



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

P&A 349 OF 2014

EMMANUEL KIPLETING MUTAI.....APPLICANT

VERSUS

CLARA JERONO.....RESPONDENT

RULING

What is pending before this court is an application dated 22nd November 2019 where the applicant made the following prayers;

1. Spent
2. That the grant of letters of administration intestate issued to CLARA JERONO and confirmed on 7th September 2018 be revoked or annulled.
3. THAT the estate property being land parcel
NANDI/LELMOKWO 399 measuring 4.99 Ha be preserved pending the hearing and determination of the application interpartes and thereafter pending the determination of the case.
4. THAT the respondent be temporarily restrained from dealing with the estate being land parcel NANDI/LELMOKWO 399 pending the hearing and determination of this application interpartes and thereafter pending the determination of the cause.
5. THAT costs of this summons be awarded to the applicant.

APPLICANT'S CASE

The applicant filed submissions on 11th May 2021. In his supporting affidavit the applicant deposed that he is one of the beneficiaries in the grant that was confirmed on 7th September 2018. He claims he was not involved in the confirmation of the grant as he was in prison serving an 18-month jail term. He annexed the proceedings in criminal case no. 2737 and 2738 of 2018 – Kapsabet in which he was jailed. He claims he never signed any consent for confirmation of the grant and any signature on the consent purporting to be his own is a forgery. He further states that the land KAPLAMAI/SIRENDE BLOCK 2/NGONYEK/34 which is claimed to have been given back to him was not part of the estate.

The applicant submits that the consent to confirmation of grant dated 10th June 2015 annexed as CJ3 is signed by two individuals; Eunice Barno and TKL who is indicated as the grandson. The name of the applicant is missing from the consent. The grandson is said to be 12 years old and the question is, was he competent to sign? The applicant cites *Section 76 of the Law of Succession Act* and submits that under *rule 40(8) of the Probate and Administration rules 1980* the court can allow the application of the confirmation where all the dependants or other persons who may be beneficiaries have filed written consents. The applicant did not attend the confirmation and the respondent concedes that he was in jail.

Rule 41(8) of the same *rules* provides that the approval of accounts may be dispensed with if all persons beneficially entitled have signed as consenting to the accounts as produced.

As regards a grant to a minor or infant the applicant cites rule 32 of the probate and administration rules and submits that there is no explanation as to how Rael Maritim became a trustee to the minor JK who ended up with 4.1 acres of the estate whose father is the applicant and who also has a surviving mother. A perusal of the court record does not show any application made by Rael Maritim to act as a guardian for him. There is no such order from any other proceedings which is filed in this cause on how he was introduced to these proceedings.

The grant was made to 5 people who are Clara Jerono, Rael Maritim, Eunice Barno, Teresia Chirchir and Janet Kosgei. The confirmation was done in favour of seven people which now included the applicant and one Thomas Letting.

The applicant seeks that the grant issued to Clara Jerono be revoked or annulled.

The applicant also filed a further affidavit on 20th January 2021. He deponed that he never consented to the making of the distribution and any signature on the consent marked CJ – 4 is a forgery. Further, contrary to paragraph 9 of the supporting affidavit, it was incumbent on the respondent or her advocate to have him produced in court during the confirmation. By merely writing a letter to the court and failing to see through for the issuance of a production order was just an act of convenience whereas no serious action was undertaken to have his presence in court.

He never consented to any withdrawal of objection and there is no such consent allegedly annexed as CJ-8 and if it exists, it's a forgery.

The respondent contends that he never attended any family meeting relating to the distribution of the estate and any document showing that he did is a fraud.

It is misleading for the respondent to claim that KAPLAMAI/SIRENDE BLOCK 2/NGONYEK/34 was part of the estate when the same was transferred to him in 2000 and the deceased was still alive at that time as he passed on 20th November 2013.

The claim that the applicant is insane is not supported by any medical evidence and borders on defamation.

RESPONDENT'S CASE

The respondent filed a replying affidavit on 10th December 2019.

The respondent deponed that she is the daughter of the deceased and the administratrix of the deceased's estate.

She deponed that she petitioned for the grant of letters of administration and annexed the same as CJ-1(a)(b) & (c). The court issued her with the grant of letters of administration on 7th September 2018 annexed as JC-2.

She deponed the history of the process of acquiring the grant. She contended that she was aware that all the beneficiaries, including the applicant herein, freely consented to the mode of distribution of the deceased's estate. She referred the court to CJ – 4.

The applicant was not in prison at the time of consenting to the mode of distribution but he was in prison at the time of confirmation of grant. She instructed her advocates to write to the court for an order of the applicant's production in court from jail in the event it deemed his presence necessary in court during the hearing. She referred to annexure CJ – 5.

The applicant filed a summons for revocation of grant prior to the confirmation of grant but afterwards recorded a consent wherein he withdrew the summons for revocation of grant and the objection proceedings. The same was annexed as CJ – 8. At the time of signing the consent the applicant was not in prison.

KAPLAMAI/SIRENDE BLOCK 2/NGONYEK/34 measuring 5.22 Ha was part of the estate of the deceased before it was transferred to the applicant. She referred to annexure CJ – 9 in support of this submission.

Based on the consent of all of the deceased's estate's beneficiaries, they distributed another 4.1 acres of the deceased's estate to the applicant's son, JK. She annexed as CJ – 10 the birth certificate notification that shows he is the son to the applicant.

The decision to distribute the land to the applicant's son was for the best interest of the minor as the applicant has a habit of selling land. She referred to annexure CJ-11 which is an official search that shows he has since sold his property.

The applicant signed all consent documents in effect that his share from the deceased's estate was to be distributed to his son. Since the son is a minor, Rael Maritim holds his share in trust in accordance with the law.

All the beneficiaries have their shares in their names and are utilizing it.

The respondent deponed that the supporting affidavit to the application is defective and illegal in so far as it states that the applicant sworn it at Eldoret yet the applicant has been serving a jail term at Kapsabet until he was released from prison on 7th December 2019.

The applicant is not in his right state of mind to swear the purported affidavit as he is apparently suffering from insanity.

ISSUES FOR DETERMINATION

1. Whether the Grant of Letters of Administration should be revoked

2. Whether the Land Parcel NANDI/LELMOKWO 399 measuring 4.99 Ha should be preserved

3. Whether the supporting affidavit to the application is defective

WHETHER THE GRANT OF LETTERS OF ADMINISTRATION SHOULD BE REVOKED

Section 76 of the *Law of Succession Act* provides;

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.”**

Whether the proceedings were defective.

The applicant contends that the proceedings were defective. The applicant claimed that the consent to the confirmation of grant dated 10th June 2015 annexed as CJ-3 is defective as it is signed by the grandson who was 12 years at the time of signing. Further, that his name is also missing. He questions whether the son was competent to sign. He also pointed out *Rule 40(8)* and *41(8)* of the probate and administration rules and that there was no justification for approval of accounts in his absence.

Rule 40(8) of the *Probate and Administration rules* provides;

(8) Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit.

Rule 41(8) of the *Probate and Administration rules* provides;

The approval of the accounts in court may be dispensed with if all persons beneficially entitled have signed as consenting to the accounts as produced.

He contends that he was in prison at the time of confirmation and therefore did not consent to the accounts. On 17th July 2018 the applicant was sentenced to 12 months' imprisonment in Criminal Case no. 2737 and 2738 of 2018. It was not in dispute that he was released from prison on 7th December 2019.

A perusal of the annexures (CJ – 4) shows that there is a signature purporting to consent to the distribution of the assets by the applicant. The consent is to the distribution of assets where he was given KAPLAMAI/SIRENDE BLOCK 2/NGONYEK/34 measuring 5.22 ha. A perusal of annexure CJ – 9 to the respondent's replying affidavit shows that the property was transferred to the applicant on 18th February 2000 and therefore cannot be said to have been part of the estate as the deceased died on 20th November 2013 as per his death certificate. It was therefore a gift and cannot be deemed to have been part of the estate as at the time of death. It does not make sense that on 23/4/2018 the applicant consented to be given land of which he already had in the year 2000.

The consent to confirmation of the grant and distribution annexed as CJ – 3 is signed by only two beneficiaries.

Section 71 of the Law of Succession Act provides;

1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may—

(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant; or

(b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of sections 56 to 66 of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered ; or

(c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or

(d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares.

It therefore follows that there was a defect in the description of assets as the land known as KAPLAMAI/SIRENDE BLOCK 2/NGONYEK/34 was not part of the estate of the deceased. There is also an issue with the consent to the confirmation of grant and distribution as the applicant did not sign the same despite the respondents' claim at paragraph 8 of the replying affidavit that the applicant was not in prison at the time of signing.

There is no explanation as to why the applicant was not included in the consent for confirmation of grant and distribution.

WHETHER THE LAND PARCEL NANDI/LELMOKWO 399 MEASURING 4.99 HA SHOULD BE PRESERVED

It is clear that there are defects in the distribution of the estate. Some property included as per the distribution schedule is not part of the estate and therefore the applicant as a beneficiary is entitled to part of the estate.

I do find that the process of obtaining the confirmation of the grant of letters of administration was defective. However, I note that the respondents claim the same has been transferred and utilized and therefore the orders that may be issued in this respect may have been overtaken by events.

WHETHER THE SUPPORTING AFFIDAVIT TO THE APPLICATION IS DEFECTIVE

The supporting affidavit was clearly sworn in Eldoret on 22nd November 2019. The applicant was released on 7th December 2019. This begs the question of how he was able to depone the affidavit while still in prison yet the same was commissioned in Eldoret despite the applicant serving time in Kapsabet.

It is clear that the supporting affidavit is defective as the same could not have been sworn in Eldoret by the applicant who was in Kapsabet serving a prison term. I find that the defect causes the application to collapse on all ends.

In the premises the application fails due to the defective supporting affidavit. There were defects in confirmation of grant but the issue of the defective supporting affidavit is not one that can be cured by provision of *article 159* of the *Constitution* as it is more than a mere technicality. It brings into question the veracity of the application itself.

Having said so, I do find that though the applicant has a point, his application is fatally defective and the prayers sought cannot be granted. The application therefore fails.

Parties to bear own costs in the application.

S.M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21ST DAY OF JUNE, 2021.

In the presence of:-

Mr. Manani for the respondent (absent)

Ms Wesonga holding brief for Mr. Nyamweya for the applicant

Ms Gladys – Court assistant