



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

SUCCESSION CAUSE NO. 217 OF 2003

IN THE MATTER OF THE ESTATE OF DAVID WILLIAM KIGUMI KIMEMIA-DECEASED

BENSON KIMEMIA..... 1ST APPLICANT/OBJECTOR

MS. EDITH MUTHOMI.....2ND APPLICANT/OBJECTOR

MS. SYLVIA WAMBOI.....3RD APPLICANT/OBJECTOR

VERSUS

SOLOME WANJIRU KIGUMI.....1ST RESPONDENT/PETITIONER

JORAM KIMEMIA.....2ND RESPONDENT/PETITIONER

ABRAHAM KIPKOSGEI CHELANGA.....PROPOSED INTERESTED PARTY

JUDGMENT

Introduction

1. The Application dated and filed on 27th February, 2019 is made pursuant to *Section 76 of the Law of Succession Act; Rule 44 Probate and Administration Rules* where the Applicants are seeking the following orders:

a) That the grant of letters of administration to SALOME WANJIRU KIGUMI and JORAM KIMEMIA issued on the 23rd day of June 2004, confirmed on the 22nd day of May, 2006 and rectified on the 14th day of May, 2007 be revoked or annulled.

b) That costs be provided.

2. The Application is premised on the grounds that:

i) That the proceedings to obtain the grant were defective in substance.

ii) That the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material of the case.

iii) That the grant was obtained by means of untrue allegations of a fact essential in point of law to justify the grant.

iv) That the Applicants' consent was no obtained and that the consent form attached to the petition for grant is a forgery since at the time the application was presented, none of the Applicant was present and so none could have appended their signature to the consent and that they in fact never signed the purported consent to the making of the grant.

v) That the persons to whom the grant was made have failed to proceed diligently with the administration of the estate which is at risk of being laid to waste.

vi) The grant has been otherwise rendered useless and inoperative.

3. In the supporting affidavit sworn by the applicant who says he is a son of the deceased, he deposes that neither he nor his elder sisters

were consulted before the petition was filed as to having their mother and brother being appointed as joint administrators. He points out that he had been living in the United States of America when the various processes leading to the making of the grant were done and never consented to the apportionment of the property in the manner reflected in the amended certificate of grant. He denies executing any of the consents which supported the summons for confirmation or rectification of the grant, saying the signatures attributed to him are not his.

4. He laments that his brother (**JORAM KIMEMIA –the 2nd petitioner/respondent**) has forcefully taken over the running of the entire estate contrary to the interests of all the other beneficiaries, thus rendering the grant ineffective.

He also claims that JORAM has been harassing their mother (the 1st petitioner/respondent) to a point where there is no positive communication, and has on several occasions had her arrested by police merely on account of her raising concerns over the management of the estate..

5. This position is supported by his two sisters **EDITH MUTHONI** and **SYLVIA WAMBOI** whose affidavits are replicate of the objector's affidavit.

By a replying affidavit sworn by the 2nd petitioner/defendant, he deposes that the applicant has come to court with unclean hands as he has failed to disclose certain material facts, insisting that the objector and his two named sisters consented to the making of the grant vide Form 38, and they all signed the consent dated 25/06/2005 nominating the two petitioners as the administrators. Further, the objector and his two sisters swore a joint affidavit which they dully signed, and the entire process followed the legal requirements under the guidance of the family lawyer **ANDAMBI & CO ADVOCATES**.

6. The 2nd petitioner contends that there had never been any dispute over the properties before they were distributed. He maintains that the estate has been distributed to all the beneficiaries, most of whom have developed, utilized and even disposed of their entitlements. He admits lodging a complaint with the police, but says this was after he realized that a General Power of Attorney had been forged claiming that he had donated such power to the 1st petitioner (who is their mother), and the matter is still pending investigations.

It was as a result of that purported power of attorney that their mother sold his property namely **PIONEER/NGERIA BLOCK 1 (EATEC)114** to High-rise Designers Company Ltd. He consequently filed **ELDORET ELC CASE NO 9 OF 2019** which is pending in court. It is his position that the property known as **ELDORET MUNICIPALITY BLOCK 15 (HURUMA) 130** was transferred to him upon distribution as reflected in the title document, and he has developed it. He laments that it is not even clear what his siblings want to achieve in this matter.

7. **ABRAHAM KIPKOSGEI CHELANGA** joined in this matter as an interested party by virtue of the fact that he purchased for value parcel **No ELDORET MUNICIPALITY BLOCK 15 (WEST FARMERS) 1020** measuring 0,1000 acres and **PIONEER NGERI BLOCK 1(EATEC) 114** measuring 1 acre from the 2nd petitioner who had acquired beneficial interest, following confirmation of the grant.

Background

8. Upon the death of the late **DAVID WILLIAM KIGUMI KIMEMIA** on 15th July, 2003, **SALOME WANJIRU KIGUMI** (his wife) and **JORAM KIMEMIA** (his son) petitioned for the grant for letters of administration which was issued on 23rd June, 2004. The grant was later confirmed on 22nd May, 2006, rectified on 14th May, 2007, then confirmed as amended on the 18th September, 2012 and which reflected the mode of distribution.

The matter proceeded through viva voce hearing where the objector in testifying as PW1 on cross examination, confirmed that although he disowns the signature in the joint affidavit of authority as not being his, and being aware that forgery constitutes a crime in the Kenyan law, he has not reported the matter to police.

9. He also confirmed that he has been given a share of the estate being 2 acres from parcel **No PIONEER NGERIA BLOCK 1 EATEC 114**, but says he has not had physical possession of the same and complains that the distribution of the estate was not fair.

10. He is also aware that some of the beneficiaries have disposed off their shares.

On cross examination by counsel for the interested party, he insisted that all the properties belong to his father, and he is not aware of anyone else using the same, and as far as he is concerned, the interested party is just being noseey.

PW2 (EDITH KARAGU KIMEMEI) reiterated in court that she did not participate in the succession cause nor did she sign any document supporting the same. On cross examination by Mr. Lemayian on behalf of the 1st petitioner, she stated that:

“My problem is that JORAM KIMEMIA was favoured and I have issues with that. There is no property in my name”

She further stated upon cross examination by Mr Mukhabane, that she never attended court during confirmation, nor give anyone her national identity card for purposes of the succession cause, or signed any documents at an advocate's office and she is not even aware that she was given any property.

11. **SYLVIA WAMBUI KIMEMIA (PW3)** held the same position as **EDITH**, in opposing the mode of distribution, and says she is not aware of any property distributed to her.

In his evidence JORAM told this court that they instructed the firm of the late advocate **ANDAMBI** together with his other, to act on the succession cause, and that on the date the grant was confirmed, both petitioners and the other siblings were present except for BEN. That the whole family agreed on the distribution, and they even spoke to the applicant on phone who said he would support whatever their mother decided.

12. On whether the distribution was equal, the 2nd petitioner stated on cross examination that one would have to look at the value of the property, but as far as he is concerned, he was satisfied. It was also his evidence that he was not involved in the administration of the estate, and the exercise was taken up solely by their mother in whose account the rent collected would be deposited.

13. The 2nd petitioner confirmed that upon confirmation of the grant and distribution, he sold the **PIONEER/ NGERIA WEST FARMERS BLOCK 15** property to the interested party so as to set off some debts and also set up his business. The sale was confirmed by the interested party who testified as DW2 who explained that at the time of sale, the vendor did not have a title deed, but they relied on the certificate of confirmed grant which showed that the parcel had been assigned to him, and no one has sued him over the land. He is opposed to the revocation as he is in possession of the property, and if the grant is revoked, then he will lose out as he was a purchaser for value.

He however confirmed on cross examination that the agreement had a clause that if the sale transaction did not go through then the 2nd petitioner would indemnify him.

Issue for Determination

14. Upon consideration of the evidence and submissions of all the parties, the issue that arises for determination is **Whether the Defendants/Respondents obtained the grant of letters of administration fraudulently?**

Drawing from the provisions of **Section 76 of the Law of Succession Act, Cap 160 Laws of Kenya**, it is the Applicants/Objectors submission that the grant should be revoked for the principal reason that the documents used by the Defendants to procure the grant of letters of administration were forgeries. In addition, the administrators have not proceeded diligently with the administration of the estate;

15. The Applicants point out that the courts have consistently revoked grant of letters of administration procured using consents and affidavits that were not actually signed by the makers, especially where the beneficiaries are purported to have signed such documents. In support of this argument, the applicant cites the case of, *In re Estate of Gathuku Gathuna (Deceased) [2020] eKLR, Mary Ruguru Njoroge -V- Peter Muriithi Gichuru, [2016] eKLR* and *Penina Akumu Nyabola -V- Robert Mbai Nyabola & Another [2011] eKLR. In re Estate of Gathuku Gathuna (Deceased) [2020] eKLR (Meoli. J)*, the Court revoked a grant issued on the basis of, inter alia, forged signature of one of the beneficiaries, and stated that **“[a] grant obtained through forged documents cannot be allowed to stand.”**

16. The Applicants/Objectors further submitted that in the instant case, the Plaintiff/Objector has the burden to prove on a balance of probability that the signature that is borne on the documents filed in court to procure the grant of letters of administration, the confirmation and revocation thereof, was not his. In his testimony, the 1st Plaintiff/Objector submitted that he was away in the United States of America at the time when he was alleged to have signed the document, and therefore could not have possibly physically signed the document. He argues that he also did not receive and/or mail any document related to the succession proceedings herein. He lays emphasis to the fact that his being away at the material time when he was alleged to have signed the document, is not contested, and 2nd petitioner confirmed as much. He presented the relevant pages of his passport No. Axxxxx showing the visa issued by the USA government for his entry to that country, and the entry and exist stamps. None of this evidence was rebutted and goes to buttress the fact that the signatures contained in the impugned succession documents were forged.

17. The applicant's two sisters similarly stated that they never signed the documents that were presented in court, which the Defendants represented to the Court as having been signed by them. It is contended that this factual assertion was not displaced, even during cross-examination.

18. It is further submitted that the 2nd administrator using the same documents procured fraudulently, allocated himself choice assets of the estate and swiftly sold them off to the Interested Party, in an attempt to place them away from the interests of the other beneficiaries. They submitted that in his testimony in court, the 2nd Defendant/Respondent had the audacity to claim that he sold off the assets of the estate for his own personal aggrandizement, because the other beneficiaries of the estate owed him an obligation for his maintenance. They urged this Court not to countenance such argument, as there is evidence clearly that the signatures used to procure the grant are not genuine. That there is also evidence that the 2nd Defendant/Respondent, as an administrator and a beneficiary, is wasting away the assets of the estate to the detriment of the interests of the other beneficiaries, and has taken the advantage of the position of trust bestowed upon him by this Honourable Court as an administrator to enrich himself personally out of the assets of the estate, and has not managed the affairs of the estate in a proper manner.

19. As for the Interested Party who entered into an agreement with the 2nd Defendant, the applicant contends that any defects in the succession proceedings can be corrected by the court and that correction would invariably affect the proposed sale, the very basis upon which the Interested Party claims an interest. In the circumstances, any interest that he may have on the subject property is a contractual interest, and he has all rights and remedies as against the person who sold it to him, namely the 2nd Defendant herein.

20. Further, that any claims or interests that the Interested Party may claim to have acquired on the subject property cannot be sought against the estate of the deceased, but rather against the seller in the sale agreement. That the parties to the sale contract clearly appreciated the contingencies that may affect the obligations of the parties under the contract, and contemplated the possibility that the sale may not go through due to family objections.

21. The applicant draws to this court's attention paragraph 7 of the Sale of Land Agreement dated 8th January, 2019 and paragraph 6 of the

Sale of Land Agreement dated 18th January, 2010 which made a provision for the way or manner in which the parties to the agreements proposed to settle any disputes arising out of a refusal by any of the family members to consent to the transaction. That the Interested Party in his testimony affirmed the existence of these provisions in the sale contract. This court is urged to find that there is an express remedy for the Interested Party in the event that the grant is annulled/revoked, and he will not be at any disadvantage, nor will he suffer irreparable damage. Consequently, the Applicant urges this Court to allow the application dated 27th February, 2019.

2nd Petitioner's/Respondent's Submission

The 2nd Petitioner/Respondent contends that the application and affidavits of the Applicant/Objector alongside those sworn by his sisters are frivolous, vexatious and a clear abuse of court process hence should be dismissed with costs. It is his contention that the Applicants have come to this court with unclean hands for non-disclosure of material facts hence not deserving the orders sought, emphasizing that this came out clearly during the testimony in court when this matter came up for viva voce hearing.

22. The 2nd Petitioner/Respondent, referring this Court to annexure marked 'JK3' of the 2nd Petitioner's Replying Affidavit, submitted that it is not in dispute that the Objector and his witnesses **SYLVIA WAMBOI, EDITH MUTHOMI, JACINAT WANJIRU** and **BENSON KIMEMIA** consented to the making of a grant of Administration Intestate to Persons of and that the court was satisfied that all the process as required by the law had been followed ordered that the petitioners for grant of letters of administration be gazetted in the Kenya Gazette.

That **SYLVIA WAMBOI, EDITH MUTHOMI, JACINAT WANJIRU** and **BENSON KIMEMIA** swore a joint affidavit dated 4th August, 2005 in which they agreed that the 1st Petitioner, **SALOME WANJIRU KIGUMI** and the 2nd Petitioner be granted letters of administration till when they shall agree and file consent on mode of distribution of the deceased estate, Later all beneficiaries signed consent on mode of distribution dated 24th November, 2005, referring to annexure 'JK11' of the 2nd Petitioners Replying Affidavit, pursuant to which the grant and issued a certificate of confirmation of grant, referring to annexure 'JK12' of the 2nd Petitioners Replying Affidavit. It is the 2nd petitioner's contention that all the processes were done by the deceased family lawyer **M/S Andambi & Company Advocates**, hence the issue of forgery and fraud does not arise.

He submitted that allegations of fraud must be proved, citing the case of **R.G Patel -V-Lalji Makanji [1957] EA 314** where the former Court of Appeal for East Africa stated thus:

"Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."

23. The 2nd Petitioner submitted that in the current case despite all the evidence brought forth by the 2nd Petitioner, the Objector and ironically the 1st Petitioner are merely alleging fraud and there is no tangible evidence to support their claims. He submitted that no one had disputed that the late advocate Andambi was their family lawyer, nor distanced themselves from the signatures on various documents.

He further cited the case of **Vijay Morjaria -V- Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA** (as he then was) stated as follows:

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from facts."

He also cited the case of **Ndolo -V-Ndolo [2008] 1KLR (G &F) 742** wherein the Court stated that:

"We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases....." ".....In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

The 2nd Petitioner cited **Central Bank of Kenya Limited -V- Trust bank Limited & 4 Others [1996] eKLR**, where the court rendered itself as follows:

"The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary civil case. "

24. He points out that **Section 109 of the Evidence Act, Cap 80, Laws of Kenya**, places the burden of proof on the applicant as it provides that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie in a particular person.

He cites **Christopher Ndaru Kagina -V- Esther Mbandi Kagina & Another [2016] eKLR** where the court stated that:

“It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care must be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the Case Central Bank of Kenya LTD -V- Trust Bank Ltd & 4 Others [26] the Court of Appeal in considering standard of proof required where fraud is alleged state that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case. The burden of proof lies on the applicant in establishing the fraud that he alleges.

In Belmont Finance Corporation Ltd -V- Williams Furniture Ltd [27] Buckley L.J said:

“An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word ‘fraud’ or the word ‘dishonesty’ must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be very clear, and in such a case, it is incumbent upon the pleader to make it clear when dishonest is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegations of its dishonest nature will not have been pleaded with sufficient clarity.”

The 2nd Petitioner insists that the estate of the deceased having been distributed to all beneficiaries, some of the beneficiaries had developed, improved, utilized and some had disposed of their entitlement.

The 2nd Petition thus urges this Court to dismiss the application for revocation and/or annulment of grant dated 27th February, 2019 with costs to the 2nd Petitioner.

Interested Party’s Submission

25. The Interested Party’s position is that he is an innocent purchaser for value of properties number **ELDORET MUNICIPALITY BLOCK 15(WEST FARMERS)/1020** measuring 0.1000Ha and **PIONEER NGERIA BLOCK 1(EATEC)/1114** measuring 1 acre which formed part of the estate of the deceased. He produced before this court copies of the sale agreements to prove the sales of the said parcels of land bought from the 2nd Respondent on the 8th day of January, 2019 and 18th day of January, 2010 respectively. It is his contention that in the strict sense of it, the 2nd Respondent/Petitioner acquired his beneficial interests in the aforesaid properties by virtue of grant of letters of administration which the Objector/Applicant seeks to revoke and/or annul in the application dated the 27th day of February, 2019.

The Interested Party argues that the 2nd Respondent derived his authority to sell the said properties to him from the aforesaid grant which shows that he was allocated the two parcels of land and therefore he has powers to do whatever he feels like with his share of the estate.

He urges this court to consider that he has been in occupation of these parcels of land since he bought them and has immensely developed them. That he stands to suffer irreparable loss if the orders sought are not granted. He mentioned that he shall be deprived of his interest in the said properties if the said grant of letters of Administration is revoked and/or annulled. He therefore urges this court to dismiss the application dated 27th February, 2019 with costs.

Analysis and Determination

26. I have carefully considered the evidence presented as well as the submissions. The issue for determination include:

- a) Whether the grant was fraudulently obtained?
- b) Had the other beneficiaries consented to the mode of distribution? If so, then what has caused the change of heart?
- c) Why has their mother (the 1st petitioner maintained a studious silence over the matter?
- d) If the 2nd petitioner had already been given the properties, with the consent of his the other beneficiaries, then why was there a clause in the sale agreement that in the event of any of the beneficiary objecting to the transaction, he would indemnify the purchaser.

27. The law governing revocation or annulment of grant is **Section 76 of the Law of Succession Act, Cap 160 Laws of Kenya, and Rule 44 of the Probate and Administration Rules**. Section 76 stipulates as follows:

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.*

28. The principal reason for seeking revocation of the grant is that the documents used by the Defendants to procure the grant of letters of administration were forgeries. The issue this Court has to grapple with is **whether the Defendants/Respondents obtained the grant of letters of administration fraudulently**, and hence warranting the revocation of the grant issued on 23rd June, 2004.

There are certain principles or requirements that must be met for the allegation of fraud to be admitted by a court of law.

29. The first principle is that an allegation of fraud must be specifically pleaded and proved. In *Vijay Morjaria -V- Nansingh Madhusingh Darbar & Another [2000] eKLR*, where *Tunoi, JA* (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently.

It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from facts.”

30. In *R.G Patel -V-Lalji Makanji [1957] EA 314* the former Court of Appeal for East Africa stated as follows:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

31. In *Belmont Finance Corporation Ltd -V- Williams Furniture Ltd [27] Buckley L.J* said:

“An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word ‘fraud’ or the word ‘dishonesty’ must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be very clear, and in such a case, it is incumbent upon the pleader to make it clear when dishonest is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegations of its dishonest nature will not have been pleaded with sufficient clarity.”

32. The second principal is that the burden of proof of an allegation of fraud is on the person alleging. In *Ndolo -V-Ndolo [2008] 1KLR (G &F) 742* the court stated that:

“We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him.....In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

33. In *Christopher Ndaru Kagina -V- Esther Mbandi Kagina & Another [2016] eKLR* the court pronounced itself as follows:

“It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care must be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations.....”

34. In the case of *Urmila w/o Mahendra Shah v Barclays Bank International Ltd & Another [1979] eKLR*, the Court of Appeal took the view that the onus to prove fraud in a matter is on the party who alleges it.

In *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] eKLR*, the Court of Appeal observed as follows:

“In the instant case, the appellants needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was fraud in the transaction leading to the transfer and registration of the suit land in the name of Janet all the way to the respondent.....”

35. The third principal is that the burden of proof of allegation of fraud is higher than that required in civil cases that of proof on a balance of probabilities; and lower than that required in criminal case that is beyond reasonable doubt. In *Ndolo -V-Ndolo [2008] 1KLR (G &F) 742* the Court stated that:

“.....Since the Respondent was making serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in criminal cases.....”

In *Central Bank of Kenya Limited -V- Trust bank Limited & 4 Others [1996] eKLR*, the court rendered itself as follows:

“The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary civil case. “

In *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] eKLR*, the Court of Appeal observed as follows:

“..... Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities.....” In *R.G Patel -V-Lalji Makanji [1957] EA 314* the former Court of Appeal for East Africa stated as follows:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

36. *Section 76 of the Law of Succession Act, Cap 160 Laws of Kenya* gives five grounds upon which a court either on an application by an interested party or on its own motion could revoke and/or annul a grant. The Applicants/Objectors based their Application on the ground that the grant was obtained fraudulently. They submitted that their Having cited fraud as their ground for revocation of the grant, this Court is tasked with finding whether the Applicant has satisfied the three requirements that are to be met before a court entertains allegation of fraud.

From the forgoing precedents, it is settled law that the allegation of fraud is a serious allegation that must be strictly pleaded and proved. The burden of proof is on the person alleging and the standard of proof is higher than that of civil cases, which is on a balance of probability, and lower than the one in criminal cases, which is beyond reasonable doubt.

37. The Applicant has specifically pleaded fraud, their only shortcoming being on proving that allegation. However, instead of proving fraud, he has introduced a sixth reason for a court to revoke a grant, by submitted that the courts have consistently revoked grant of letters of administration procured using consents and affidavits that were not actually signed by the makers, especially where the beneficiaries are purported to have signed such documents. In support of this argument, they cited that case of, *In re Estate of Gathuku Gathuna (Deceased) [2020] eKLR*, *Mary Ruguru Njoroge -V- Peter Muriithi Gichuru, [2016] eKLR* and *Penina Akumu Nyabola -V- Robert Mbai Nyabola & Another [2011] eKLR*. In *re Estate of Gathuku Gathuna (Deceased) [2020] eKLR (Meoli. J)*, the Court revoked a grant issued on the basis of, inter alia, forged signature of one of the beneficiaries, and stated that **“[a]grant obtained through forged documents cannot be allowed to stand.”** Hence, the allegation of fraud fails as the Applicants have not sufficiently and specifically proved it.

38. The initial certificate of confirmation of grant was issued on 30th May, and listed that

JORAM KIMEMIA –

a) ELDORET MUNC. BLOCK 15 (WEST FARMERS)1020 –WHOLE SHARE

b) PIONEER/ NGERIA BLOCK 1 (EATEC) 1114 -1 ACRE

c) UASIN GISHU/KIMUMU/312 –1 ACRE

SYLVIA WAMBUI - PIONEER/ NGERIA BLOCK 1 (EATEC) 1114 - 1 ACRE

JACINTA WANJIRU- PIONEER/ NGERIA BLOCK 1 (EATEC) 1114 - 1 ACRE

EDITH MUTHONI - PIONEER/ NGERIA BLOCK 1 (EATEC) 1114 - 1 ACRE

BENSON KIMEMIA - PIONEER/ NGERIA BLOCK 1 (EATEC) 1114 - 1 ACRE

, BENSON KIMEMIA - UASIN GISHU/KIMUMU/312 - 2 ACRES

SALOME WANJIRU KIGUMI - UASIN GISHU/KIMUMU/312 -2 ACRES

SALOME WANJIRU KIGUMI - ALL DECEASED PROPERTIES AND REMAINING COMPANY’S SHARES

39. This was later rectified to add another property in **BUNGOMA/ NDALU/339** measuring **3.10 acres** which was to be registered in the joint names of the two administrators and be held in trust for all the other beneficiaries. In addition the applicant and the 2nd petitioner were allocated shares at **MBOI KAMITI COMPANY, AND HURUMA FARMERES COMPANY RESPECTIVELY, WHILE SALOME GOT SHARES FROM BARCLAYS BANK, STANDARD CHARTERED BANK, IPS, REA VIPINGO AND KENYA AIRWAYS.**

40. I have perused the record, and this is what I pose even as we test the burden of proving fraud - since it is conceded that the applicant was not within the country when the process geared towards obtaining grant of letters begun, what explanation does the 2nd petitioner have for the signature appended against the applicant's name in the form titled consent for mode of distribution dated 24th November 2005?

Admittedly since the Applicant and his two siblings allege that the signatures attributed to them are forged, the onus of proving this allegation was squarely on them because an allegation of fraud is a serious matter and should be brought to the attention of a court at the earliest opportunity. The 2nd petitioner has not given a satisfactory explanation as to who appended the signature attributed to the applicant, in the documents which were presented to the court, as to create the impression that the applicant had consented and even sworn affidavits. It is common ground that the applicant was out of the country at the time, and if he had appended his signature electronically then it would not be appearing as it is in the handwritten documents, and in any case that is not what the 2nd respondent claims.

41. Then there is the issue as to whether they attended court for confirmation- unfortunately there is no record of proceedings for confirmation of the grant, and it is difficult to tell whether the court recorded the names of those who were present, or even their identification details.

When the matter was presented before the court on 18/12/2006 for rectification, the record shows that only the 1st petitioner was present, and the court relied on a consent purported to have been signed by all the beneficiaries- again the applicant was not in the country, so who signed on his behalf, and with whose authority.

42. The subsequent rectification which added the Bungoma property was done on 23/4/2007, according to the court record, and only the 1st and 2nd petitioners were present – little wonder then that the other beneficiaries lament that things were being done without involving them. I find that the applicant has demonstrated misrepresentation on the part of the administrators, and there is nothing on record, either by way of information to the court, or by some other document, to show that the court was made aware that one of the beneficiaries was outside the country.

I find that the applicant has met two of the limbs envisaged under **Section 76 of the Law of Succession Act**, namely that there was non-disclosure as regards the absence of the applicant (which if the court had been informed, I am sure it would have set certain conditions to be met so as to be certain that he applicant was aware of the on-goings and had consented.

43. Secondly, there was obvious misrepresentation as to who signed all the documents against the applicants name so as to make it appear that he was the signatory, yet at the time he was out of the country.

In considering what the effect of granting the order for revocation would have especially on the Interested Party who was an innocent purchaser for value, I think his interest is well secured by the clause included in the sale agreement that in the event that any beneficiary opposes the transaction, the 2nd plaintiff would indemnify him. The inclusion of this clause leads me to draw a reasonable inference that the 2nd petitioner was aware that not all the beneficiaries had been involved in the confirmation and distribution of the estate. Fortunately for the Interested Party, not all is lost as he has a claim against the 2nd petitioner.

Consequently, I hold and find that the application for revocation grant is merited and is allowed to the effect that the grant of letters of administration to **SALOME WANJIRU KIGUMI** and **JORAM KIMEMIA** issued on the 23rd day of June 2004, confirmed on the 22nd day of May, 2006 and rectified on 18/12/2006, then further rectified on the 14th day of May, 2007 and further rectified, be and is hereby revoked.

Costs of this application shall be borne by the 2nd petitioner.

DELIVERED, SIGNED and DATED at ELDORET this 27th day of May 2021

H. A. Omondi

Judge