



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION CAUSE NO 506 OF 2011

IN THE MATTER OF THE ESTATE OF THE LATE ZAGANYA PEA CHOVU (DECEASED)

BONDORA GANJIRANI.....APPLICANT

VERSUS

ROBERT KARISA ZANI.....RESPONDENT

JUDGEMENT

1. The deceased herein died intestate on 12th May, 2007 while domiciled at Mbwaka-Kikomani area within the Republic of Kenya. He was survived by a brother known as Robert Karisa Zani the petitioner /respondent herein as the only beneficiary. The only asset allegedly left by the deceased was L.R Plot No. Kilifi /Chauringo /xxx.

2. On 13th December, 2011, the said Robert Karisa petitioned for a grant of representation. The same was granted and issued on 4th December, 2012. It was subsequently confirmed on 9th April, 2019 with the petitioner taking the entire estate

3. Consequently, on 18th December, 2020, one Bondora Ganjirani, filed a summons for revocation of grant dated 17th December, 2020 seeking orders as follows;

(1) Spent;

(2) That an order of inhibition of plot No Kilifi/Chauringo/xxx be granted pending the hearing and determination of this application;

(3) That the grant of letters of administration intestate issued to Robert Karisa Zani on the 4th of December, 2012 and confirmed on 9th April, 2019 be revoked;

(4) That the costs of the application be provided for.

4. The application is premised upon grounds set out on the face of it and the content contained in the affidavit in support sworn by the applicant on 17th December, 2020 claiming that; the grant was fraudulently obtained by the making of a false statement that plot No Kilifi/Chauringo /xxx formed part of the estate of the deceased; grant was obtained fraudulently by concealment from the court material facts that plot no Kilifi/Chauringo/xxx had on 5th November, 2008 been awarded to the applicant, by Kaloleni, Land Disputes Tribunal in claim No. LDT/KAL/2007 which award was subsequently adopted on 10th April, 2018 by an order of the court by Senior Resident Magistrate's Court Kaloleni Land Case No 41/2008;

5. It was averred that the petitioner was fully aware of the said award as he took part in the land disputes tribunal's proceedings which culminated into the said award which was later adopted as an order of the court. The award is to date in force and valid. That having not challenged the award on appeal, the applicant had no capacity to list the land in question as comprising the estate of the deceased thus attempting to defraud the applicant and also circumventing the award and therefore the court judgment in force. A copy of the award and the court order were attached as proof and marked as annexure BG-29 and GB 26 respectively.

6. Despite service of the said revocation application upon the petitioner/respondent, no response was elicited nor filed. When the matter came for hearing on 4th February, 2021, Mr. Amadi appearing for the petitioner /respondent sought for time to file a response. Counsel was granted 14 days to do so. Hearing was then rescheduled to 8th March, 2021. Come 8th March, 2021 Mr. Amadi again sought an adjournment claiming that he had not been able to file a response due to his client's sickness. Despite strenuous objection to adjourn by Mr. Origi counsel

for the applicant, the court granted an adjournment on a benefit of doubt. Again, Mr. Amadi was given 14 days to file a response. Hearing was then rescheduled to 3rd May, 2012.

7. On 8th March, 2021, there was no appearance for the respondent. M/s Maiga holding brief for Mr. Origi for the applicant urged the court to allow the application as the same was not opposed. She literally relied on the averments contained in the affidavit in support.

Determination.

8. I have considered the application herein, grounds and averments contained in the affidavit in support thereof. As explained above, the application is not opposed. However, the fact that the application is not opposed is not a guarantee that the application must succeed. The applicant is duty bound to prove the veracity of his case to the required degree the absence of any response notwithstanding. See **Gideon Sitelu Konchellah Vs Julius Lekakeny Ole Sunkuli & 2 Others (2018) e KLR** where the Supreme Court held that the fact that a suit is not opposed does not mean that the court will automatically allow the same without placing evidence before the court and have the same determined on merit.

9. The law governing revocation of a grant is provided under Section 76 of the Law of Succession Act which bestows authority upon the court to revoke or annul a grant of representation whether or not confirmed if the court is satisfied at any time either on application by any interested party or of its own motion that;

(a) 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 fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently

(d).....

(e).....

10. It is trite that the authority to revoke or not to revoke a grant is within the discretion of the presiding Judge or court. See **Albert Imbuga Kisigwa v Recho Karai Kisigwa Succession cause No 158 /2000** where the court held that;

“Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to revoke or annul a grant and when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice”.

11. In the instant case, the petitioner has been accused of dishonesty and failure to disclose the fact that there was a Land Dispute Tribunal award which was made on 5th November, 2008 in favour of the applicant thus conferring ownership of the subject land into the applicant’s name. I have perused the said award and the court order dated 12th July, 2018 adopting the award as an order of the court.

12. Indeed, had this information been relayed to the court, the Court could not have made the orders it did through the certificate of confirmation of grant conferring ownership of the said land to the petitioner. Further, the petitioner had no reason to seek for a grant of representation while fully aware that the deceased had not left any estate capable of inheritance and distribution.

13. I am convinced that the respondent/petitioner concealed material information from the court hence the grant was obtained through fraudulent means. Considering that the application was not opposed, I am satisfied that the application is merited and the same is allowed with orders that;

(1) The grant issued on 4th December, 2012 and confirmed on 9th April, 2019 is hereby revoked and the certificate of confirmation thereof annulled.

(2) I do award costs to the applicant.

DATED, SINGED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF JUNE 2021

J. N. ONYIEGO

JUDGE