



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 539 OF 2002

IN THE MATTER OF THE ESTATE OF ANDREW OTINGA OLUNGA (DECEASED)

RULING

1. The application for determination is that dated 3rd December 2019. The application dated 4th April 2020 was determined on 5th March 2020, when Njagi J ruled that the bank was not a party to the proceedings, and declined to grant the orders sought in the application. The court directed the applicant in that application, to file a separate miscellaneous application to seek for the orders sought.
2. The Motion dated 3rd December 2019, and which was filed herein one even date, seeks annulment of the confirmed grant dated 28th October 2013 and to have fresh succession proceedings initiated. It also seeks the removal of the 1st administrator, David Olunga Osundwa, from office, and the retainer of Mary Makokha Olunga, Anna Kuusa Olunga and Jennifer Namalwa Olunga as administrators. The third prayer is that Bukhayo/Kisoko/782 be included as part of the estate and distributed equally amongst all the beneficiaries.
3. It is not clear who the applicants in the application are, for it bears names of three individuals, being Anna Kuusa Olunga, Jennifer Namalwa Olunga and Joyce Kibone Olunga. It is signed by only one person, and it is not clear whether that person is Jennifer Namalwa Olunga or Joyce Kibone Olunga. The affidavit in support of the application is signed by Anne Kuusa Olunga and Jennifer Namalwa. I shall nevertheless, refer to them as the applicants.
4. The grounds of the face of the application are that the David Osundwa Olunga, described as the first administrator, who I shall described as the respondent for the purpose of these proceedings, had obtained a certificate of confirmation of grant on 28th October 2013 without involving the other administrators. It is said that the said certificate was on the face of it prejudicial to the other survivors. He is also accused of knowingly excluding Bukhayo/Kisoko/782 from the succession cause. It is also said that the rest of the assets within Kakamega County were distributed in an unequal manner. They complain that they were kept in the dark regarding existence of the certificate of confirmation of grant obtained in 2013, from 2013 till they discovered it in 2019. The respondent is said to have intermeddled with the estate and the only cure was to have the matter heard afresh.
5. In the affidavit sworn in support of the application, the applicants aver to be the widows of the deceased. They state that the court had on 30th October 2019 directed them to file an affidavit stating their concerns, and that the application was their reaction to that order. They state that a certificate of confirmation of grant was made to the respondent on 28th October 2013. They would like the certificate of confirmation of grant nullified, and a fresh succession process initiated. They accuse the respondent of acting alone contrary to the orders of the court of 9th March 2011. They argue that the respondent did not involve them and the other survivors in the proceedings that led up to the issuance of the certificate of confirmation of grant dated 28th October 2013. They also say that he excluded Bukhayo/Kisoko/782 from the proceedings, yet he knew it to be the largest asset in the estate. They accuse him of unfair the court to distribute the estate in a most misguided manner, and they propose a redistribution of the estate in the manner that they have set out in their affidavit. They also accuse the respondent of intermeddling with the estate in a manner designed to exclude them from benefit one Francis Makuba Mukanda, a legitimate purchaser. They would like the respondent relieved of his duties as administrator. They have attached several documents to their affidavit. There is a certificate of confirmation of grant dated 28th October 2013, copy of a green/white card for Bukhayo/Kisoko/792, copy of the grant issued in the matter on 9th March 2011, and a draft summons for confirmation of grant dated 2019.
6. The respondent, David Olunga Osundwa, swore an affidavit on 13th January 2010, in reply. He denied initiating the succession cause, saying that the same was commenced by Patrick Inganga Olunga and a grant was made to the initial administrator sometime in 2003. The respondent was then made an administrator together with the applicants in 2011. The court directed the applicants, specifically Anna Kuusa Olunga and Jennifer Namalwa Olunga, to apply for confirmation of the grant within 60 days. They did so, through an advocate known as Imwene. The grant was confirmed based on the proposals made by the applicants and a certificate was issued dated 28th October 2013. According to him, Francis Makuba Mukanda was inserted into the schedule of assets despite orders that had been made by GBM Kariuki J and Ochieng J in 2005 and 2008. He avers that if the applicants were unhappy with those rulings they ought to have appealed against them. There was a mediation process, which he says was driven by the applicants. He says that the applicants had signed a transmission form but they now appear to be turning against the said process. He says that he was the one who collected the certificate of confirmation of grant, arguing that the same was available for collection by any of the administrators. He says that the applicants met in 2007, in his absence, and

decided to exclude Bukhayo/Kisoko/792 from the confirmation process, on grounds that the deceased had charged it to a bank, adding that the applicants knew that the property had since been sold to other parties.

7. He has attached to his affidavit a copy of the proceedings of 23rd February 2011, in which he and the applicants were appointed administrators. He has also attached a copy of the mediation settlement agreement which the parties signed on 18th July 2019. There is a bundle of copies of transmission forms executed by the applicants and others. Finally, there is a copy of minutes of a meeting held on 7th August 2006, attended by the widows, including the applicants, and the then administrators, where it was resolved, *inter alia*, that Bukhayo/Kisoko/782 be excluded from distribution, because of a bank loan, and there was even a suggestion that the said property be sold.

8. The applicants reacted to the respondent's reply by swearing an affidavit on 17th January 2020. They say that the respondent had not responded to their claim that he had subdivided the property to his advantage, and to the detriment of the others beneficiaries. They aver that there was no nexus between the certificate of confirmation of grant and the documents attached to the respondent's affidavit. He is also said not have explained why he excluded Bukhayo/Kisoko/782 from the certificate of confirmation of grant. They deny having had a hand in the exclusion of the said property from the succession cause. They aver that the document the respondent had relied on talked of selling the property and not excluding it from the cause. They say that they did not sign the document, and that it was the mother of the respondent and the previous administrator who signed the document. They assert that it was respondent who procured confirmation of the grant in 2013.

9. The said application was heard orally on 1st December 2020. Mr. Amasakha invited me to look at the applications dated 3rd December 2019 and 4th March 2020 and to make my determination. Anne Kuusa informed the court that the respondent had been acting alone, and had obtained the grant secretly. They only discovered much later that he had done so. He did not include all the assets. Jennifer Namalwa similarly said that the respondent acted secretly and obtained the grant. He invited the court to distribute the estate. Joyce Kibone said that she supported the application. Francis Makuba said that it was the respondent who brought him into the matter, and that he wanted to get his right.

10. Revocation of grants of representation is provided for under section 76 of the Law of Succession Act, which provides as follows:

“76. Revocation or annulment of grant

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.”

11. Under the said provision a grant may be revoked for three general reasons. The first relates to the process of obtaining the grant. If the process was defective, or was marred by fraud or misrepresentation or concealment of important information from the court. The second is about the process of administration, where the grant was obtained regularly, but the administrator experienced difficulties with administration, by way of failing to apply for confirmation of grant within the timelines required, or failed to proceed diligently with administration of the estate, or failed to render accounts as and when he was required to by the law or the court. The third would be where the grant has become useless and inoperative due to subsequent circumstances. That would happen where a sole administrator dies, leaving the estate without an administrator, or becomes of unsound mind; or becomes so physically infirm as to be unable to discharge his duties; or is adjudged bankrupt.

12. In the instant matter, the applicants, from their filings, and contrary to what they told me at the oral hearing on 1st December 2020, are not so much complaining about the process of the making of the grant to the respondent, but rather about the confirmation of the grant in 2013. They appear to say that he proceeded to get the grant confirmed without involving them, and that they only got to know about it much later.

13. I have perused the record. It is clear that the cause herein was initiated in 2002 by someone other than the respondent, and the respondent got appointed as administrator on the same date with the applicants, on 23rd February 2011. It is, therefore, not accurate nor true

that the respondent obtained the grant secretly, since he was appointed by the court in orders that were made in open court, and he was appointed simultaneously with the applicants. No grant was made on 28th October 2013 that is capable of being revoked. 28th October 2013 is not the date when a grant was made, but rather the date when a certificate of confirmation of grant was signed. Revocation under section 76 is of grants of representation, not certificates of confirmation of grant. The application is, therefore, misconceived.

14. On the same date, 23rd February 2011, the court directed Anna Kuusa Olunga and Jennifer Namalwa Olunga to file for the confirmation of the said grant within 60 days. The record reflects that on 29th June 2011, a summons for confirmation of grant, dated 27th June 2011, was filed by Anna Kuusa Olunga and Jennifer Namalwa Olunga, through Messrs. Imwene PA & Co. Advocates. The applicants proposed a mode of distribution of the estate to the respondent, to themselves, and other persons.

15. The application was heard on 27th September 2011, in the presence of Mrs. Imwene, the advocate for the applicants, Mr. Anziya for the respondent, and another advocate for an alleged purchaser. The application was allowed, and it was ordered that the estate be distributed as per paragraph 5 of the affidavit sworn in support of the application by Anna Kuusa Olunga and Jennifer Namalwa Olunga. The only amendment to the proposals was that the property proposed to go to Francis Makuba Mukanda was to devolve upon Mary Makokha Olunga, Anna Kuusa Olunga, Jennifer Namalwa Olunga and Joyce Kibone Olunga. A certificate of confirmation of grant was subsequently issued, dated 28th October 2013.

16. I do not think that the applicants had taken time to peruse the court record, before they filed the application the subject of this ruling. If they had done so they would have established that the grant of letters of administration intestate that they had been given, jointly with the respondent, on 23rd February 2011, and issued on 9th March 2011, was confirmed on 27th September 2011, on an application that they themselves had drawn and filed. It was drawn and filed by an advocate known as Mrs. Imwene, who had acted throughout as their advocate. The record reflects that the said Mrs. Imwene never acted for the respondent, for the respondent had his own advocate, Mr. Anziya. It cannot be said, therefore, that Mrs. Imwene might have had acted on instructions from the respondent, that the applicants or the widows were not privy to. After the confirmation of grant in 2011, the certificate of confirmation of grant was not issued until 28th October 2013, and the same was collected until 12th December 2013. I have closely compared the contents of the certificate of confirmation of grant with the proposals on distribution contained in the affidavit that Anna Kuusa Olunga and Jennifer Namalwa Olunga swore in support of their confirmation application, and I note that the certificate is based on the said affidavit, as ordered by the court when it allowed the application. It cannot, therefore, be that the respondent manipulated the contents of the certificate after he collected it. He was one of the administrators, and his name appeared on the document, and it was quite proper for him to collect it. The respondent did not procure the confirmation of the grant. The proposals that went into the application, and found their way into the certificate of confirmation of grant were not his, they came from Anna Kuusa Olunga and Jennifer Namalwa Olunga. The allegations that he moved secretly to have the grant confirmed cannot hold water.

17. The applicants appear to be making a case for Francis Makuba Mukanda, that he was a genuine purchaser who should have been provided for. Let me say two things about this. Firstly, the court had previously addressed the issue of Francis Makuba Mukanda, and directed that his claim could not be ventilated through the succession cause, and that what he needed to do was to file a separate suit against the estate. Those orders were made on 16th December 2005, by GBM Kariuki J, and were reiterated on 25th February 2008, by Ochieng J. It would appear that Francis Makuba Mukanda did not heed the advice given, by filing and prosecuting a separate suit. Neither did he file an appeal, if he did not agree with those orders. That issue is now water under the bridge. The applicants are flogging a dead horse. Secondly, the applicants, in their summons dated 27th June 2011, had proposed that Francis Makuba Mukanda be given a portion of East Wanga/Malaha/676. However, when the matter came up for hearing, the court, in view of the orders of 16th December 2005 and 5th February 2008, declined to allow that proposal, and instead directed that what was to go to Francis Makuba Mukanda as proposed in the application, devolve upon the four widows, including the applicants herein. That direction was captured in the certificate of confirmation of grant that was issued 28th October 2008. There is nothing on record to show that the respondent had anything to do with the exclusion of Francis Makuba Mukanda from that property, and there is nothing to stop the widows conveying their share of East Wanga/Malaha/676 to Francis Makuba Mukanda if they are so minded.

18. On the exclusion of Bukhayo/Kisoko/782 from distribution, I will say that the distribution that the court ordered was based on the application filed by the applicants, through their application dated 27th June 2011. In that application, they did not list Bukhayo/Kisoko/782 among the property to be distributed. They did not propose it for distribution. As said earlier, this was an application by the applicants. It had nothing to do with the respondent. All the respondent did was to collect the certificate of confirmation of grant from the court registry, once the same was executed by the Judge. There is no evidence that he manipulated it in any manner to remove the said property from the schedule of distributed assets, since that property was never in the schedule that the applications placed in the court in the first place.

19. There are complaints that the property within Kakamega was distributed in an inequitable manner. Again, the distribution reflected in the certificate of confirmation of grant, was based on the application for confirmation of grant that the applicants filed in court on 29th June 2011. I repeat that those were proposals that the applicants made. They were not made by the respondent. The respondent merely collected the certificate of confirmation of grant from court. He cannot, therefore, be guilty of distributing the property inequitably when the application that culminated in those orders was not drawn nor filed by him.

20. There is no evidence of any wrongdoing on the part of the respondent. He is accused of intermeddling with the estate. No evidence has been proffered. In any event, he is an administrator of the estate. Section 79 of the Law of Succession Act vest the estate in him, together with the applicants, I do not see how a person in whom the assets are vested can be guilty of intermeddling. He is accused of holding on to the certificate for many years without disclosing its existence to the applicants. It may well be that that is what happened, but that alone is not a good reason for revoking the grant. In any case, the certificate was a product of the application filed by the applicants. The matter was before the Judge in September 2011, when the grant was confirmed, the applicants took no steps thereafter to have the certificate generated, until the respondent got a copy in December 2013. The certificate was the product of the work, of the applicants so they should have pursued its issuance. They went to sleep, and they should not blame the respondent for their indolence. Furthermore, nothing prevented them from approaching the court, and requesting to be furnished with a copy.

21. There is clearly no merit at all in the application dated 3rd December 2019. It is an application that should not have been filed in the first

place, if only the applicants had perused the court file and apprised themselves of what had been happening in the matter, if their advocate had not kept them abreast of its progress. The same is for dismissal and I hereby dismiss it. Costs are deserved in this case, for the respondent has needlessly been dragged to court, but I note that the applicants are his stepmothers, who are unrepresented, and are, probably, completely uninformed of the actual position in the record. I shall, therefore, refrain from making any order as to costs against them. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 19TH DAY OF MARCH 2021

W. MUSYOKA

JUDGE