



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

SUCCESSION CAUSE NO 101 OF 2009

IN THE MATTER OF THE ESTATE OF MATHAYO ARWA (DECEASED)

JAMES ORAO ARWA.....PETITIONER

VERSUS

TOM MBOYA ARWA.....OBJECTOR.

RULING

1. On 29th June 2020, the Objector herein filed Summons for Revocation of Grant dated 25th June 2020. He sought that the Grant of Letters of Administration of the Estate of Mathayo Arwa (hereinafter referred to as “the deceased”) that was issued to James O rao Arwa on 2nd December 2019 and was pending confirmation, be revoked.
2. In an Affidavit that he swore on 25th June 2020, he averred that the Grant was obtained fraudulently by the making of a false statement and that there was forgery in seeking of the consent of the beneficiaries. He added that the Petitioner failed to include his name as one of the beneficiaries of the deceased and particularly, in respect of Land Parcel No Kisumu/Karateng/480, where he stated he had an equal right of share.
3. He contended that the Petitioner had also without reasonable cause, failed to diligently administer the deceased’s estate according to the deceased’s wishes who had distributed his estate to all beneficiaries of his polygamous family prior to his death. He was emphatic that he was the deceased’s son and had an equal right to a grant of representation.
4. In opposition to the Objector’s Summons for Revocation, on 1st February 2021, the Petitioner filed Written Submissions. The court granted him leave to file an affidavit in opposition to the said Summons for Revocation of Grant. On 29th April 2021, he filed what he referred to as Affidavit in support of his Submissions. It was sworn on even date.
5. He averred that the Objector was his step brother and that the deceased died intestate and therefore he did not leave any will as had been claimed by the Objector. He stated that the deceased had five parcels of land namely Kisumu/Karateng 497,480,1235,450 and 473 and not six (6) as the Objector had contended. He added that the deceased was survived by six (6) wives and several children.
6. He was emphatic that L.R. No Kisumu/Karateng/497 and L.R. No Kisumu/Karateng/480 which were registered in the names of the deceased and Zacharia Odhiambo Juma respectively did not belong to the Objector’s mother. He pointed out that according to a Land Adjudication Judgment of 1971, L.R. No Kisumu/Karateng/480 was to be transferred to the deceased.
7. He asserted that the Objector sold L.R. No Kisumu/Karateng/497 and a portion of Kisumu/Karateng/480 and that the Objector was the only one who benefited from the proceeds. He was categorical that the pre-sale contracts alleged by the Objector were illegal since there was no agreement between the family and the said buyers and thus any sale thereof by the Objector, was null and void.
8. He added that the deceased members of Mathayos’ family namely Justus Arwa, Yonah Arwa and Charles Arwa died without leaving any dependents and had not been allocated any portion of the estate of the deceased.
9. He averred that the Objector’s Summons for Revocation of Grant was heard by Cherere J on 15th July 2020 and she rejected the application. He prayed for an eviction order to issue to the occupants of L.R. No Kisumu/Karateng/497 and portion of L.R. No Kisumu/Karateng/480 and asked that the titles issued to the buyers of the said parcels of land revert to the deceased’s name to enable him administer and distribute the same to its lawful beneficiaries. It was his contention that the Objector should exercise patience as he would get his fair share of the deceased’s estate.

10. Despite the court having given the Objector and Interested Parties an opportunity to file their respective Written Submissions, they did not do so. The Ruling herein is therefore based on the Petitioner's Written Submissions only, which submissions, he relied upon in their entirety.

LEGAL ANALYSIS

11. Right at the outset, this court found it prudent to determine if the Objector's Summons for Revocation of Grant was *res judicata* on account of Cherere J having dismissed the same on 15th July 2020. A reading of the proceedings of the court showed the contrary. On 6th July 2020, the learned judge observed that the said Summons for Revocation of Grant was premature as no application for distribution of the deceased's estate had been filed.

12. A further perusal of the court proceedings showed that the Petitioner actually filed his Summons for Confirmation of grant dated 29th October 2019 on even date. Be that as it may, this court found and held that the Objector's Summons for Revocation herein was not *res judicata* as the same had not been heard and determined by any court and the same were still pending determination.

13. Turning to the substance of the Summons for Revocation of Grant herein, 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.”

14. **In the Matter of the Estate of L A K – (Deceased) [2014] eKLR**, the court therein held that:-

“Revocation of grants is governed by Section 76 of the Law of Succession Act. The relevant portions of Section 76 are paragraphs (a), (b) and (c) since the issues raised relate to the process of the making of a grant. A grant may be revoked where the proceedings leading up to its making were defective, or were attended by fraud and concealment of important matter, or was obtained by an untrue allegation of a fact essential to the point.”

15. A perusal of the Petition for a Grant of Letters of Administration that was lodged on 4th March 2000 showed that the Objector herein was listed as a beneficiary of the deceased's estate. The Chief's letter dated 12th January 2009 that was attached to the said Petition for Grant of Letters of Administration indicated that he was a beneficiary of the deceased, in the 6th house of Yuniah Omocho. A recent Chief's letter dated 14th October 2019 also mentioned him as a beneficiary. He was part of the beneficiaries listed on the consent to the mode of distribution of the estate of the deceased in support of Summons for Confirmation of Grant filed in this Court on 29th October 2019, which was still pending hearing and determination. There was a signature next to his name, which he had contended had been forged.

16. To be granted an order for revocation of grant, an objector must prove that the grounds for revocation in Section 76 of the Law of Succession had been satisfied. Notably, the Objector was contesting the mode of distribution which in this court's view was an issue that could be dealt with at the point of the court confirming the grant. This was not an issue that would warrant the revocation of the Grant of Letters of Administration that had been issued herein.

17. After carefully considering the Affidavit evidence and the Petitioner's Written Submissions, this court came to the firm conclusion that the Objector did not demonstrate that there existed any of the grounds stipulated in Section 76 of the Law of Succession that would have persuaded this court to revoke the Grant of Letters of Administration that was issued herein.

DISPOSITION

18. For the foregoing reasons, the upshot of this court's decision was that the Objector's Summons for Revocation of grant that was dated 25th June 2020 and filed on 29th June 2020 was not only premature as Cherere J had found but it was also not merited. The same be and is hereby dismissed with costs to the Petitioner herein.

19. For the avoidance of doubt, this court heard and determined the Objector's Summons for Revocation of Grant with a view to moving this matter forward as the same had been listed for hearing and determination contrary to the directions of Cherere J.

20. It is so ordered.

DATED and DELIVERED at KISUMU this 28th day of September 2021

J. KAMAU

JUDGE