



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 223 OF 2011

CONSOLIDATED WITH SUCCESSION CAUSE NO. 80 OF 2001

IN THE MATTER OF ESTATE OF PETER NYAGA MUCHUNGURI (DECEASED)

JUSTUS NJERU GIDEON.....APPLICANT

VERSUS

JOHN NJERU MURUGU.....PETITIONER/1ST RESPONDENT

CHARITY MUTHONI MURUGU.....2ND RESPONDENT

RULING

A. Introduction

1. The applicant herein filed before this court the instant application wherein he substantially seeks for orders that the grant and confirmation thereof made on 7/07/2020 and issued on 8/07/2020 be revoked. He further prayed for the costs of the application.
2. The said summons is based on the grounds on its face and further supported by the affidavit annexed to the application. In a nutshell, it is the applicant's case that he had always been a protestor in this matter having filed his affidavit of protest on 9/02/2016 but which protest has never been heard and determined as the respondents have never been ready to proceed with the application. That it was not until 30/07/2020 when he realized that the respondents had filed consent in court to have the grant in this matter confirmed and without his notice and/or involvement despite them being aware that he was a party to the proceedings herein and thus affecting his rights in the estate and the said consent is illegal for all intent and purpose. That if the grant herein is left to stand, he stands to be prejudiced as his protest will have been dismissed without having been heard and thus it is only fair that the said grant be revoked and a proper one issued recognizing his interests in the estate.
3. The said application is opposed vide a replying affidavit sworn by 2nd respondent wherein she deposed that the suit land (Ngandori/Kiriari/35) does not exist and does not form part of the estate of the deceased and that the consent herein does not include that parcel of land. Further that the applicant herein had sued the administrator of the estate in Embu High Court Civil Suit No. 125 of 2012 claiming the same parcel of land and which suit was dismissed in the year 2015 and that the claim over the said land would be time barred as the applicant claims to have bought the land in 1976. As such the instant application ought to be dismissed as the same is bad in law and an abuse of the court process.
4. The application was canvassed by way of written submissions. It was submitted on behalf of the applicant that he has all along been a party to the proceedings herein as a protestor vide an affidavit of protest dated 8/02/2020 and filed in court on 9/02/2020 and as such, he was entitled to be involved at every step in the proceedings including the settlement reached by the parties. As such, failure to involve him in the consent by the respondent is a ground enough to have it set aside. It was submitted that it was within the applicant's rights to be heard before any decision could be made in this cause and thus the grant issued ought to be revoked for failure to meet the legal threshold. Relying on the grounds for revocation of grant as provided for under Section 76 of the Law of Succession Act, it was submitted that there was concealment of material facts to the effect that the applicant was a party to these proceedings and that he had a pending protest which was disregarded by the respondents and as such the court was misled into confirming the grant when the applicant was not heard on merit.
5. On the part of the 1st respondent/petitioner, it was submitted that the application is res judicata by virtue of Kerugoya ELC No. 182 of 2013 and further that the applicant has not satisfied the conditions for revocation of grant under Section 76 of the Law of Succession Act.
6. On the part of the 2nd respondent, reliance was made on the 2nd respondent's replying affidavit and the depositions therein reiterated to the effect that the suit land wherein the applicant is laying claim does not exist and neither does it form part of the deceased's estate and thus the applicant can't be granted the revocation orders; that the suit land does not form part of the properties which the consent touches on and

as such, his involvement was not necessary as he is not a beneficiary therein; and that his claim on the suit land was heard and determined in Embu High Court Civil Suit No. 125 of 2012 where the applicant had sued the administrator of the estate herein claiming the same land parcel and which suit was dismissed and thus the claim herein is res judicata as the same was conclusively determined and that the said claim is time barred.

7. I have considered the application, the responses thereto and the rival written submissions filed by the parties herein.

8. As I have already noted, the application herein seeks for orders that the grant and confirmation thereof made on 7/07/2020 and issued on 8/07/2020 be revoked.

9. The circumstances under which a grant of representation may be revoked are provided for under section 76 (a)- (e) of the Law of Succession Act Cap 180 of the Laws of Kenya. The said provision was explained by Musyoka J in **re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR** where he observed that:-

“8. Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.....”

(See also in **re Estate of Agwang Wasiro (Deceased) [2020] eKLR**).

10. Further the Court of Appeal in the case of **Matheka and Another vs Matheka [2005] 2 KLR 455** laid down the following guiding principles; -

“i. A grant may be revoked either by application by an interested party or by the court on its own motion.

ii. Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.”

11. It is clear therefore that the grounds upon which a grant may be revoked or annulled are statutory and it is incumbent upon any party making an application for revocation or annulment of a grant to demonstrate the existence of any, some or all the above grounds. Further, from the reading of section 76 above, it is clear that the same deals with revocation of grant and not the process of confirming the grant or the certificate of confirmation of grant (See **re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR**).

12. I have perused the court record and I note that on 7/07/2020, the court (Hon. Ndeng'eri DR) did adopt a consent earlier filed on 29/10/2019 as an order of the court. The said consent is dated 25/10/2019 and is signed by the respondents herein and which has the effect of distributing the estate of the deceased herein. The record indicates further that the parties herein had indicated to the court on several occasions that they were engaging in negotiations with the view of recording a consent. The consent filed provided a consented mode of distribution between the respondents. What is conspicuously clear is that at the said date, no grant was issued but the parties only provided for the mode of distribution. It is this mode of distribution or the consent which the applicant is challenging and the said challenge being for the reasons that he was not consulted when the consent was executed.

13. It is my considered view that the grant issued by this court to the respondents cannot be revoked on these grounds. The grounds relate to confirmation of grant as opposed to issuance of the grant itself. In **re Estate of Prisca Ong'ayo Nande (Deceased) (supra)** and which authority I find persuasive, Musyoka, J found that Section 76 of the Law of Succession Act provides only for revocation of grant and not the certificate of confirmation of grant and that a person who is aggrieved by the orders made with respect to a confirmation application, which are encapsulated in the certificate of confirmation of grant, has no remedy under Section 76 of the Law of Succession Act, for that provision does not envisage revocation of certificates of confirmation of grants. That the recourses available to such a person under general civil law is either to appeal or to review (to the extent that the same is permissible under the Law of Succession Act) or to apply for the setting aside or vacating of confirmation orders where the same are obtained through abuse of procedure.

14. It is my view therefore that the applicant did not make a case for revocation of the grant herein. Further it is my view that the application herein is improperly before the court. The applicant ought to have applied for review of the orders of 7/07/2020 or appeal against the same or apply for setting aside of the said orders.

15. However, the above notwithstanding, I note that the said application was brought under amongst other rules, rule 73 of the Probate and

Administration Rules. This rule bestows upon this court the inherent powers to **make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. It is my view that this court can invoke the said inherent powers and issue orders herein for the ends of justice to be met.**

16. However, the said orders ought to be issued where a party has proved that he/she deserves such orders and thus in my considered view, despite the applicant having approached this court seeking revocation of grant as opposed to review or setting aside of the proceedings of 7/07/2020, this court ought to set aside the said proceedings by invoking its inherent powers under Rule 73. After all, Article 159 of the Constitution dictates upon this court to administer justice without undue regards to procedural technicalities. Further, this court is obligated under Section 47 of the Law of Succession Act to entertain any application and determine any dispute under the Law of Succession Act and pronounce such decrees and makes such orders therein as may be expedient. So the question therefore is whether this court can set aside the proceedings of 7/07/2019 and the consent which was filed herein on 29/10/2019 and order for the hearing of the protest by the applicant herein.

17. From the reading of the affidavit of protest by the applicant, it is clear that the interests he asserts over the suit land are based on the fact that he bought 5 acres which land formed part of LR. Ngandori/Kiriari/ 5 from one Mathew Macharia and that Land control board consent was obtained to transfer the said 5 acres to him but the said Mathew Macharia sold the same piece of land to the deceased herein and a second consent to sub-divide the land was registered by the land registrar. He deposed that he managed to have orders declaring the second consent a nullity but the land registrar failed to act on the said orders and he was advised to get express orders from the court. That, however, he tried to trace the deceased herein (Peter Nyaga) and he was informed that he was dead until he learned that there was a succession cause wherein the administrator had not distributed the 5 acres to him but the 2nd respondent herein was registered as a proprietor of part of the said land. As such, his interest was in the said 5 acres which were registered in the names of the deceased yet he had bought the same. Directions were then given that the protest be heard by way of *viva voce* evidence and the applicant proceeded to file his list of documents and which included sale agreement dated 3/11/1969.

18. However, in reply to the application herein the 2nd respondent deposed that there has been a suit between the applicant and the estate of the deceased herein in relation to the said dispute. A copy of the plaint in Embu High Court Civil Suit No. 125 of 2012 was annexed to the said replying affidavit. In the further list of document filed in court on 25.10.2019, there is annexed thereto a copy of the ruling in Kerugoya High Court ELC Case No. 182 of 2013. From the reading of paragraph one thereof, it is clear that the said ruling is in relation to Embu High Court Civil Suit No. 125 of 2012 as the said paragraph refers to the suit having been filed on 19/07/2012 and which is the same date of the filing of Embu High Court Civil Suit No. 125 of 2012. In the said ruling, the court dismissed the applicant's suit (plaintiff therein) on the basis of the preliminary objection to the effect that the same was *res judicata*.

19. What this means, in my view, is that at the time of the signing of the consent, the applicant herein had no interest in **LR** Ngandori/Kiriari/35 as his claim had been dismissed by the court. The documents which I have referred to are part of the court record and they have not been disputed by any party herein. There is no evidence that the applicant has appealed against the said ruling to the court of Appeal. It is my considered view therefore that the applicant herein has no any claim against the estate of the deceased whatsoever so as to warrant him being consulted at the time of signing the consent. Despite having filed an affidavit of protest, the applicant does not have any interest capable of being litigated on pursuant to the said affidavit of protest and which obligated the respondents herein to consult him. I am guided by the decision in **Alexander Mbaka –vs- Royford Muriuki Rauni & 7 Others [2016] eKLR** where the Court held that; -

“It is only where one has an established claim against the estate that has already crystallised that he can litigate it before a family court. The claim is to be considered as a liability to the estate. This Court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystallised. The right must be shown to have crystallised before the family court can entertain it.”

20. Since the applicant deposed to have bought the 5 acres from Mathew Macharia who sold the same land to the deceased herein, his rights can only be enforced as against the said Mathew Macharia and not the estate of the deceased herein.

21. Further, even assuming that he has any interests in the said estate, it is my considered view that the issues raised relates to ownership to land and which this court is bereft of jurisdiction to adjudicate upon. The primary duty of the Probate Court is to distribute the net estate of the deceased being that which he was free to deal with during his lifetime to the rightful beneficiaries. Where issues of the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. (See **In re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR**). The issue as to ownership of the property having been determined in the proper forum (in Kerugoya High Court ELC Case No. 182 of 2013), allowing the application herein and thus giving way for the affidavit of protest to be heard will be an act in futility and an academic exercise as it is obvious that the issue of ownership has already been determined.

22. It is my considered view therefore that the applicant herein has not satisfied the conditions for revocation of grant as provided in law. Further, the applicant herein is not a beneficiary of the estate as of now and thus he was not entitled to be consulted before the consent filed herein was signed by the parties thereto. As such he has not made a case for this court to exercise its inherent powers and order review and/ or setting aside of the proceedings and/ or orders of 7.07.2020. Further the interests advanced in the said affidavit of protest having been determined by a court of competent jurisdiction, it would be a waste of court's time to have the same heard.

23. In the premises, the application is hereby dismissed with costs.

24. It is so ordered.

Delivered, dated and signed at Embu this 24th day of February, 2021.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent