



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION CASE NO. 310 OF 2012

ATHMAN AHMED ATHAMAN (Thro his lawful Attorney)

FATUMA MOHAMED OMAR.....APPLICANT

VERSUS

GHALIB ABUBAKAR AHMED.....RESPONDENT

JUDGMENT

1. The deceased herein Fatuma Abdul Rahman Sayyid died intestate on 5th June, 2010 while domiciled within Kibokoni Mombasa. The following were listed as survivors to the estate;

i. Alawi Abubakar Ahmed

ii. Ahmed Shariff Abubakar

iii. Ghalib Abubakar Ahmed

iv. Idarus Shariff Abubakar

2. According to form P&A 5, two assets were listed as comprising the estate. These are;

i. Title Mombasa/Block XXIX/80

ii. A/C No. [particulars withheld] Standard Chartered Bank

3. From the chief's introductory letter dated 18th October, 2011 and form P&A 5, the relationship between the deceased and the listed survivors is not disclosed. However, on 27th July, 2012 one Alawi Abubakar Ahmed petitioned for a grant of representation. The estate was gazetted on 30th November, 2012 with the petitioner appearing as the grandson to the deceased.

4. Consequently, a grant of letters of administration intestate was made on 18th February, 2013 and issued on 20th February, 2013. The grant was subsequently confirmed on 12th November, 2013 and the estate shared out amongst the heirs (Survivors) in accordance with the Islamic law.

5. On 11th February, 2014, Fatuma Mohamed Omar moved to this court vide summons for revocation or annulment of the grant pursuant to Section 76 and 83 of the law of succession seeking that;

i. This application be certified urgent and service be dispensed with in the first instance.

ii. That grant of letters of administration issued on the 18th February 2013 confirmed on 12th November, 2013 and all consequential orders obtained pursuant thereto be revoked

iii. That the respondent to provide accounts for the rent collected from the deceased's property

iv.Costs of this application

6. The application is anchored on the grounds that;

a. The petitioner concealed material information to the court that there are two pending cases at the lower court whose subject matter relates to the property in dispute -Plot No. Mombasa/Block XXIX/180

b. That the respondent misled the court by stating in the letters of administration that he is the deceased's son.

c. That the petitioner did not disclose to the court the full list of the heirs and beneficiaries of the deceased's estate.

d. That the applicant included Plot No Mombasa/Block XXIX/180 in the list of the deceased's estate when the same should not have formed part of the estate as it was gifted to the appellant.

7. The application is further supported by averments contained in an affidavit sworn on 5th February,2014 by Fatuma Mohamed Omar as the registered Attorney of her husband Athman Ahmed Athman stating that, the petitioner lied to the court that he was a grandson to the deceased when he is actually a nephew.

8. That the appellant concealed material information to the effect that there were two pending suits revolving around ownership dispute. To prove that allegation, she attached a copy of a plaint in respect of Civil suit No 1687/2014 between Fatuma Mohamed Omar and Alawi Abubakar Said,Aldarus Abubakar and Ghatib Abubakar Said (annexure "B") in which the appellant on behalf of her husband sought a declaration that her husband is the owner of plot Mombasa/Block/XXIX/80 the same having been bequeathed to him by the deceased as a gift.

9. She further averred that the said plot does not comprise part of the estate. A copy of a transfer form alleged to have been executed by the deceased in favour of Ahmed Athman by the deceased was attached as annexure "D"

10. She further attached a letter from the Ministry of lands dated 29th January, 2013 addressed to her confirming that they had received a transfer form in respect of the said Plot on 22nd June, 2000 for registration vide D B No. 49.

11. In the same vein, the appellant attached a ruling from the Kadhi's court Mombasa Succession Cause No. 21/2012 where Mohamed Omar petitioned for transfer letter of the same land. Vide its ruling dated 24th May,2012 the Kadhi's court suspended further proceedings pending the outcome of the civil suit pending before the magistrate's court.

12. In response, the petitioner Ghalib Abubakar Ahmed filed replying affidavit sworn on 29th October,2015. He averred that the suits referred to by the applicant were non-starters as they have been pending since 2011 unprosecuted.

13. He stated that he was related to the deceased a fact that was according to him admitted by the appellant. That the property was sold three years ago and proceeds shared out amongst the beneficiaries.

14. When the matter came up for hearing, the appellant gave oral evidence reiterating the averments contained in the affidavit in support of the application. she stated that the deceased was her husband's aunt. That when the deceased died they informed the respondent that the property in question was gifted to her husband (Athman Ahmed).

15. She told the court that the mother to the deceased was known as Athika who was the mother to her husband's father. That her husband was brought up by the deceased since he was young. That the respondent was a nephew to the deceased from the father's side. She further told the court that the deceased had no children. She produced transfer forms attached as annexures to her affidavit as proof of the property having been gifted.

16. After the close of the applicant's case, the respondents were given sufficient time after several adjournments to tender their defence but all in vain. The court eventually had the case for the respondent closed without any evidence being tendered due to non- attendance of the respondent. Parties having been ordered to file their submissions, only the applicant filed hers.

Applicant's submissions.

17. Through the firm of Balala and Co. Advocates, the applicant filed her submissions dated 22nd February,2019. The applicant's submissions are basically a replica of the averments contained in the affidavit in support of the application. Counsel submitted that, the sale of the subject property was irregular taking into account the fact that there were two pending cases which information the respondents did not disclose to the court. He therefore prayed for the revocation of the grant as the respondent did not disclose material information that the property had been gifted to the appellant prior to the deceased's death and a transfer thereof executed.

Determination.

18. I have considered the application herein, affidavit in support and response thereto. Issues that crystalize for determination are;

i.Whether the applicant has met the criteria for revocation of the grant;

ii. Whether the sale of part of the estate to 3rd parties was legal and regular.

19. The application herein is anchored on the grounds that the grant was obtained by the administrator /respondent who falsely described himself as a grandson to the deceased while he is a nephew; that consent was not sought from the applicant as the nephew of the deceased; that the subject property of the estate i.e LR Mombasa/Block XXIX/80 was gifted to the applicant by the deceased as a gift *inter vivos* before he died

20. The law governing revocation of a grant is established under Section 76 of the Law of Succession Act 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 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 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).....

(ii).....

(iii).....

(e) That the grant has become useless and inoperative through subsequent circumstances.

21. Therefore, it is incumbent upon the applicant to prove any of the above ingredients to the satisfaction of the court before a court could exercise its discretion to revoke the grant. See Matheka and another vs Matheka (2005) e KLR 455 and Jesse Karaya Gatimu Vs Mary Wanjiku Gathenji (2014) e KLR.

22. However, while exercising its discretion, the court must be alive to the fact that its powers are meant to uphold the integrity of the judicial process and the interest of justice. See Nyaga Catholengo Francis V Pius Mwaniki Karani (2017) e KLR where the court held that;

“the combined effect of the provision of the law cited above is to clothe the court with considerably wide powers to do justice in any particular estate of a deceased person on case-by-case basis. The discretion exercisable is in terms unfettered but of course, it must be guided by the law and reason but not whims or caprice”

23. According to the applicant, he was not consulted by the respondent before petitioning for the grant. It is not in dispute that the deceased had no spouse, parent, children nor siblings. According to the chief’s letter, the deceased left four heirs. Their relationship to the deceased is not stated. Form P&A also does not indicate the four survivors’ relationship with the deceased.

24. However, the applicant herein stated that the administrator /respondent was a nephew to the deceased and not a grandson. He however did not state how the element of a nephew came about.

25. However, in his replying affidavit sworn on 29th October, 2015 the respondent in paragraph 5 stated that;

“That indeed I am a blood relation (sic) of the deceased a fact that the applicant has acknowledged”

26. From the quoted averment, the respondent was a nephew to the deceased and not a grandson as stated in the application. The respondent also does not say that the applicant was a nephew to the deceased. Under section 66 of the law of succession, the court has discretion to determine on the person on whom a grant of representation can issue but guided by the order of preference with priority given to the spouses and then the order as per part V of the Act. Section 39 gives the order of preference in the absence of a spouse or child/children as follows;

a. Father or if dead

b. Mother or if dead

c. Brothers and sisters, and any child or children of the deceased’s brothers and sisters’ children in equal share.

27. Both the applicant and the respondent are nephews to the deceased. Under section 39(1) (c) of the law of succession, they have equal

rights whether nephew or grandchild to petition for a grant and none has superior rights than the other.

28. Having held as above, the respondent was duty bound to seek consent from the applicant pursuant to section 71 (2) (d) of the law of succession. Failure to obtain consent from anybody entitled to a share in an intestate estate is a ground to nullify or revoke a grant. In this regard, I am guided by the holding in the matter of the estate of Ngaii Gathumbi alias James Ngaii Gatimbi HC Succession case No 783/1993 where the court held;

“a grant will be revoked where a person who is entitled to apply is not notified by the petitioner of his intention to apply and that person’s consent to the petitioner’s application is not sought”.

29. Similar position was held in the case of In re estate of Hannah Wambui Murigi (deceased) (2018) e KLR where the court stated;

“From the evidence on record, the consent to the making of the grant was signed by three of the beneficiaries instead of four. The applicant has not appended his signature or thumb print alongside his name as done by the other three beneficiaries. For this reason, the grant is defective in substance as the applicant did not consent to the issuance of the said grant to the respondents”.

30. Guided by the above case law, it is my finding that the respondent did not comply with the statutory provision of the law under Section 71(2) (d) of the law of succession. Failure to disclose existence of other beneficiaries and further, failure to obtain the applicants’ consent is a material concealment of information from the court hence a misrepresentation of facts with the intention of defrauding the applicant. Further, failure to seek consent means that the application was defective.

31. Was the applicant aware that there were two pending cases before the Kadhi’s court and the Chief Magistrate court? In its ruling in succession case No 2/2012 the Kadhi’s court on 24th May, 2012 directed that proceedings relating to the estate of the deceased be suspended until a pending civil suit No 1487/2011 between the parties herein was resolved.

32. Contrary to this ruling, on 20th February, 2013, the respondent obtained a grant from the high court without disclosing of the existence of the two suits. He actually acknowledged in his replying affidavit that those suits were nonstarters. It is in the civil suit in the magistrate’s court that the dispute of ownership of the subject property is pending. To rubbush the existence of the two suits as non-starters is to say the least a high degree of disrespect o the Kenyan legal/judicial system.

33. In my view, there was no discloser of material information. He couldn’t proceed in this court while fully aware that there were similar proceedings in respect of the same subject property pending before the Khadi’s court. This is purely an abuse of the court process.

34. Even when aware of those suits, and having fraudulently obtained the grant herein secretly, he proceeded to so quickly dispose the property. In view of the fraudulent acts, the grant issued herein must be revoked with orders that;

a. The grant herein issued and confirmed on 12th November, 2013 is hereby revoked

b. That the transfer of L.R Plot No Mombasa/Block XXIX/80 to any 3rd party or purchaser be and is hereby cancelled and registration thereof be restored to the original owner the deceased herein Fatima Abdul Rahman Sayyid alias Fatumu Said Bakari Sharty alias Fatuma Abubakar Ahmed (deceased)

c. That a grant of letters of administration intestate should issue to the applicant and respondent jointly.

d. That the Kadhi’s succession file No 2/2012 shall be transferred to the high court for consolidation with this file and further directions issue.

e. That proceedings herein shall remain stayed until ownership dispute in respect of LR Mombasa/Block XXIX/80 pending in civil suit No 1487/2021 is heard and determined.

f. This matter to be mentioned after delivery of judgment in the pending civil suit.

g. Costs shall be in the cause.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 26TH DAY OF FEBRUARY, 2021

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J. N. ONYIEGO

JUDGE