



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION CAUSE NO 302 OF 2015

IN THE MATTER OF THE ESTATE OF THE LATE HESBON FRANCIS OTIENO OLUOCH (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR REVOCATION OF GRANT OF LETTERS OF

ADMINISTRATION ISSUED TO IRENE AWUOR ODHIAMBO

GILBERT OTIENO OLUOCH.....2ND PETITIONER

HENRY ANGULA OLUOCH..... OBJECTOR

VERSUS

IRENE AWUOR ODHIAMBO.....1ST PETITIONER

RULING (2)

1. In their Summons for Revocation of Grant dated 25th October 2019 and filed on 28th October 2019. The 2nd Petitioner and the Objector sought orders that the Letters of Administration of the deceased's estate that were issued to the 1st and 2nd Petitioners on 5th May 2016, pending confirmation, be revoked and that upon the said order being granted, this Honourable Court be pleased to issue fresh Letters of Administration of the deceased Estate.
2. He also sought orders for cancellation of title deeds issued in Kisumu/Kanyadwera/671, Kisumu/Kanyadwera/672, Kisumu/Kombewa/4259, East Seme/Kombewa/4260, Manyatta A 361, Manyatta A 362, Unsurveyed Residential Plot No 361 Migosi S & S Scheme Kisumu, Unsurveyed Residential Plot No 362 and Plot No L.R Kisumu/15026/40 with the said properties reverting to the deceased's estate.
3. They also prayed that the 1st Petitioner be summoned to disclose the extent of her intermeddling with the deceased's estate and show cause why criminal sanctions should not befall her. The said Summons for Revocation of Grant was supported by their Affidavits that were both sworn on 25th October 2019.
4. They pointed out that they were blood brothers and averred that they survived the deceased together with the 1st Petitioner and their brother. They were emphatic that the deceased did not have any other dependant and put any other person claiming to be a dependant of the deceased to strict proof thereof.
5. They averred that at the time the Grant of Letters of Administration intestate was issued on 5th May 2016, out of the aforementioned properties, the 1st Petitioner willingly and maliciously failed to list Kisumu/Kanyadwera/671, Manyatta A 361 and Manyatta A 362 as properties that belonged to the deceased at the time of his death.
6. They contended that they had since discovered that the 1st Petitioner had unilaterally sold all the said properties. They accused her of failing to table a true inventory of assets and account of administration as required by law. They were emphatic that if the orders they sought were not granted, they would suffer irreparable loss and the proceedings herein will be rendered nugatory. They added that they had filed a complaint with the police vide O.B No 40/27/10/19 which was under investigation.
7. In response to the said Summons for Revocation of Grant, the 1st Petitioner swore a Replying Affidavit on 5th August 2020. The same was filed on 10th August 2020.

8. She admitted she was issued with the Grant of Letters of Administration herein together with the 2nd Petitioner herein. She averred that the said Grant of Letters of Administration had not been confirmed as he had been uncooperative. She asserted that she had young children to take care of unlike the first wife's children who were adults and had less needs.
9. She pointed out that the law provides that each house of the deceased required to be represented in the appointment of an administrator. She was apprehensive that if she was removed as an administrator to the deceased's estate, then the interests of her minor children would be ignored.
10. She further stated that at the time of petitioning for letters of administration, she listed all the properties that were within her knowledge. She asserted that she was not aware of any deceased's property known as Manyatta 361 and Manyatta 362 which the 2nd Petitioner had alleged that she deliberately failed to bring to the attention of court.
11. She explained that her matrimonial home was situated on Unsurveyed Residential Plot No 361 Migosi S & S Scheme and adjacent to Unsurveyed Residential Plot No 362 Migosi S & S scheme, whose construction therein caused leaking of water into her matrimonial home making it uninhabitable. She added that it was unanimously agreed that both parcels of land be sold and that after she sold them, she used the proceeds and purchased a property in Mamboleo, Kisumu County where she was currently residing.
12. She also stated that she did not know that Kisumu/Kanyadwera/671 and Kisumu/Kanyadwera/672 were different properties as they were adjacent to each other and were not demarcated by any boundary. It was therefore her contention that it was not a deliberate concealment/misrepresentation to the court when she listed the property as one parcel of land.
13. She said that she sold Kisumu/Kanyadwera/671 and Kisumu/Kanyadwera/672 on the assumption that it was Kisumu/Kanyadwera/672 and East Seme/Kombewa/4260 and Kisumu/Kombewa/4259 to raise money to pay a hospital bill of her son.
14. In respect of Kisumu/15026/40, she contended she was aware of it but gave its Allotment Letter to one Kennedy Onsare, CID who she alleged was assisting in investigating on the other properties of the deceased.
15. The 1st Petitioner did not file any Written Submissions herein. The 2nd Petitioner filed Written Submissions dated 19th January 2021 on 15th February 2021. The Objector's Written Submissions dated 16th February 2021 partly agreed with issues that were raised by the 2nd Petitioner.

LEGAL ANALYSIS

16. The Petitioner and Objector herein relied on the case of **Re: Estate of Mati Njeru (Deceased) [2020] e KLR** to argue that the court has power to revoke a grant of letters of administration if the grounds set out in Section 76 of the Law of Succession Act are demonstrated.
17. They further placed reliance on the case of **Re: Estate of Beatrice Wanjiku Ng'ok (Deceased) [2020] eKLR** where the court therein held that concealment of a deceased's assets among other irregularities are grounds for revocation of a grant.
18. They further submitted that all the deceased's properties that had been transferred to third parties be transferred back to the deceased's name. They referred this court to Section 82 (b) (ii) of the Law of Succession Act which stipulates that no immovable property shall be sold before confirmation of the grant.
19. In this regard, they relied on the case of **Njoki Gicheru Ndiuni vs Dadson Githenji Wahome & 3 Others [2016] e KLR** and **Re: Estate of M'ibuathu M'ilula (Deceased) [2019] e KLR** where courts cancelled titles and restored title deeds in the name of the deceased therein for redistribution. They also made an alternative proposal that 8,589 KCB shares, Title No Kisumu/15026/40, Unsurveyed Residential Plot No 361 Migosi S & S Scheme and Unsurveyed Residential Plot No 362 Migosi S & S Scheme be distributed equally amongst them because the said parcels of land were purchased and developed by their mother before she died. They therefore said that the said parcels of land had a lot of sentimental value to them.
20. They further submitted that the 2nd Petitioner had contravened Section 45 (1) and Section 45 (2) of the Law of Succession Act and urged this court to summon the 2nd Petitioner as aforesaid. In this regard, they relied on the case of **Re: Estate of Veronica Njoki Wakagoto (Deceased)** where the court therein held that intermeddling with a deceased's estate was an offence.
21. They asked to be awarded with costs of the application and in that respect, relied on the case of **George Kireru Gatungu vs Francis Gatere Getungu & 2 Others [2016] e KLR** where the application therein was dismissed and costs awarded.
22. According to section 76 of the Law of Succession Act Cap 160 (Laws of Kenya);

“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.”

23. An order for revocation of the grant can thus only be given if the aforesaid grounds for revocation had been satisfied. A similar finding was arrived at **Re: Estate of L A K – (Deceased) [2014] eKLR.**

24. At the time of petitioning for the Grant of Letters of Administration, the Petitioners listed the following assets as having belonged to the deceased as at the time of his death:-

a. Terminal Benefits from Ministry of Health.

b. Benefits from AFYA SACCO SOCIETY LTD

c. Unsurveyed Residential Plot No 361 Migosi S & S Scheme Kisumu

d. Unsurveyed Residential Plot No. 362 Migosi S & S Scheme Kisumu

e. Land Parcel No. Kisumu Kanyadwera/672 measuring 0.5 hectare

f. Land Parcel No. Kisumu/Kombewa/4259 measuring 0.07 hectare

g. Land Parcel No. East Seme /Kombewa/4260 measuring 0.07 hectare

h. Plot No. L.R KSM/15026/40 Kisumu Municipality

25. Notably, the Grant of Letters of Administration had not been confirmed. It therefore means that no immovable property could be sold. Section 55 of the Law of Succession states that:-

(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until the grant has been confirmed as provided by section 71.

(2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.

26. Further, Section 82 of the Law of Succession provides that:-

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that

(i) the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) no immovable property shall be sold before confirmation of the grant; (emphasis court)

27. The restriction provided by law that no immovable property shall be sold or distributed before confirmation of grant is not merely directory or an embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law.

Accordingly, acquisition of immovable property of the estate in contravention of the Law of Succession Act is unlawful acquisition. Thus property so acquired does not enjoy the protection of property rights under article 40 (6) of the Constitution of Kenya, 2010.

28. The said Article 40 (6) of the Constitution of Kenya states that:-

“The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

29. Accordingly, applying the law and the Constitution of Kenya to the facts of this case, it was evident that the sale of the deceased’s properties by the 1st Petitioner before the Grant of Letters of Administration was confirmed was in contravention of the Law of Succession Act. All the transactions were thus invalid, null and void and illegal.

30. This court could not with certainty determine that she made false statements at the time of the petitioning for Letters of Administration intestate herein because she petitioned for the same together with the 2nd Petitioner herein. It is not uncommon for intended administrators and/or families of a deceased to have limited knowledge of such deceased’s assets at the time of petitioning for letters of administration.

31. Indeed, the Grant of Letters of Administration is intended to give power to the petitioners to collate all the deceased’s assets within Six (6) months and/or before confirmation. In this respect, this court was prepared to give the 1st Petitioner the benefit of doubt that she listed all the deceased’s properties that she was aware of at the material time.

32. After carefully considering the affidavit evidence and the 2nd Petitioner’s Written Submissions, this court was not persuaded that the 2nd Petitioner had proved any of the grounds for revocation and/or annulment of the Grant of Letters of Administration that was issued herein. However, this court found and held that it was in fact both the 1st and 2nd Petitioners who had concealed material facts by not disclosing that there was another beneficiary by the name of Yvette Anita Oluoch, an Objector in this matter who filed a Summons for Revocation of Grant dated and filed on 4th April 2017. The court allowed the said Summons for Revocation of Grant.

33. In its Ruling No (1) of 28th July 2021, the court revoked the Grant of Letters of Administration that was issued to the 1st and 2nd Petitioners on 5th May 2016. It rendered itself as follows:-

“The Grant of Letters of Administration issued herein on 5th May 2016 be and is hereby revoked but amended to reflect the change to the effect that the Objector herein has been enjoined as a co-administrator of the deceased’s estate together with the Petitioners herein.”

34. Going further, the 1st Petitioner’s arguments that she sold the deceased’s assets to raise hospital bills for her ailing son or because the construction on adjacent parcel caused leaking in her matrimonial house did not change this reality of the law or fetter the jurisdiction of a probate court to preserve estate property for purposes of succession.

35. The 2nd Petitioner and Objector herein had demonstrated how the 1st Petitioner had failed to diligently collate the deceased’s estate. It was irrespective that the deceased’s properties were sold with the consent of all the beneficiaries. The duties of an administrator are well set out in the law but she failed to adhere to the same. She could not be trusted to administer the deceased’s estate and could be removed on this ground.

36. Having said so, this court noted that the deceased’s estate was hotly contested making it necessary for every family of the deceased to be represented. It was for this reason that the court enjoined the said Yvette Anita Oluoch as a co-administrator of the deceased’s estate. To ensure that each family was treated fairly, the court found that it would be unwise to enjoin the Objector herein as a co-administrator in the deceased’s estate as he was the 2nd Petitioner’s blood brother.

37. As the court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process under Rule 73 of the Probate and Administration Rules, it found that it was in the interests of justice not to remove the 1st Petitioner as an administrator of the deceased’s despite her having mismanaged the deceased’s estate. This is because she had children whose interests had to be protected.

38. Indeed, the 2nd Petitioner and the Objector’s interests were still safeguarded by the law. They had sought to have the 1st Petitioner account for contravening Section 45 (1) of the Law of Succession. They also had a remedy in having the deceased’s properties that were sold before the Grant of Letters of Administration was confirmed revert to the estate for distribution between them and other beneficiaries.

39. In this regard, this court fully associated itself with the holdings in the cases of **Njoki Gicheru Ndiuni vs Dadson Githenji Wahome & 3 Others** (Supra) and **Re: Estate of M’ibuathu M’ilula (Deceased)** (Supra) and **Re: Estate of Veronica Njoki Wakagoto (Deceased)** (Supra) and there was merit in the titles that had been transferred to the third parties revoked and cancelled and reverted to the deceased’s name for distribution to his beneficiaries.

40. It is important to point out that the 2nd Petitioner and the Objector herein provided copies of titles of the parcels of land namely, Kisumu/Kanyadwera/672, Kisumu/Kombewa/4259, East Seme/Kombewa/4260, Unsurveyed Residential Plot No 361 Migosi S and S Scheme Kisumu and Unsurveyed Residential Plot No 362 Migosi S & S Scheme Kisumu that showed that the titles were previously in the deceased’s name.

41. However, they did not provide any proof that the deceased owned Kisumu/Kanyadwera/671. It had also not been listed in P & A 5 at the time of petitioning for the Grant of Letters of Administration. The court could not therefore revoke and/or cancel the said title for the reason

that there was no evidence that was adduced before this court to prove that the said parcel of land belonged to the deceased as the 2nd Petitioner and the Objector herein had contended.

DISPOSITION

42. For the foregoing reasons, the upshot of this court's decision was that the 2nd Petitioner's and Objector's Summons for Revocation of Grant dated 25th October 2019 and filed on 28th October 2019 was partly merited and the same be and is hereby allowed in terms of Prayer No (c) and (d) therein.

43. As the parcels of land namely, Kisumu/Kanyadwera/672, Kisumu/Kombewa/4259, East Seme/Kombewa/4260, Unsurveyed Residential Plot No 361 Migosi S and S Scheme Kisumu and Unsurveyed Residential Plot No 362 Migosi S & S Scheme Kisumu were sold before the Grant of Letters of Administration issued on 5th May 2016 was confirmed, their respective titles be and are hereby revoked and cancelled. The titles shall revert to the deceased's name for purposes of distribution of his estate in this cause.

44. For the avoidance of doubt, the court did not revoke and/or cancel the title to parcel of land namely, Kisumu/Kanyadwera/671. The 2nd Petitioner and the Objector herein are at liberty to provide further proof regarding this property for consideration by the court.

45. The 1st Petitioner shall bear the 2nd Petitioner's and Objector's costs of the Summons for Revocation of Grant herein.

46. Dates to be taken at the Registry.

47. It is so ordered.

DATED and DELIVERED at KISUMU this 28th day of July 2021.

J. KAMAU

JUDGE