



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

SUCCESSION CAUSE NO. 106 OF 2016

IN THE MATTER OF THE ESTATE OF DEDAN KABIRU KIHONGE (DECEASED)

RULING

1. This succession cause relates to the *ESTATE OF BEDAN KABIRU KIHONGE DECEASED*. The deceased had two wives. The deceased's two sons from the two homes petitioned, by their petition dated 21st November 2003, for grant of letters of administration intestate for the deceased's estate. A grant was issued to them dated 15th April, 2004. By summons dated 8th December, 2010, the administrators sought confirmation of grant. A confirmed grant was issued by the court dated 26th January, 2011. By summons dated 28th June, 2016, **ROSE WAMBUI KARANJA (Rose)** seeks revocation of that grant on the ground that:-

- a. That the proceedings to obtain the ground were defective in substance.
- b. That the grant was obtained fraudulently by making a false statement and by concealment from the court of something material to the case.
- c. That the grant was obtained by means of untrue allegations of facts essential in point of law of (sic) justify the grant.
- d. That some of the beneficiaries were left out.

2. In the affidavit in support of that application, Rose deponed that she was not informed of the petition for grant of letters of administration; that the petitioners failed to state, in the petition, the "true beneficiaries"; that the grant was obtained fraudulently by making false statement and by concealment from the court of the true numbers of beneficiaries; and that the grant was obtained by untrue allegations of facts. It is upon those ground that Rose sought the grant to be revoked and that the transactions and registrations undertaken on the basis of the grant hereof, be cancelled and the estate of the deceased be reinstated to the status it was in before the confirmation of the grant.

3. Rose gave viva voce evidence in support of the summons for revocation of grant. By that evidence, Rose reiterated, in chief that, she was not "involved" in the petition for grant in this case.

4. On cross examination, Rose confirmed that the deceased's property, in Juja was sold and she was given a share of the sale proceeds. She confirmed that she was shown the grant by her step brother and proceeded to state:-

"I have been trying to persuade the petitioners together with other siblings to share with me the remaining estate...

That is after I learnt the grant had been issued."

5. Rose also confirmed under cross examination that she and her siblings had long discussions on several occasions which discussions did not bear any fruits and consequently, she reported the matter to the chief before whom she and her siblings had lengthy discussion. The chief thereafter referred the matter to elders. Those elders resolved that Rose be given ? acre which resolution Rose did not accept. Rose also disagreed with the mode of distribution, in the confirmed grant, because she did not participate in the agreement of that distribution. She stated she was unaware that the mode of distribution was in accordance with their deceased father's mutation of the estate property. Rose confirmed that she requested by letter, the deceased to give her land during his life time. Although she stated her siblings failed to follow the deceased's instructions, that she be given the Juja land she did, later, confirm that Juja land was sold by her siblings. She did not object and she was given Kshs.307,000 of the sale proceed of that land. Rose stated that she did not sign any documents relating to the petition for grant of letter of administration. Rose finally stated in cross-examination:-

"Yes the land I claim was given to my siblings by father (the deceased) in his lifetime."

6. On 26th October, 2020 parties recorded a consent to the effect that the replying affidavits, by the respondents to Rose's application, be **"treated as evidence,"** in this matter.

7. The respondent to the application by Rose for revocation of grant is the sole surviving administrator, **Joseph Ngigi Kabiro (Joseph)**. Joseph through his replying affidavit dated, 4th December, 2019 deponed that Rose was not candid in stating that she was not involved in this succession proceedings. He stated that Rose was involved through the other administrator (now deceased) **Norbert Mwangi Kabiru** deceased, who was her brother.

8. Joseph further deponed that their deceased father subdivided his land properties amongst his beneficiaries and to that end there were annexed to Joseph's affidavit mutation forms that the deceased signed in his life time, that is on 26th July, 1998. After the deceased subdivided his properties in his lifetime, he permitted his beneficiaries to take physical possession of the land he, the deceased, had allocated to them. That when the deceased subdivided his properties amongst his beneficiaries, his married daughters, including Rose, were uninterested in being allocated land by the deceased. Rose however, later changed her mind and requested the deceased to allocate her land and the deceased acquiescence to her request. The deceased did so in writing by letter addressed *"To whom it may concern"*, dated 6th April, 1999. He directed, by that letter that property RUIRU EAST/JUJA EAST BLOCK NO.2/93 be distributed between homes of his two wives and in doing so Rose be allocated ½ acre from the land to be registered in her name. Joseph deponed that Rose was allocated ½ acre which she agreed to sell and the sale proceeds were given to her. He further deponed:-

"That Rose Wambui Karanja has now made false allegations against me so that she can get a double inheritance from the estate of my late father.

That grant was confirmed in (sic) 26th January, 2011 and Rose Wambui has waited until it is too late to object (sic) because all the beneficiaries have taken possession and developed their respective parcel of land and the process on inheritance is complete. Some of the beneficiaries have even sold their positions."

9. Rose's application for revocation of grant was also opposed through the replying affidavit of **Lydia Wangui Kabiru (Lydia)**. Lydia deponed that the deceased had two wives and that she and Rose were children of one of those wives namely, **Maria Wanjiku Kabiru**. That the deceased in his life time divided his land amongst his sons and his unmarried daughter. Lydia was one of the unmarried daughters of the deceased. That in allocating his land amongst his sons and his unmarried daughters the deceased obtained the services of a land surveyor who carried out the subdivisions and drew mutations. That at Rose's request the deceased wrote and stated that Rose was entitled to ½ of RUIRU EAST/JUJA BLOCK 2/93 whose total acreage was ¾ acres. That Rose did not raise any complaint on the sharing of the deceased's land in the life time of the deceased. That Rose subsequently sold her land at Juja with the intention of buying an alternative land. Lydia further deponed:-

" That Rose Wambui Karanja claim is an afterthought that has been overtaken by events. She is merely misusing these proceedings to unlawfully acquire a double inheritance.

- **That Rose Wambui Karanja has no claim against the house of my stepmother Phylis Wanjiku Kabiru but she has caused anguish and disharmony amongst myself, my brothers and my sisters.**
- **That it is not true that Rose Wambui Karanja was not involved in the succession proceedings. She was aware at all times but she did not see the need of disrupting (sic) because the administrators namely, Joseph Ngige Kabiro and Norbert Mwangi Kabiru had applied to have the assets of the estate distributed in exactly the same way my father had divided when he was alive."**

ANALYSIS

10. Rose has moved this Court by **Section 76** of the **Law of Succession Act, Cap 160**, for revocation of the grant. **Rule 44(1) and (2)** of the Probate and Administration Rules (hereinafter the Rule) provides the procedure a party should follow in seeking revocation of a grant. **Rule 44 (1) and (2)** is in the following terms:-

"(1) Where any person interested in the estate of the deceased seeks pursuant to the provisions of Section 76 of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that Resident Magistrate's registry.

(2) There shall be filed with the summons an affidavit of the applicant in form 14 for revocation or annulment identifying the cause and the grant and containing the following particulars so far as they are known to him:-

- a. whether the applicant seeks to have the grant revoked or annulled and the grounds and facts upon which the application is based; and**
- b. the extent to which the estate of the deceased has been or is believed to have been administered or to remain unadministered, together with any other material information.**

11. From the provisions of the above Rule, it is clear Rose was required to set out the grounds and facts upon which she based her prayer for revocation of the grant. Rose in her affidavit in support of the application for revocation set out the grounds upon which she sought her prayer which are; she was not informed of this cause; the proceedings in obtaining the grant were defective; the grant was obtained

fraudulently by making false statement and by concealing the true numbers of the beneficiaries; and that the grant was obtained by means of untrue allegations of fact.

12. A close look of those ground will show there is absence thereof, of facts to support the same. For example, how was the application defective in substance? How was it fraudulent and what were the untrue allegations? The affidavit in support of the application fails to substantiate the above grounds. Indeed, it is clear what Rose simply did in her affidavit is to replicate the provisions of **Section 76 of Cap 160** provides 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.”

13. Consideration of Rose’s affidavit shows that the beneficiaries and even this Court would fail to appreciate Rose’s grievance and the reason she seeks for the grant to be revoked. In the evidence in chief, Rose simply adopted her affidavit. She did not therefore in evidence in chief set out how fraud was committed by the administrators or how they obtained the grant by false allegations of facts. It was only in cross examination that Rose stated:-

“Yes, my affidavit says my signature was forged but my affidavit did not specify. I did not sign any of the petition documents.”

14. What actually is the position in this cause is that there is a consent signed by beneficiaries, filed in court on 21st November, 2003, which consent signified the beneficiaries’ acceptance of the petition being filed by the two administrators. That consent is stamped and signed by the chief of Tinganga location. The name of Rose is in that consent and there is a signature next to Rose’s name. Further, when the administrators filed the application for confirmation of grant on 14th December, 2010, they annexed a consent of the beneficiaries which signified their acceptance of the distribution of the estate. Rose’s name again appears on this consent and next to Rose’s name is a signature. What is important to note is that the signatures of those beneficiaries were appended in the presence of *Anthony M. Mulekyo Advocate*, whose stamp appears below those signatures.

15. In the light of the above, what is this Court to make of the flimsy allegations made by Rose? Rose did not specifically deny appending her signature in both of those consents. It was not enough for Rose to allege fraud or untrue statement allegedly made by the administrators.

16. The allegations Rose makes, by her present application allege criminal activity. Rose’s allegations of fraud calls for heighten scrutiny of evidence. There is however no evidence presented to this Court which prove fraud. Proof of fraud requires clear and cogent proof. The standard of proof on allegation of fraud was discussed in the case *URMILA W/O MAHENDRA SHA VS. BARCLAYS BANK INTERNATIONAL LTD & ANOTHER (1979) eKLR* thus:-

“As was said by this Court’s predecessor in *RATILAL GORDHANBHAI PATEL V LALJI MAKANJI [1957] EA 314, 317:*

“There is one preliminary observation which we must take on the learned judge’s treatment of this evidence: he does not anywhere... expressly direct himself on the burden of proof or on the standard of proof required. 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. There is no specific indication that the learned judge had this in mind: there are some indications which suggest he had not.”

17. The Court of Appeal in the case *KURIA KIARIE & 2 OTHERS VS. SAMMY MAGERA (2018) eKLR* also confirmed standard of proof for fraud as follows:-

“25. The next and only other issue is fraud. The law is clear and we take it from the case of *VIJAY MORJARIA VS 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 the facts.’ [Emphasis added].

...

26. As regards the standard of proof, this Court in the case of *KINYANJUI KAMAU VS GEORGE KAMAU [2015]*

eKLR expressed itself as follows:-

‘...It is trite law that any allegations of fraud must be pleaded and strictly proved. See NDOLO VS NDOLO (2008) 1 KLR (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 a 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.’

As was said by this Court’s predecessor in RATILAL GORDHANBHAI PATEL V LALJI MAKANJI [1957] EA 314, 317:

‘There is one preliminary observation which we must take on the learned judge’s treatment of this evidence: he does not anywhere... expressly direct himself on the burden of proof or on the standard of proof required. 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. There is no specific indication that the learned judge had this in mind: there are some indications which suggest he had not.’”

18. Rose did not specifically plead fraud. In other words, she failed to particularise the alleged fraud. She did not deny in her affidavit having signed the two consents. Rose therefore failed to satisfy the onus of proof on the required standard for an allegation of fraud. Rose Failed to establish upon balance of probability and by a degree of proof commensurate with the gravity of the allegation that there was fraud.

19. Rose also did not specify what made the proceedings in this cause to be defective in substance and she also failed to prove there were false statements made by the administrators. A case on this point is In re ESTATE OF MICHAEL KIPKOSGEI KURGAT (Deceased) 2021) eKLR thus:-

“The Court in the case of JAMLECK MAINA NJOROGE –VS- MARY WANJIRU MWANGI (2015) eKLR at paragraph 11 of its ruling in revoking a grant reiterated the grounds upon which a grant can be revoked. It stated as follows;

‘11. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession Act. For a grant to be revoked either on the Application of an interested party or on the court’s 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 making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.’” (emphasis added.)

20. In my view the application is incompetent and misconceived. Rose further failed to address whether the properties distributed to the beneficiaries had been sold to third parties as required by **Rule 44(2)(b)**.

DISPOSITION

21. In the end, this Court finds the statutory grounds of revocation of grant having not been established in the summons dated 28th June, 2016, the same is incompetent and is hereby dismissed with costs.

RULING DATED, SIGNED AND DELIVERED AT KIAMBU THIS 23RD DAY OF JUNE, 2021

MARY KASANGO

JUDGE

Coram:

C/A :Ndege

For Rose Wambui Karanja : Mr. Gatitu

For the Administrator: Mr. Wambu holding brief Mrs. Wainaina

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE