Peter v Mutua (Succession Cause 159 of 2001)
[2022] KEHC 13308 (KLR) (26 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13308 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

SUCCESSION CAUSE 159 OF 2001

GV ODUNGA, J

SEPTEMBER 26, 2022

BETWEEN

REGINA NDITHI PETER ..... APPLICANT

AND

MUTUKU MUTUA ..... RESPONDENT

RULING

1. By summons for revocation or annulment of grant dated November 20, 2019, the 2nd administrator/ applicant herein, Regina Ndithi Peter, seeks an order that the confirmed grant issued herein on August 8, 2019 be revoked and annulled.

2. According to the applicant, she is one of the administrators herein and on August 6, 2018 when the matter came up for confirmation of grant, they were all required to attend. However, her advocate on record did not attend court on that day. It was her case that she did not understand the schedule of distribution and ended up agreeing to the schedule that she had no idea about. Though she accepted that the distribution be in accordance with the said schedule, she deposed that she later realised that the same was not as per their prior agreement.

3. It was averred that after the confirmation of the grant, the respondent and his family members became arrogant and abusive to herself and her family members. She disclosed that a series of meetings were held between her family and the family of the respondent in an attempt to settle some issues pertaining to the subdivision of land parcel no Machakos/Kaindani/xxx. Part of the said deliberations centred on the fact that Philip Mutua Nzuki (the deceased) who is a brother to her husband had sold almost a quarter of the property which had been subdivided by their parents and which he was left to hold in trust for his younger brother.

4. It was disclosed that while the respondent and his family proposed that the land should be subdivided only with the remaining portion exclusive of what their father sold, the applicant's family proposed that they should retain the current boundaries since there was no bad blood between them.

5. According to the applicant, it is well within the knowledge of the respondent that his late father solely sold almost a quarter of the land located at Miwani Village and he is inciting his family members that they should move their boundaries to the applicant's remaining portion which is less than half of the whole portion.

6. The applicant averred that she was ready to sign all relevant documents for the transfer of the transmission if the respondent and his family members agree that their father sold almost a quarter of the land and they subdivide the remaining portion as per the current boundaries.

7. In opposition to the summons, the respondent filed an affidavit sworn on February 18, 2020 in which he averred that the process before confirmation of the grant was done in an open manner and all parties were present in court when the confirmation was done in open court and therefore the application of November 20, 2019 is far-fetched and an attempt to hold the estate hostage and unnecessarily derail the process of distribution. According to him, the issues raised concerning parcel of land no Machakos/Kiandani/xxx are misleading as the certificate of confirmed grant was clear that the land was to be shared into two (2) equal portions and distributed to the two families (family of Philip Mutua Nzuki & family of Peter Nzuki Mwalai).

8. According to him, the averments that his late father (Philip Mutua Nzuki) solely sold a portion of the land in issue to third parties are misleading. The truth, he averred, is that all the land sold out were done so by both his late father and the late Peter Nzuki Mwalai and the applicant herein is well aware of that position. He asserted that the applicant has been making efforts to illegally apportion to herself a larger portion of the land than what the certificate of grant indicated.

9. It was therefore his position that it has not been demonstrated why the certificate of grant should be revoked and no points of law or fact have been adduced that ought to be litigated upon before confirmation of grant. In his view, the application is an afterthought, an abuse of the court process and definitely ought to be dismissed with costs.

10. In her submissions, the applicant reiterated the contents of the supporting affidavit but adduced other facts which are not contained in the supporting affidavit. It was submitted that during the confirmation proceedings, the boundaries were not followed and do not reflect what the applicants had agreed on and what is reflected on the ground. According to her, this is the material non-disclosure that make the certificate of confirmation of grant inoperative and useless.

11. It was submitted that all along the applicant and the respondent in their respective discussions thought that the respondent has captured their position/interest as it is on the ground vide the schedule of distribution which they came later to learn was not the position.

12. It was therefore submitted that the applicant had established the grounds set out in section 76 of the *Law of Succession Act* for the revocation of grant and urged that the application be allowed as prayed.

13. On behalf of the respondent, it was noted that that the applicant and the respondent are joint administrators of the subject estate in this succession cause. According to the respondent, In the supporting affidavit to the said summons for revocation and annulment of the grant, the applicant has not shown what was the material non-disclosure at the time the grant was confirmed. From the reading of the application, the applicant is only aggrieved with how the property was distributed. What she is seeking to be revoked here is not the grant itself, but the certificate that was issued upon the

confirmation of the grant. It was submitted that in principle, the applicant appears to be aggrieved with the confirmation process.

14. According to the respondent, the issue that this court has to determine is whether once it finds it fit to revoke the grant issued and the court redistributes the estate of the deceased, it will reach a different conclusion from the one in the certificate of confirmation of grant issued on August 18, 2018. It was argued that if the court will not reach a different conclusion, there is no need to revoke the said grant and the current application is a misuse of court process. According to the respondent, under Rule 73 of the *Probate and Administration Rules*, the court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process and can make other orders apart from revoking the grant, if the same will serve justice to all parties.

15. It was submitted that the only property in contention here is Machakos/Kiandani/xxx which is registered in the name of the deceased who is the father of the 2nd administrator/respondent. The 1st administrator/applicant is a sister in-law to the deceased. Legally she is not a direct beneficiary of the estate of the deceased and it is only the family of the 2nd administrator who have decided to give them apart of it as they are their relatives. The applicant is neither a dependant to the estate of the deceased under section 29 nor a *bona fide* creditor under section 66 of the *Law of Succession Act*. The applicant alleges that the said parcel of land was to be divided equally between the family of her late husband (Peter Nzuki Mwalai -deceased) and the estate of Philip Mutua Nzuki (deceased). She alleges that the said Philip Mutua Nzuki (deceased) who is the registered owner of that parcel of land had sold a quarter of the said parcel of land and that he was holding the title in trust of his brother (Peter Nzuki Mwalai-deceased). She suggests that the said property should be sub-divided equally excluding the part sold by Philip Mutua Nzuki (deceased) and that part should be counted to belong to the family of Philip Mutua Nzuki (deceased).

16. In response to the allegations, it was submitted that the respondent states clearly in his replying affidavit at paragraph 5 that the said portion was sold jointly by the two brothers. This is shown by the two annexures marked as MM-1 and MM-2 which are the sale agreements and their translation for the sale of a portion of the parcel of land. The two brothers were the sellers and received the payment jointly. It is the remaining parcel of land that is to be sub-divided equally between the two families. This is information that the applicant is very much aware of but is feigning ignorance. The applicant cannot allege now that she was not aware of the same at the time the grant was confirmed. Actually, she was in court when the schedule for distribution of property of the deceased was approved and adopted as orders of the court. She has not shown that she was coerced or unduly influenced to accept the schedule of distribution of property of the deceased as presented.

17. It was the respondent's position that even if the court revokes the grant and later redistributes the subject parcel of land in contention, it will not reach a different position than the one in the certificate for confirmation of grant.

18. The power to revoke a grant, it was submitted, is a discretionary power that must be exercised judiciously and there must be evidence of wrong doing for the court to revoke or annul a grant. Reliance for this submission was placed on the case of *Albert Imbuga Kisigwa vs Recho Kavai Kisigwa* [2016] eKLR and it was submitted that from the foregoing, the applicant has failed to discharge the burden of proof of her case against the respondent in terms of section 76 of the Act that the making of the grant of letters of administration in respect of the estate of Philip Mutua Nzuki (deceased) was made without non-disclosure of material evidence or any false representation by the respondent.

19. According to the respondent, the summons for revocation is a non-starter and non-suited in respect of the estate of the deceased and any such thoughts or, intention to pursue revocation and annulment

should not be allowed. He urged the court exercise its inherent powers under Rule 73 of the *Probate and Administration Rules*, which allows it make such orders as may be necessary for the ends of justice or to prevent abuse of the court process and dismiss the summons with costs to the respondent.

Determination

20. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

21. Section 76 of the *Law of Succession Act* provides 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 order or allow; 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.

22. However, it is not in every situation where transgressions are alleged that the grant must be revoked.

23. I therefore agree with the position adopted by Muigai, J in *Mary Wangari Kihika vs John Gichuhi Kinuthia & 2 Others* [2015] eKLR, that in exercising its discretion the court ought to take into account the effect of either revoking the grant or relieving all the administrators of their duties and where more injustice would be caused by such action to instead opt for an alternative that would ensure that the estate is properly administered.

24. The same position was adopted in the case of I also agree with the decision of Mwita, J in the case of *Albert Imbuga Kisigwa vs Recho Kavai Kisigwa* [2016] eKLR Succession Cause No 158 of 2000, Mwita J where it was held that;-

> " Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not a discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke

or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice."

25. Similarly, in *Re The Estate of the Late Suleman Kusundwa* [1965] EA 247, it was held that:

> " The court is...not obliged to revoke the existing grant, and should only exercise its discretion to do so if useful purpose would be thereby achieved or any right of the applicant safeguarded which could not otherwise be safeguarded. In the present case such rights of inheritance as the applicant possesses, outside the will, are sufficiently safeguarded by the assurance given by the Administrator-General. Therefore I decline to revoke the existing grant, a revocation which would entail needless expense; but it is qualified by declaring that the provisions of the annexed will, in which he purported to leave the whole of his property to his nephew, the second respondent, shall be given effect to only in respect of such portion of the deceased's property as he was entitled to dispose of by will under the applicable law of inheritance."

26. This position was clearly appreciated by Khamoni, J in *Re Estate of Gitau* (deceased) [2002] 2 KLR 430 where he expressed himself as hereunder:

> " Distribution of the estate comes during the proceedings to confirm the relevant grant and a party dissatisfied with the distribution may not necessarily be dissatisfied with the grant of letters of administration and vice versa. That being the position, it becomes unreasonable for a person dissatisfied with the distribution of the estate only to proceed to ask for the revocation or annulment of the grant, which has nothing wrong...While section 76 of the *Law of Succession Act* should therefore be relied upon to revoke or annul a grant it is not proper to use the same section where the objector is challenging the distribution only. There are relevant provisions to be used for that purpose and section 76 is not one of them."

27. In this case, the record reads that on July 19, 2018, Mr Mulwa appeared before this court for the 1st petitioners while Mrs Nyaata held brief for Mr Ngolya who was on record for the2nd administrator. The beneficiaries were also present including the applicant herein and they confirmed that they had agreed on the distribution of the estate in terms of paragraph 6 of the affidavit in support of the summons for confirmation of grant sworn on March 14, 2018. To that affidavit was annexed a consent which was signed by all the beneficiaries including the applicant herein.

28. In this case, the applicant now contends that on August 6, 2018 when the matter came up for confirmation of grant, they were all required to attend. However, her advocate on record did not attend court on that day. It was her case that she did not understand the schedule of distribution and ended up agreeing to the schedule that she had no idea about. Though she accepted that the distribution be in accordance with the said schedule, she deposed that she later realised that the same was not as per their prior agreement.

29. First from the record, there are no proceedings that took place on August 6, 2018. The applicant seems to be mistaking the date of issue of the certificate of conformation of grant as the date of the court appearance. Before that date, on March 14, 2018, some four months earlier, the beneficiaries herein had executed a consent in the presence of counsel agreeing on the mode of distribution. In my view, the applicant had ample time to reflect on the consent before it was adopted in court. Even after its adoption, the applicant did not raise any objection till November 20, 2019, more than a year later when the present application was filed. By then, the respondent had on March 1, 2019 filed his application

dated February 27, 2019 seeking an order compelling the applicant to execute the necessary documents to effectuate the transmission of the property in question and in default the Deputy Registrar of this court to do so.

30. From the conduct of the applicant one cannot but agree with the respondent that this application is an afterthought. The decision whether or not to revoke a grant is discretionary and the court will not assist a person who is indolent and who sleeps on his rights inordinately.

31. As indicated above there are express grounds upon which a grant may be revoked. In this case, the ground cited is that the fact that during the confirmation proceedings, the boundaries were not followed and do not reflect what the applicants had agreed on and what is on the ground is the material non-disclosure that make the certificate of confirmation of grant inoperative and useless.

32. In deciding whether or not to revoke grants, I associate myself with the position In *re Estate of Mukhobi Namonya* (Deceased) [2020] eKLR that:

> " under section 76 of the Act, a grant of representation is liable to revocation on three general grounds. The first ground would be where the process of obtaining the grant was attended by glaring difficulties, such as where the same was defective, say because the person who obtained representation was not qualified to be appointed as personal representative, or the procedural requirements were not met for some reason or other. It could also be because the petitioner used fraud or misrepresentation or concealed important information in order to obtain the grant. The second general ground is where the grant is obtained procedurally, but the administrator subsequently runs into difficulties during the process of administration of the estate. Such difficulties include his failure or omission to apply for confirmation of his grant within the period allowed in law, or where he fails to exercise diligence in administration of the estate, such as where he omits to collect or get in an asset, or where he fails to render accounts as and when he is required to do so by the law. The third general ground is where the grant has become inoperative or useless on account of subsequent circumstances, such as where the sole administrator died or loses the soundness of his mind or is adjudged bankrupt."

33. In this case, the parties were represented by counsel. Before they appeared in court they had signed a consent whose execution they confirmed before the court in the presence of their respective legal representatives. The said representatives have not confirmed to the court the allegations now being made that the applicant was not aware of the actual mode of distribution of the estate. Parties cannot, by simply changing advocates, renege on a position taken by them earlier in the same proceedings. In such circumstances the general rule was laid down by the Court of Appeal *Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited & Another* Civil Appeal No 276 of 1997 in where it was held that:

> " A solicitor has a general authority to compromise on behalf of a client, if bona fide and not contrary to express negative direction; and it would seem that a solicitor acting as an agent for the principal solicitor has the same power. No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice...A consent order can only be set aside on grounds which would justify setting aside a contract or if certain conditions remain to be settled which are not carried out."

34. The *locus classicus* in applications for setting aside consent orders or judgements is the Court of Appeal decision in *Flora N Wasike vs Destimo Wamboko* [1988] KLR 429; [1982-88] 1 KAR 625. In that case the court expressed itself as hereunder:

> "Prima facie a consent order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement...A court cannot interfere with a consent judgement except in such circumstances as would afford good ground for varying or rescinding a contract between the parties... a solicitor or counsel would ordinarily have ostensible authority to compromise suit so far as the opponent is concerned...But it would be no mean task for a party to a decree by consent to prove that the decree is invalid on the grounds referred. It is abundantly clear that the appellant was a ready and willing party to the material judgement by consent and that the terms and consequences of the judgement were explained to her."

35. The East African Court of Appeal on its part in *Brooke Bond Liebig (T) Ltd vs Mallya* Civil Appeal No 18 of 1975 [1975] EA 266 noted that:

> "In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could have been no mistake or misunderstanding. None of the factors which give rise to the setting aside of a consent agreement existed."

36. I have considered the material placed before me including the applicant's conduct post the confirmation of grant and I find no merit in the applicant's complaint that she was unaware of the effect of the distribution. From the supporting affidavit, it would seem that the applicant is unhappy with the attitude of the respondent towards her post the confirmation. That however, is not one of the grounds for revoking a grant.

37. Consequently, I find no merit in the summons for revocation or annulment of grant dated November 20, 2019, which I hereby dismiss with no order as to costs.

38. It is so ordered.

G V ODUNGA

JUDGE

RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 26TH DAY OF SEPTEMBER, 2022

M W MUIGAI

JUDGE