



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 174 OF 2006

IN THE MATTER OF THE ESTATE OF M'MWAJA MUNORU Alias M'MWAJA MUNORU (DECEASED)

JOSPHAT KIMATHI GABRIEL.....APPLICANT

VERSUS

VINCENZA KAINDA MWAJA.....PETITIONER/RESPONDENT

RULING

1. By Summons 29.10.2018 and brought pursuant to section 76 of the Law of Succession Act, Rules 26, 49 & 73 of the Probate and Administration Rules and all other enabling provisions of law, the applicant seeks in the main an order for revocation or annulment of the grant and in the interim an order of inhibition of any dealings with land parcel number **Nkuene/Nkumari/754** either by way of subdivision, sale, lease, charge or otherwise pending the determination of the application for revocation or annulment of the grant issued on 19/7/2007.
2. The grounds upon which the applicant premised the request for revocation is that he is a grandson of the deceased who was not provided for nor notified of the cause despite the fact that he has built his home on ½ acre of the estate, where he lives with his family. In the Affidavit in support, he mutates the claim to be that he bought a portion of the land from John Kaburu Mwaja, a son to the deceased, himself now deceased, and exhibited a sale agreement to show that he bought ½ acre. He contends that he was to get the share given to Stella Mukami because he paid her loan with KWFT on her behalf. He wants an order of inhibition issued to preserve the estate pending the determination of the question of revocation.
3. The respondent opposed the application by her replying affidavit sworn on 16/11/2018. The respondent concedes that the applicant is a son of her brother namely Gabriel Nkone Mwaja, who is the objector herein, hence a grandson to the deceased but asserts that he has no direct claim against the estate. According to her, the applicant's claim against John Kaburu, now deceased, and Stella Mukami, if any, lies in the Environment and Land Court. She concluded that the application ought to be dismissed with costs.
4. By directions given on the 19/11/2018, the court's directed that the application be canvassed by way of written submissions but by the time of preparing this determination only the applicant had filed submissions. In the submissions, he reiterates his averments in his application and urges the court to be guided by the court of Appeal decision in **Musa Nyaribari Gekone & 2 others v Peter Miyianda & anor (2015) eKLR**, on the interpretation of the expression "*any interested party*".
5. I have considered the affidavits and the submissions on record. The issue for determination is whether the grant should be revoked on the basis that an interested party was excluded from the process leading to distribution of the estate and the distribution itself.
6. Section 76 of the Law of Succession Act sets out the requirements for revocation or annulment of grant. It provides:-

“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.

7. The applicant is not pursuing his father's share but a portion of the land allegedly sold to him by one John Kaburu, now deceased. The question is whether the shares due to kaburu subsists to be given to him and if this is the due forum for the determination of the rights created by the alleged agreement of sale. I find that the applicant being a grandson has no direct claim to the estate unless through the father, which isn't the case here. On that basic position of the law, I find that the applicant cannot fit as qualified to apply for revocation of the grant on the grounds alleged. On the other ground that he bought the land from a beneficiary and seeking his share from such beneficiary, I do find that there is no share currently subsisting in favour of John Kaburu Mwaja as the same was dissipated by the decision by the court dated 7.11.2017. in that decision the court said and held: -

“ Since John Kaburu Mwaja did not leave any survivor, his share of one acre is to be inherited by those with whom he was entitled to in the estate. These are the daughters of the deceased. The contention by the protestor that the daughters are married and are therefore not entitled to John Kaburu's share has no basis. Marriage of a daughter per se does not bar a daughter from inheriting her parent's property. The protestor did not show why it was only him and not his other brothers who was entitled to John Kaburu's share.”

8. The fault upon the petitioners/administrators/respondent for having concealed material facts and filing the cause secretly, without his knowledge must be seen through the prism that the applicant is not a direct beneficiary. He stood in no priority to be consulted or sought consent from. However, upon perusal of the record, I note that the grant of letters of administration intestate had been jointly issued to John Kaburu Mwaja and the respondent herein. Following the demise of John Kaburu Mwaja in 2009, he was substituted by Jacinta Maiti Mwaja. The applicant's father has fully participated in these proceedings. The applicant cannot therefore be believed when he says that these proceedings were commenced secretly because, his father and the person who allegedly sold to him part of the estate where there on their own deserved rights. In any event, applicant's claim, if any, lies elsewhere in that being a claim based on contract for the sale of land, it isn't suited to be dealt with in this cause and with the alleged vendor dead and not present to answer to the claim.

8. The inevitable conclusion I come to is the application is bereft of merit, otherwise grounded on incoherent claim and is hereby dismissed.

9. I consider this to be one of those cases that the court must express its displeasure at the conduct of the applicant, as a scheme to derail the process of concluding the administration of an estate. I express such displeasure by condemning the applicant to pay the costs of the application which I assess in the sum of Kshs 12,000. The costs be paid within 30 days from today and in default execution be issued.

10. Because the matter ought to be brought to a closure, I direct that parties attend court on the 8/12/2021 and report on how far conclusion of administration stands.

Dated signed and delivered **virtually via Microsoft teams** at Meru this 11th day of August 2021

Patrick J.O Otieno

Judge

In presence of

Ms Murithi for the petitioner/respondent

No appearance for the applicant

Patrick J.O Otieno

Judge