



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION CASE NO. 342 OF 1994

IN THE ESTATE OF NMM (DECEASED)

PNN.....APPLICANT

VERSUS

HMN.....RESPONDENT

RULING

1. The deceased herein died intestate on 1st September, 1989 while domiciled in Mombasa Kenya. He left behind a widow AGN, and two sons namely; HMN and PNN the respondent and applicant herein respectively. Among the assets listed as comprising the estate is L.R Kabare /Nyangati/xxx and 3 houses without land at Magongo and 2 others in joint name with another.

3. On 3rd August, 1994, AG (widow) and HMN petitioned for a grant of representation. Subsequently, a grant of letters of administration intestate was made and issued to the two petitioners jointly on 13th July, 1999.

3. The grant having stayed for a long time without being confirmed, Mr PNN moved to this court on 1st September, 2020 vide a summons for revocation of grant dated 27th August, 2020 seeking orders as follows;

1. The grant of letters of administration issued to HMN and AGN on the 13th July 1999 be revoked/annulled due to the fact that they were issued fraudulently, having been issued to the applicant's mother as one of the administrators, despite having a mental illness (schizophrenia) since 1985 and to the brother who have failed to show interest in continuing with the confirmation of grant.

2. Protection orders do issue against HMN prohibiting him from further interference or intermeddling with the assets of the estate of the deceased

3. This court to allow PNN the applicant who lives and takes care of the mother, to access KSh 25,000 monthly from the estate of the deceased to facilitate for her treatment and up keep pending the confirmation of the grant. The said amount to be deposited to his Equity Account No [particulars withheld] under the name of PNN.

4. HMN be called to account for the deceased's estate since the grant of letters of administration intestate of all the estate of NMM was issued to him and to specifically account for all the sums collected from the deceased's account and from the sum collected from his two properties Plot No xxxx/VI/MN and Plot No xxxx/VI/MN.

5. Costs of the application be provided for.

4. The application is anchored upon grounds stated on the face of it and an affidavit in support. Subsequently, the application was amended with what is titled as "amended notice of motion" filed on 1st September, 2020 and supported by an amended supporting affidavit sworn on 16th October, 2020.

5. It was averred that the grant herein was obtained by the respondent his mother without his consent. That there was material non-disclosure that the said mother was suffering from mental illness hence not fit to administrator the estate. He stated that the respondent has taken advantage of the ailing Mother thereby withdrawing cash from the deceased's bank account besides collecting and intentionally spending rent collected from plot No xxxx/V/MN and Plot xxxx thus intermeddling with the estate.

6. He further averred that despite his brother Hudson collecting rent from the two plots, he has neglected their mother whom he is now forced to look after. He prayed for an order to access Ksh25,000 monthly for the upkeep of their mother and kshs 7,000 for the house help.

7. In response, the respondent relied on his replying affidavit to the original application sworn on 6th October, 2020 in which he denied the claim that their mother had been mentally ill since 1985. He averred that the medical notes relied on were for the period 2020 much later after obtaining the grant in 1999.

8. He denied allegations that the deceased had any account with cash in it. He went further to state that the two plots referred to as xxxx/VI/MN and xxxx have a case in court pending hearing in Civil Suit No xxxx/2013 Mombasa CM' court (See annexure "HMN" and 2") hence the reason why the grant cannot be confirmed.

9. Regarding their sick mother, he stated that he was the one taking care of her while the applicant has wasted his life and has no wife to look after their mother. He contended that he is legally representing the estate in suits where the estate properties are involved and that if the grant is revoked, the said cases will collapse.

10. Parties agreed to file submissions to dispose the matter. The applicant filed his first set of submissions on 27th November, 2020 in person and another on set on 10th December 2020 thus reiterating the averments contained in the amended affidavit. He made reference to several authorities in support of revocation of grant which authorities I have taken into account.

11. On his part, the respondent filed his submissions on 8th December, 2020 through the firm of Mwarandu advocates. The respondent basically adopted the averments contained in the replying affidavit. Learned counsel urged the court to find the application defective and strike it out on account of being supported by an amended supporting affidavit.

12. I have considered the amended notice of motion supported by the aforesaid amended supporting affidavit. I have also considered the response thereto and submission by both parties.

13. Issues that emerge for determination are;

1. Whether the amended notice of motion is defective and therefore a nullity by virtue of being supported by an amended affidavit.

2. If the answer to the above is negative, has the application met the criteria for revocation of grant.

14. There is no dispute that the amended notice of motion is supported by an amended supporting affidavit. It is trite law that an affidavit is never amended and therefore substantially valueless in the face of the pleadings and proceedings. What are the consequences of a pleading relying on an amended affidavit? In the case of James Peter Maina Muriuki Vs Moses Maina Ngugi & another (2008) e KLR Justice Aganyanya JA as he then was stated that;

"While the law does not allow an amendment of an affidavit to support an amended chamber summons, there should be an independent affidavit to support the amended chamber summons even if it is in similar terms as that which supports the original chamber application. And it is not advisable to only refer to original affidavit as supporting the amended chamber application".

15. Equally, in the case of Swaleh Gheithan Vs Commissioner of Lands and 5 others (2002) e KLR the court held as follows;

"While I have upon mere commonsense and /or logic, agreed that the substantive deponements which are the subject matter of the oath in an affidavit should not be amended, any other formal parts like the title should not in my view, as a general rule, be barred from being amended".

16. A supporting affidavit to a pleading is the cornerstone of any pleading. Since some of the amended parts of the affidavit form the substratum of the application, they cannot stand in law. An affidavit cannot be amended to support an amended pleading. The best the applicant should have done was to file a supplementary affidavit. Unfortunately, there is no fall back to the original supporting affidavit.

17. In view of this lapse, the amended Notice of Motion is exposed and therefore a nullity on the face of it. It is by all means a defective application which cannot stand the test of a valid application. A pleading or submissions pegged on a fatally defective affidavit cannot stand. See Supreme court decision in the case of Gideon Sitelu Koncellah v Julius Lekakeny Ole Sukuli & 2 others (2018) eKLR where the court held that;

"A replying affidavit is the principal document wherein a respondent's reply is set and the basis of any submission and /or list of authorities that should be subsequently filed. Absence of this foundational pleading, the replying affidavit, and even the written submissions purportedly filed by the 1st respondents on 17th August 2018 are of no effect."

18. Having held that the amended notice of motion is fatally defective, I am inclined to have the same struck out. Having struck out the engine of the application, I have nothing remaining to consider.

19. However, taking into account that this matter has been lying in the registry unconfirmed for a long time, this court has powers suo motto to summon the administrators to appear in court and show cause why the grant should not be revoked. Accordingly, the administrators are hereby summoned to appear before court on 26th April, 2012 to show cause why the grant should not be revoked or be confirmed.

Dated, signed and delivered at Mombasa this 26th day of March, 2021

J. N. ONYIEGO

JUDGE