



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 80 OF 2011

IN THE MATTER OF ESTATE OF NYAGA GATEMA (DECEASED)

PENINA MWENDE NGAI.....1ST APPLICANT

CERINA MBATHI NYAGA.....2ND APPLICANT

MUNYI NGAI.....3RD APPLICANT

VERSUS

MUTHONI NTHIGA.....1ST RESPONDENT

NJURA NTHIGA.....2ND RESPONDENT

ALICE NTHIGA.....3RD RESPONDENT

NJUE NTHIGA.....4TH RESPONDENT

RULING

1. The record in this matter indicates that the 1st and 2nd applicants herein filed summons for revocation of grant dated 25.10.2018 and which they filed in person. The same was filed contemporaneously with chamber summons seeking interim orders of prohibition to be registered against land parcel No. Embu/Gangara/522 pending hearing and determination of the said summons for revocation. This court (Hon. Muchemi J) granted interim orders vide the orders of 20.11.2018.

2. On 25.03.2019, Munyi Ngai who for purposes of this ruling is referred to as (the 3rd applicant) also filed summons for revocation of grant dated 25.03.2019. On 25.03.2019, the record indicates that Mr. Njiru appeared for one of the applicants (3rd applicant herein) and indicated to the court that the initial respondent was deceased. On 1/07/2021, counsel withdrew the application against Muthioni Nthiga and Njue Nthiga who are deceased. He sought time to serve the same upon the wife of the administrator (deceased respondent). He later sought more time to substitute the said deceased respondent. All along there is no indication as to the said advocate being on record for all the respondents herein but only for the 3rd respondent.

3. On 25.04.2019, the 1st and 2nd applicants filed an amended summons for revocation of grant and which they filed in person. The matter came up in court on 31.10.2019 and the court directed that the applicants adopt the right procedure in substituting the respondent Nthiga Gicana.

4. What followed are two amended summons for revocation of grant both undated but both filed in court on 20.07.2020. One summons is by the 1st and 2nd applicants herein while the other was by the 3rd applicant. The two applications were filed by the firm of Njiru Mbogo & Company Advocates. When the summons came up for hearing on 1.07.2021 Mr. Njiru appeared for the applicants and informed court that there are two applications for revocation of grant but filed by different people. He took directions to canvass the applications by way of written submissions and in compliance thereof he proceeded to file two sets of submissions one for the 1st and 2nd applicant and the other for the 3rd respondent.

5. It is considering the above background of facts that I will proceed to determine the two applications together. This is bearing in mind and further having noted that they seek similar orders. Basically the applicants in the two applications seeks the following orders:-

- 1) That the grant confirmed by this Honourable Court on 9.07.2014 be revoked and the entire succession cause be struck out.

2) That the caution and/ or prohibition which had been registered in relation to the Land Parcel No. Embu/ Gangara/522 in ELC No. 63 of 2013 be reinstated.

3) Costs of the applications to be borne by the respondents.

6. The two applications are premised on the grounds on their face and further supported by the affidavits sworn by the 1st applicant (in support of the 1st and 2nd applicants' summons) and by 3rd applicant (in support of the 3rd applicants' summons). The 1st and 2nd applicants' case is that they are the administrators of the estate of the deceased herein having been issued with a grant in Succession Cause No. 27 of 2017 on 21.06.2018 and that the deceased was their father and who had four children namely; Harrison Mbogo, Celina Mbathi Nyaga, Penina Mwenda Nyaga and Mary Njoki Nyaga.

7. That upon completion of the said succession cause, they went to register LR 9 forms and they discovered that one Nthiga Gigana had obtained a grant fraudulently and had the same confirmed on 9.07.2014 and after which discovery, they filed the instant application but the said Thiga Gigana is now deceased. It was their case that the respondents' husband misled the court that he was the son of the deceased while in fact he was not and thus the succession cause was supported by fake documents.

8. The 3rd applicant's case on the other hand is that he is an interested party in the suit land herein owned by one Nyaga Gatema the deceased and which land parcel has a standing dispute between the deceased and the 3rd applicant. Further that on or about 5.01.2019, he was informed by the administrator of the estate of the deceased that one Nthiga Gigana had filed a succession cause using fake documents and without knowledge or consent of the family and that he proceeded to court and found that the said Nthiga had indeed filed a succession cause. Further that, the said deceased respondent proceeded and fraudulently caused the prohibition orders issued by the court in ELC Case No. 63 of 2013 to be removed and which case is still pending in court. It was his deposition that as such the succession cause ought to be struck out with costs.

9. Directions were taken that the applications be canvassed by way of written submissions.

10. The 1st and 2nd applicants reiterated their position as deposed in the affidavit to the effect that they are the children of the deceased herein and that they filed succession cause in Siakago Principal Magistrate's Court as Succession Cause No. 27 of 2017 and the grant was confirmed on 21.06.2018 and part of the estate which was being distributed includes the suit land herein and which was distributed amongst the children of the deceased. However, when they went to register the same, they found that the land had been transferred to one Nthiga Cigana through Succession Cause No. 80 of 2011. The 1st and 2nd applicants explained the whole process which they submitted that it amounted to fraud and thus the grant was obtained fraudulently and that the said Nthiga Gicana did not involve the family members and used forged documents. Further that, the said Nthiga as well as the respondents herein were all served but did not oppose the application and as such the same is unopposed and ought to be allowed.

11. On the part of the 3rd applicant, it was submitted that the 3rd applicant upon noting that an inhibition which had been issued by the court in ELC No. 63 of 2013 had been vacated he did further investigations and wherein he established that the same had been lifted vide an order made in the cause herein. The same was pursuant to an application filed in court on 24.10.2017 and wherein the respondent was indicated to be one Njue Muriokinde and not himself (3rd applicant) and thus the said inhibition was wrongly lifted by the said Nthiga Gicana. Further that the name of the respondent (in the application for lifting the inhibition) not being his, the same was only meant to deliberately mislead the court and confuse other parties interested in the land. That he was never served with the application but the same was served upon Njue Muriokinde.

12. As I indicated elsewhere in this ruling, I will determine the two applications together. In doing so, I have considered the two applications herein together with the written submissions filed by the applicants.

13. What is common in the two applications is that each of them seeks for revocation of the grant confirmed by this court on 9.07.2014. Despite the applications not indicating the provisions under which they are premised, it is trite that revocation of grant is provided for under Section 76 of the Law of Succession Act Cap 160 Laws of Kenya and Rule 44 of the Probate and Administration Rules 1980. Section 76 (a) - (d) provides for revocation of grant and the circumstances under which a grant of representation may be revoked.

14. However, from the perusal of the application herein, the applicant's ground for seeking the revocation are mainly that one Nthiga Gicana obtained the grant fraudulently and having misrepresented to the court that he was the son of the deceased. The 1st and 2nd applicants deposed that he was not a son of the deceased and that the deceased had four children and thus they pleaded fraud. As such, it is clear that the application is premised on the provision of section 76(c) and which provides that 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 grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case.

15. It is trite, however, that the power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds but not to be exercised whimsically or capriciously. Further that the grounds as provided for under section 76 ought to be proved with evidence. Even when revocation is by the court on its own motion, there must be evidence to satisfy the grounds for revocation of grant (See **Matheka and Another –vs- Matheka [2005] 2 KLR 455**). The question therefore is whether the applicants proved their grounds for revocation of the impugned grant.

16. In the instant case, the 1st and 2nd applicants' case is that the grant was obtained fraudulently on the basis that Nthiga Gicana misrepresented to the court that he is the son of the deceased. I have perused the record herein and I note that indeed the said Nthiga Gicana indicated (in the petition for letters of administration intestate) that he is the son of the deceased. The 1st and 2nd applicants deposed that the said Nthiga Gicana is not a son of the deceased.

17. The record indicates that the said Nthiga Gicana was served with the earlier application (before his demise) and in fact attended court on 7.01.2019 and wherein he sought for more time to file a replying affidavit. As such, it can only be said that he was aware of the application for revocation of grant by the 1st and 2nd applicants herein. Further, from the records, the respondents herein have always been served with the applications and notices but they have never appeared in court or filed their responses. As such, the application herein was not opposed and thus the depositions that Nthiga Gicana was not a son of the deceased was not rebutted.

18. The above notwithstanding, by the fact that the 1st and 2nd applicants herein were children of the deceased and which fact is not disputed, it was required that the deceased Nthiga Gicana get consents from them to apply for letters of administration. This is because they ranked equal in priority with the said Nthiga Gicana. Section 51 of the Act provides that application for grant ought to be by way of a petition. The contents of the petition are provided under section 51(2). **Rule 26 of the Probate and Administration Rules** provides that: -

“26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”

19. In **the matter of the Estate of Isaac Kireru Njuguna (deceased) Nairobi HC Succession Cause 1064 of 1994** the court found that a grant is liable for revocation where all the heirs have not consented to the mode of distribution and all the properties which make up the estate are not taken into account or distributed. (See also **Antony Karukenya Njeru –vs- Thomas M. Njeru [2014] eKLR and In the Matter of the Estate of Muriranjia Mboro Njiri, Nairobi H.C. Succ. Cause No. 890 of 2003** where in both cases, a grant of letters of administration was revoked for failure by persons with equal priority to consent to the petitioners therein applying for grant of letters of administration)

20. In the instant case, therefore, the grant made to the said Nthiga Gicana is a good candidate for revocation for lack of consent by the applicants herein and who were the children of the deceased.

21. Further section 51(2)(g) of the Law of Succession Act requires that in cases of total or partial intestacy, the petition should include the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased. In the instant case, the deceased Nthiga Gicana indicated the beneficiaries of the estate as being himself and Mbui Gatema and who was indicated as the brother of the deceased. In my view, failure to include the names of the 1st and 2nd applicants in the petition amounts to material non-disclosure. The said grant was indeed obtained fraudulently by the making of a false statement and also by the concealment from the court of something material to the case. The deceased administrator concealed the existence of the 1st and 2nd applicants herein and he can only be said to have obtained the grant by means of an untrue allegation of a fact essential in point of law to justify the grant. Had he disclosed the existence of the applicants herein, the court would not have made the grant to him without their consent.

22. Considering all the above, it is my considered view that the grant made to Nthiga Gicana on 9.07.2014 ought to be revoked at the instance of the 1st and 2nd applicants herein. As such, prayer 2 of the undated application by the 1st and 2nd applicants filed in court on 20.07.2020 is hereby allowed.

23. Concerning prayer 3, I have perused the court record and I note that the deceased administrator filed an application seeking removal of the caution or restriction which had been placed on the suit land. The same was allowed by this court vide the orders of 11.04.2018. This court has jurisdiction under section 47 to issue any orders so as to protect the estate of a deceased person from being wasted. I note that the suit land was distributed between the deceased administrator (he got five acres) and Mbui Gatema was given the remaining portion. It has not been disclosed as to the status of the suit land as at the time of filing the applications. However, in the interest of justice, the suit land ought to be protected from being wasted or being disposed off. It is on that premise that prayer 3 of the undated application by the 1st and 2nd applicants filed in court on 20.07.2020 ought to be allowed. The same is hereby allowed.

24. Concerning prayer 1 of the application by the 1st and 2nd applicants, they sought that the four respondents be replaced as administrators in this cause. However, I note that the 1st applicant deposed that they had filed succession cause in Siakago (being Succession Cause No. 27 of 2017). I have perused the certificate of confirmation of grant which is annexed to the said application and which is not disputed. On the face of it, the 1st applicant was appointed as the administrator of the estate of the deceased herein and which includes the suit land. As such, it is not clear as to why the respondents would like to be appointed as administrators. I decline to grant the said prayer and in doing so rely on section 66 of the Law of Succession Act which grants this court discretion to appoint administrators and further section 56(1)(b) of the Act which provides that a grant of letters of administration should not be issued to more than four persons in respect of the same property. For one to be appointed an administrator, he or she must follow the process under the Law of Succession Act and the Probate and Administration Rules. There is absolutely no room for substitution of the deceased administrator under the Law of Succession Act. In my view, therefore, where the sole administrator is a natural person, and he or she dies, the grant becomes useless or inoperative by reason of subsequent event of his demise.

25. As such, prayer (1) of the undated application by the 1st and 2nd applicants filed in court on 20.07.2020 hereby fails and the same is disallowed.

26. As for the application by the 3rd applicant, his case is that he has a beneficial interest in the estate herein as there has been pending litigation between him and the deceased. His case seems to be that the deceased administrator used fake documents to lift the caution which he had put in relation to the suit land. It is on this ground that he sought revocation of the grant herein. In my considered view, the 3rd applicant did not make a case for revocation of the grant. There is no evidence to satisfy any of the grounds as provided for under Section 76

of the Law of Succession Act. As such, prayer 1 of the undated 3rd applicant's application has no merits and the same is dismissed.

27. If the 3rd applicant felt that the caution was fraudulently lifted, his recourse would be to apply for setting aside of the orders lifting the caution but not an application for revocation and which he has done under prayer 2 of his application. However, having allowed a similar prayer in the application by the 1st and 2nd applicants, the said prayer is moot.

28. This being a succession cause, and taking into account the circumstances of the case, each party to bear his or her own costs. The respondents herein cannot be condemned to pay the costs wherein they were wrongly enjoined.

29. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF SEPTEMBER, 2021.

L. NJUGUNA

JUDGE

.....for the Applicants

.....for the Respondents