) 1ST PETITIONER
HANSPETER RUEDIN 2ND PETITIONER
ROLAND RUEDIN 3RD PETITIONER**

AND

**ALPHONSE MWANGEMI MUNGA & 11 OTHERS (SUING ON THEIR
BEHALF AND ON BEHALF OF 367 EMPLOYEES OF AFRICAN SAFARI CLUB
LIMITED) APPLICANT**

AND

**STEPHEN KIMANI KARUU T/A KIRIIYU MERCHANTS AUCTIONEERS
FRANK NEUGEBAUER ERDEMANN PROPERTY LIMITED & 11
OTHERS AFFECTED PARTY**

RULING

1. This matter has been to several courts ranging from Employment and Labour Relations Court, Environment and Land Court, Court of Appeal and now the Probate Court. It all began before the Industrial court vide the Industrial cause No 133 of 2008 where the claimants totaling 367 through their representative one Alphone Mwangemi Munga and 9 others sued African Safari Club for unlawful dismissal hence prayed for payment of their terminal dues, gratuity and certificate of service.
2. On April 28, 2011, the Industrial court delivered its judgment thus granting the orders sought. Unable to execute the award, the claimants applied on September 8, 2011 for summons requiring the directors



- of African Safari Club to be examined on the identity and location of company properties and produce books of accounts to facilitate recovery of the outstanding amount totaling to Kshs 137,400,025. Unfortunately, by December 11, 2013 when the summons came for hearing, Kari Jacobs Ruedin the deceased herein had died.
3. However, the remaining directors entered into a consent through their lawyers before Nduma J for plot No MN/1/1515 CR No 1337 to be sold by auction and the proceeds thereof be used to offset the claim/award. The property was subsequently sold to Erdemman property limited.
 4. Upon discovery of this orders, Sheila (hereafter the respondent), filed succession cause No 305 of 2013 in respect of the estate of Kari Jacobs Ruedin through which she obtained a grant of letters of administration ad Colligenda bona for purposes of suing. She again filed High Court Petition number 24 of 2014 through which she obtained an injunction restraining the auction of the only asset of the estate which the Industrial Court had ordered sold.
 5. Subsequently, she proceeded to file an application dated January 30, 2013 before the industrial court seeking review and setting aside of the consent order authorizing the sale of the said property. After considering the review application, the Hon. Judge dismissed the same on grounds that Sheila had no capacity to represent the estate. Consequently, the auction went on as scheduled.
 6. Aggrieved by the dismissal application, Sheila moved to the court of appeal vide C. Appeal case No 314 of 2014 challenging the consent order and subsequent sale. Unfortunately, the court of appeal dismissed the appeal thus upholding the ruling of the Hon Judge on December 8, 2016.
 7. Undeterred, the respondent herein (Sheila) moved back to the Industrial Court seeking review orders against the consent order aforesaid. Upon hearing the application dated June 27, 2020, the court dismissed it on November 19, 2021 on grounds of being resjudicata.
 8. Meanwhile, in the course of this struggle to set aside the orders for sale of the said property, Sheila petitioned this court on October 1, 2014 through this file seeking a full grant of letters of administration intestate in her capacity as a friend and counsel to the deceased (Jacobs' family). In the petition, the sons of the deceased known as Hanspeter Ruedin and Roland Reudin were named as the survivors.
 9. A grant of letters of administration intestate was issued on March 22, 2016 and subsequently confirmed on May 16, 2016 with the estate indicated as comprising plot No. NM/1515 CR 13371 6.03 acres, shares, furniture and a generator shared out equally.
 10. Upon realizing that there was a confirmed grant and the property already sold by auction had been distributed, the claimants in the Industrial Court case moved to this court as the applicants through a summons for revocation of a certificate of confirmation dated November 28, 2016 and filed on November 29, 2016 against the petitioner (Sheila) and the deceased's children as beneficiaries.
 11. Among the prayers sought was; stay of implementation of the certificate of confirmation of grant dated May 16, 2016; an order restraining the respondent from selling the subject property and; an order to issue against Sheila to show cause why she should not be prosecuted for disobeying a court order. The application is anchored on grounds stated on the face of it and further amplified by averments contained in an affidavit sworn by Alphonse Mwangemi Munga representing 367 employees of African Safari club limited.
 12. Basically, the application is based on the fact that; the listing and eventual distribution of the subject plot sold through a court order was illegal and irregular; the respondents failed to disclose to the probate



court that the plot in question was not free property capable of distribution hence made a false and fraudulent declaration that the property was available for distribution.

13. At the same time, Edermman property limited the buyer of the property in question pursuant to the industrial court order also filed an application dated November 23, 2016 seeking revocation of the same grant citing similar grounds as the other applicant.
14. When the matter came up for directions, parties agreed to file submissions. Consequently, the respondents filed their submissions on October 15, 2021 through the firm of Kinyua Muyaa and company Advocates while the firm of Kurauka appearing for the applicants in respect of the revocation application dated November 28, 2016 did not file any and instead relied on the content in the affidavit in support of the application and the ELRC court ruling delivered by Maureen Onyango on November 19, 2021 in which the 1st respondent's application for review of the aforesaid consent order was dismissed.
15. Counsel submitted that the court cannot stay implementation of the confirmed grant in respect of the estate property which has since been sold and transferred to a 3rd party. That the property is not in the deceased's name any more and therefore cannot be sold.
16. Regarding the contempt proceedings, counsel submitted that there was a lawful order from the high court restraining an illegal order for sale of the estate property.

Determination

17. I have considered the application herein, annexed materials in support and submissions by the respondents. Issues that arise for determine are;
 - a. Whether a stay order for implementation of the confirmed grant can issue
 - b. Whether the applicants have met the threshold for revocation of the grant.
18. The law governing revocation of a grant is clearly set out under Section 76 of the [Law of Succession Act](#). For avoidance of doubt, I wish to reproduce that section as hereunder;

“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 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 is 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”.
19. It is incumbent upon the applicants to prove the ingredients set out under Section 76 of the *Law of Succession Act*. see *Jesse Karaya Gatimu vs Mary Wanjiku Gitbinji* (2014) e KLR and *Matheka and Another vs Matheka* (2005) KLR 455
20. The main ground relied on by the applicants was concealment and non-disclosure of material information that part of the estate had been sold by public auction. Indeed, by the time the respondents petitioned for the grant, plot No 1515/MN/1 CRN133/1 had been sold. By listing the property in question, the respondents deliberately failed to disclose that the subject property was no longer free property for distribution.
21. The key question however is, does the listing of assets which ought not to be listed a ground to revoke a grant. It is trite that a certificate of a confirmed grant is an order arising out of a grant hence cannot be revoked. See *in the re estate of Prisca Onga’yo Nande (deceased)* (2020) e KLR. Nobody is challenging issuance of the grant to the petitioner. Under section 66 of the *Law of Succession Act*, the court has discretion to issue a grant to any person or persons if the interest of justice to all concern so demands.
22. In this case, the 1st respondent made material disclosure that she was a family friend and that the children of the deceased had consented to her petitioning for a grant. Since nobody is opposed to the grant being issued to the petitioner, the same cannot be revoked.
23. Regarding the issue of listing the contested property, courts have severally held that wrongful listing of assets or omission is not a ground for revocation of a grant. This position was held in the case of *In the matter of the estate of Hellen Tito (deceased)* Mombasa Succession cause No 146 of 2007.
24. From the pleadings and submissions by both parties, plot No MN/1515/ was sold through a court order. Every effort through review applications and appeal to the court of appeal have been unsuccessful. The latest decision was by a ruling delivered on November 19, 2021 where the second review application before the ELRC was dismissed on grounds of being resjudicata.
25. There is no doubt therefore that the property was wrongly listed hence its inclusion in the confirmed grant was improper. In fact, the appellants ought to have filed an application for exclusion of the property from the list of assets instead of revocation of the grant.
26. In view of the above holding, the prayer for revocation of the grant cannot stand as there were other assets included which must be distributed through the same grant. To that extent, the only just decision to make is to order for review and amendment of the confirmed grant there by excluding Plot No MN/1515/CR No. 13371 from the list of assets.
27. Concerning stay of implementation of the confirmed grant, both parties admitted in their pleadings and submissions that the property has since changed hands hence there is nothing to stay. The only hope was that the ELRC was to review its order. This has since been thwarted by the ruling of November 19, 2021. I do agree with Mr Kinyua that there is nothing to stay as the property has changed hands. For those reasons that prayer is overtaken by events.



28. As to contempt proceedings, the applicants argued that the 1st respondent should be imprisoned for disobeying the court order. It is trite that a court order whether bad or not should at all times be obeyed until discharged. However, in this case, the 1st respondent had obeyed another court order injunctioning the sale. whether the order was irregularly obtained or not, it was a lawful order hence the applicant cannot be said to have disobeyed a court order. In the circumstances, that prayer is not tenable hence dismissed.
29. Having held as above, the application for revocation of the grant is rejected and instead the certificate of confirmation of the grant shall be amended and or reviewed to exclude Plot No MN/1515/CR.1337. Regarding costs, each shall bear own costs.

DATED SINGED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF AUGUST 2022.

J. N. ONYIEGO

JUDGE

