



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

SUCCESSION CAUSE NO. 442 OF 2012

IN THE MATTER OF ESTATE OF NJENGA NJIRATA (DECEASED)

SEPHANIA NYAGA NJAGI.....1ST APPLICANT

NEWTON NTHIA NJERU.....2ND APPLICANT

VERSUS

NJERU NTHIGA.....RESPONDENT

RULING

1. Sephania Nyaga Njagi and Newton Nthia Njeru (herein referred to as applicants for the purposes of the application dated 4.08.2020) moved this court vide an application dated 4.08.2020 and wherein they basically seek for orders for the issuance of a new certificate of letters of administration (form 41) and a new certificate of confirmed grant and further that the costs of the application be provided for. The gist of the application is that the applicants need the same so as to enable them have the land parcels awarded to them, transmitted to them.

2. It is their case that the original grant was made by the court to the respondent on 7.11.1990 and confirmed on 5.06.1991 and the respondent picked the same so as to administer the estate and which he administered but left out some shares un-administered. That the court has ordered that the Deputy Registrar do sign the relevant documents so as to ensure the transmission, however, the transmission process requires the originals of the grant of letters of administration (Form 41) and the confirmed grant (form 54) to be availed to the Land Registry thus the instant application.

3. On 17.11.2020, Cacilia Wanja Nthiga (herein referred to as applicant for purposes of the application dated 16.11.2020) filed her application dated 16.11.2020 and wherein she seeks for order that this court be pleased to revoke/ annul the confirmed grant of administration issued on 11.12.1990 and confirmed on 5.06.1991 on the grounds that the proceedings to obtain the same were defective in substance and that the grant was obtained fraudulently by making of false statements or by concealment from the court of material facts germane to the case, by the respondent herein. She further prayed that she be appointed as the administrator of the estate of the deceased in place of the respondent and also that the costs of the application be provided for.

4. The said application is premised on the grounds on its face and further supported by the affidavit sworn by the applicant. Her case is that she is the widow of the deceased who died on 10.05.1985. That the respondent herein who is the administrator of the estate allowed two strangers who are neither her children nor dependants as defined by law to be included as beneficiaries of the deceased' estate and which inclusion was contrary to the law and which can be deemed to be fraudulent and is further untrue allegations of facts as the letter from the chief indicated the real and true children and widow of the deceased. That the two individuals inherited LR Nthawa/Riandu/1319 to the detriment of other legal beneficiaries and it's the only land which has been left not administered. As such the grant ought to be revoked.

5. The respondent opposed the application dated 4.08.2020 and wherein he deposed that the said application is frivolous, vexatious and an abuse of the court process as the original grant still subsists. Further that the applicants through fraud and misrepresentation had their names included in the list of beneficiaries to the estate of the deceased due to the respondent's illiteracy and that neither of the applicant's in the said application are the children of the deceased or his dependant. That the said applicants have their own parents from whom they are entitled to inheritance. However, he deposed that he was not opposed to the application dated 16.11.2020 and urged the court to strike out the applicants' names from the list of the beneficiaries of the deceased's estate.

6. The record reveals that the 1st applicant herein filed a replying affidavit which appears to be in opposition to the application dated 16.11.2020. He deposed that the respondent upon the grant having been made to him and the same having been confirmed distributed all the land parcels but refused, failed or neglected to transfer LR Nthawa/Riandu/1319 and which land had been awarded to himself and one Newton Nthia Njeru jointly. That despite the respondent and his proxies having made every imaginable application to the court in bid to stop the transmission of the said applications have since been dismissed. He deposed that the application herein was thus similar to application

dated 13.12.2017 and which was dismissed by the court on 18.09.2019 and thus the same is res judicata and aimed at denying them their shares.

7. The court directed that the two applications be canvassed together and by way of written submissions.

8. In support of their application dated 4.08.2020, the 1st and 2nd applicants submitted that their application ought to be allowed and the grant and the certificate of confirmation of the grant ought to be reissued as the same are not available for use by the beneficiaries and that the ones in the court file are duplicates and are torn due to age.

9. The applicant in support of her application dated 16.11.2020 submitted that the 1st and 2nd applicants are not children of the deceased as it can be seen from the chief's letter on record and hence strangers in relation to the estate and which is contrary to the law. Further that they are not dependants within the meaning of section 29 of the Law of Succession Act. It was further submitted that the respondent was not diligent in administering the estate herein as he did not take the necessary steps to protect the said estate from being wasted or taken over by persons who are not entitled to it. As such, he needs to be removed from the role of an administrator and the 3rd applicant being the surviving spouse to the deceased, ranks high in priority and as such, she is the most suited to be the administrator of the estate.

10. I have indeed considered the two applications, the replying affidavits filed by the parties and the written submissions on record. The first application seeks re-issuance of grant and the certificate of confirmation of the grant to enable transmission of the remaining land parcel to the applicants. On the other hand, the second application seeks revocation of the said grant (which re-issuance is being sought). That being the case, it is obvious that the application seeking revocation of the grant ought to be heard first since if the same is revoked, the 1st and 2nd applicants' application will have been rendered useless as the grant they are in pursuit of, will be of no any legal effect.

11. However, I note that the respondent (who is the same in both applications) in his replying affidavit deposed to the effect that there had been previous applications which had been filed herein and which had been dismissed earlier. He zeroed in on the application dated 13.12.2017 and which was dismissed by the court on 18.09.2019 and which he deposed was similar to the instant application. He thus argued that the instant application is res judicata.

12. The doctrine of res judicata is provided for under section 7 of the Civil Procedure Act (and which in my view is applicable to this court as it is a civil court). The said section provides that:-

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.”

13. The Court of Appeal in the case of **Uhuru Highway Development Limited –vs- Central Bank of Kenya & 2 others [1996] eKLR** explained the application of the above doctrine and held that in order for the defense of res judicata to be applicable, there must be a previous suit in which the matter was in issue; the parties were the same or litigating under the same title; a competent court heard the matter in issue; and the issue has been raised once again in a fresh suit.

14. The effect of this doctrine is that where a matter is res judicata, the court is bereft of jurisdiction to determine the same. As such, the issue ought to be determined *in limine* (by the fact that it touches on jurisdiction) as it is trite that the court cannot determine on a matter where it has no jurisdiction.

15. As such, the issue which this court is invited to determine is whether the application herein is res judicata (and if not so); whether the applicant has made a case for revocation of the grant made to the respondent herein and thus warranting its revocation. If not, whether the grant made to the respondent herein and subsequently confirmed ought to be re-issued.

16. As to whether the application is *res judicata*, I have perused the application dated 13.12.2017 and I note that the same was filed by one Elijah Kithaka Nthiga and wherein the respondent was a party. The same sought revocation of the grant made to the respondent herein and as confirmed, the grounds in support of the said application were similar to the ones in support of the current application that the 1st and 2nd applicants herein are not beneficiaries of the estate. The applicant in the supporting affidavit deposed that he had authority from amongst others, the applicant to file the application on their behalf. However, no such authority was annexed to the application.

17. The applicant having brought another application on behalf of the same respondent (through the said Elijah Kithaka) and touching on the same issue, it is my view that by the fact that the said application was earlier determined by this court (court of competent jurisdiction) the same can be said to be res judicata. However, for the reasons that the said Elijah Kithaka did not annex the consent by the applicant to plead on her behalf, and due to the need to put the issues arising from this application to rest once and for all, and further having perused the said ruling and noted that the court in delivering the said ruling did not determine as to the issue whether the 1st and 2nd applicants herein are beneficiaries of the estate of the deceased, I will then proceed to determine the application on merit. In doing so, I find that the application herein is not *res judicata*.

18. That being the case therefore, the next issue is whether the applicant has made a case for revocation of the grant issued to the respondent. The applicant's application is brought under Section 76 of the Law of Succession Act Cap 160 Laws of Kenya and Rule 44 of the Probate and Administration Rules 1980 and which provisions of the Law indeed provides for the circumstances for revocation of a grant. Under the said provisions, *a grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an interested party or of its own motion on the grounds either that the proceedings to obtain the grant were defective in substance; that the grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case; or that the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant not*

withstanding that the allegation was made in ignorance or inadvertently.

19. The applicant herein has a duty to prove any grounds set out in **Section 76** of the **Law of Succession Act** before the grant issued is revoked. In the case of **Albert Imbuga Kisigwa –vs- Recho Kawai Kisigwa, Succession Cause No.158 OF 2000**, Mwita J. in a decision rendered on 15th November, 2016, noted thus:

“[13] 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 invoke section 76 and order 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.”

20. It is clear therefore that the grounds upon which a grant may be revoked or annulled are statutory and it is incumbent upon any party making an application for revocation or annulment of a grant to demonstrate the existence of any, some or all the above grounds. The applicant had the duty to demonstrate the ground(s) which she relies on in challenging the grant.

21. What can be gathered from the applicant’s application is that the respondent failed to make disclosure that the 1st and 2nd applicants were not beneficiaries of the estate of the deceased as they were not children of the deceased nor were they dependants of the deceased within the meaning of Section 29 of the Law of Succession Act. The 1st and 2nd applicants did not dispute this fact in their replying affidavit and submissions. Indeed, a perusal of the court record indicates that when the grant came up for confirmation on 7.10.1990, the applicants are indicated as the grandchildren of the deceased. There is also one Jedida Kiragu who is indicated to be a grand-daughter of the deceased. As such, it is not disputed that the 1st and 2nd applicants are not children of the deceased. It is further not in dispute that the deceased herein died on 10.05.1985 and at a time when the Law of Succession Act was applicable.

22. Rule 7 of the Probate and Administration Rules 1980 provides that application for grant of representation in relation to an estate of a deceased person to whose estate no grant or no grant other than one under section 49 or a limited grant under section 67 of the Act has been made, the application shall be by petition supported by an affidavit. The said affidavit must contain amongst other details, the names, addresses, marital status and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving spouse or child, like particulars of such person or persons who would succeed in accordance with section 39(1) of the Act {Rule 17(e)(i)}.

23. I have perused the affidavit in support of the application for letters of administration intestate and which was sworn on 4.06.1990 and indeed it includes the 1st and 2nd applicants herein. Despite the affidavit having not indicated their relationship with the deceased, it can be seen from the court record that on the day of confirmation of the grant, the court was informed that they were grandchildren to the deceased. In my view, including them as such cannot be said to amount to the grant having been *obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case; or that the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently. The applicant did not prove how the same amounts to such. I say so having noted that the 3rd applicant was in court at the time of confirming the grant and did not oppose to the said grant being confirmed or even to the 1st and 2nd applicants getting the share of the estate which they got. They consented to the said applicants getting LR Nthawa/ Riandu/ 1319 jointly in their names.*

24. Despite the applicant having deposed that the 1st and 2nd applicants were not beneficiaries of the estate, by her presence and that of the administrator and other beneficiaries in court on the day of confirming the grant, she is as such estopped from denying the 1st and 2nd applicants their share of the estate.

25. Further, despite the deceased having died intestate and thus the rules of intestacy being applicable in the instant case which have the effect of denying the 1st and 2nd applicants right to inherit their grandfather’s estate, the said rules are not applicable herein by virtue of the fact that the estate was distributed by consent while all the beneficiaries were in court.

26. I note that the petitioner therein (the respondent) ranking lower than the applicant (as she is his mother) did not secure her consent. Neither did he secure consent from his other brothers who are listed as having survived the deceased. This is contrary to the provisions of Rule 26 of the Probate and Administration Rules. However, they are estopped from denying their involvement in the process by the virtue of the fact that they attended court on the day of confirmation of the grant and wherein they consented to the grant which had been made to the respondent herein being confirmed. It can only be said to be an afterthought and an abuse of the court process for the applicant to come to court and seek revocation of a grant which she participated in the confirmation of or claiming that the 1st and 2nd applicants are not entitled to the estate of the deceased when she consented to them getting the land in dispute.

27. The respondent in support of the applicant’s application deposed that he had the 1st and 2nd applicants’ names included in the list of beneficiaries as a result of fraud and misrepresentation by the 1st and 2nd applicants due to his illiteracy. However, it is trite that fraud and/or misrepresentation needs to be proved by way of cogent evidence and the standard of prove is always higher than in ordinary civil cases. In this case the respondent did not tender any evidence to prove the said fraud or misrepresentation. It is not understandable how if indeed he had their names included as beneficiaries as a result of the said fraud, he consented in court to have them get their share.

28. As I have already pointed out elsewhere, 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 invoke section 76 and order 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 in the interest of justice. The applicant herein does not deserve the enjoyment of the said discretion.

29. It is definitely clear that the application by the applicant is unmerited and further an afterthought and which can only suffer one fate and

which is dismissal.

30. As for the grant and certificate of confirmation of grant being re-issued, it is not disputed that the respondent herein was issued with orders to sign the transmission documents and which he failed to do. The applicants proceeded to secure orders that the Deputy Registrar of this court do execute the relevant documents in relation to the transmission of their share. They now claim that the original certificate of confirmation of grant is required so as to effect the transmission. I take notice that different land registries may have different internal management rules. This court has inherent powers to make any order so as so ensure that justice is served. Further under section 47, this court has jurisdiction to determine any dispute which is brought before it and give any order or decree. All this is aimed at ensuring that the orders of this court are executed.

31. I take note of the age of this matter. I have perused the court record and noted that the original copy of the grant on record is indeed torn to a great extent. Further that there is no original certificate of confirmation of grant on record. In my view, it is in the interest of justice and further to ensure that all the beneficiaries of the estate herein get their shares that the application dated 4.08.2020 ought to be allowed in terms of prayer 1 therein. It is hereby allowed.

32. This being a succession cause, each party shall bear their own costs.

33. It is so ordered.

Delivered, dated and signed at Embu this 29th day of September, 2021.

L. NJUGUNA

JUDGE

.....for the Applicants

.....for the Respondent