



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO. 263 OF 2014

IN THE MATTER OF THE ESTATE OF THE LATE NOAH OLOO KAMIDIGO (DECEASED)

DUCANE OCHIENG KAMIDIGOPROTESTOR/BENEFICIARY

AND

RECCE REBECCA KAMIDIGO.....PETITIONER/ADMINISTRATOR

RULING

BACKGROUND

1. The petitioner petitioned for letters of administration intestate on 10th April 2014 in respect of the estate of the late **Noah Oloo Kamidigo** who died on 25th December 2013. She was granted letters of administration on 8th July 2015. On 2nd February 2016; she filed summons for confirmation of grant and the grant of letters of administration was confirmed on 11th February 2016.
2. The protestor being dissatisfied with the distribution has filed the current application 6th August 2020 seeking revocation of grant. In the application, the protestor sought the following orders:-
 - a. Spent
 - b. Spent
 - c. That the letters of Administration issued to the Respondent/Administrator on 20th April 2016 be revoked and the certificate of the confirmation of the Grant issued to the Respondent /Administrator on 11th February 2016 be canceled.
 - d. That the costs of this application be costs to the estate.
3. Grounds on the face of the application are as follows:-
 - i. *That the process under which the grant was issued and later confirmed was materially and procedurally defective in substance.*
 - ii. *That the applicants' consent was neither sought nor obtained in the process of the issuance of the grant and its subsequent confirmation yet the protestor/Beneficiary has a direct beneficial interest in not only the deceased's estate but more specifically **Nakuru/Municipality Block 1/447 Langa Langa**.*
 - iii. *That the grant and its subsequent confirmation were obtained discretely through an improper procedure; it was based on false information, concealment of material information, and untrue allegations of facts.*
 - iv. *That the respondent/ Administrator is putting into use a certificate of confirmation of a grant in an indiscriminate way by hurriedly subdividing the deceased's land and soliciting or touting for potential buyers of the subdivision plots knowing quite well that the process under which the Grant and Certificate of confirmation were obtained is under challenge.*
 - v. *That the Respondent /Administrator cannot sell, dispose of or alienate the deceased's properties in her fiduciary and Trustee position unless the court issues her with an order.*
4. The application is supported by the affidavit of **Ducane Ochieng' Kamidigo**. He restated grounds in support of the application.

5. In response, the petitioner averred that the protestor was involved in filing the petition for letters of administration and executed the consent. He averred that the protestor ceased his interest in Nakuru/ Municipality Block 1/447 after the deceased bought him a house in Nairobi Syokimau.

6. Further the petitioner filed grounds of opposition dated 8th October 2020 as follows:-

- a. *The application is bad in law and not anchored on the law.*
- b. *That the protestor consented to the confirmation of grant and was present in court when the grant was confirmed.*
- c. *That the protestor's interest in the parcel of land known as **Nakuru/Municipality Block 1/447 Langa Langa** cannot be litigated under this succession cause.*
- d. *That the protestor is guilty of laches and he has acquiesced to the absorption of his interest to the estate.*
- e. *That the said property **Nakuru/Municipality Block 1/447 LangaLanga** has changed in character as new rental buildings have been erected on the property with the consent and or knowledge of the protestor.*
- f. *The protestor as a son to the petitioner is challenging the grant after being denied some favors he wanted from the family.*

7. In response to the grounds of opposition, the protestor filed a replying affidavit and averred that the issue in dispute is Nakuru/Municipality Block 1/447 Langa Langa, which he owned jointly with the deceased and it does not form part of the deceased estate. He averred that all the properties are assigned to the petitioner and there is no schedule of distribution attached to the application for the confirmation of grant thus he was not able to discern the properties that devolved to the petitioner. Further, there was no meeting for distributing the properties of the estate to the petitioner and the grant was obtained by fraud, secrets, and marred with bad faith.

8. The protestor further averred that the entire process and purpose of the succession cause were not properly explained to him and the building of rental units does not extinguish his rights to own the property. He averred that he has never met counsel **Nathaniel Kiongo Githua** nor been in his firm **M/S Cresswell, Mann & Dod** and the affidavit does not raise issues of law and fact save for insults.

9. In a rebuttal, **Obed Sunga Kamidigo** filed a replying affidavit and averred that he is the brother to the protestor and stated that the protestor and all beneficiaries were involved in the succession process; that the protestor was in court during the confirmation of the grant before **Hon Justice Ndung'u** and he did not raise any objection. He stated that the counsel in conduct of the matter is **Mr. Nathaniel Kiongo** and the protestor has met and interacted with counsel.

10. The application proceeded by way of written submissions.

PROTESTOR'S SUBMISSION

11. The protestor submitted **Nakuru/Municipality Block 1/447 Langa Langa** was acquired in 2005 jointly between the deceased and him Ducane Ochieng' and it does not form part of the estate of the deceased. He submitted that they both wished to develop the plot and showed court building plans and land rate receipts signed by the deceased and the protestor.

12. The Protestor further submitted that **Nakuru/Municipality Block 1/447 Langa Langa** being joint tenancy, he is supposed to inherit the property after the death of the deceased and cited **sections 2, and 49 of the Land Act** which provide as follows:-

Section 2 defines **joint tenancy** as

“ a form of concurrent ownership of the land where two or more persons each possess the land simultaneously and have individual interests in the land under which upon the death of one owner it is transferred to the surviving owner or owners.”

Section 49 provides as follows:-

“if one of two or more joint proprietors of any land, lease or charge dies, the registrar shall, on proof of the death, delete the name of the deceased from the register by registration of the death certificate”

13. The protestor further submitted that, the principle of survivorship over jointly owned property operates to exclude the property from the Law of succession and cited the case of in **Re estate of John Njogu Gichobi (deceased) (2018) eKLR** the court held as follows:-

“ my view is that as the objector and the deceased were joint owners, the objector as the surviving joint owner was entitled to acquire ownership without being subjected to the process of intestacy”

14. The protestor submitted that the grant was obtained by fraud and concealment of material facts about the suit property and urged this court to revoke the grant and vest the property with the protestor and to find the delay of 5 years to be reasonable as sufficient proof has been adduced for the delay and cited the case of **Re Estate of Wambui Ngurio Ng'ethe (deceased) 2021 eKLR**.

15. He submitted that the issue in respect to Nakuru/Municipality Block 1/447 Langa Langa is one of ownership rather than inheritance and counsel failed to advise them on the fact that Nakuru/ Municipality block 1/ 447 Langa Langa was not available for distribution;that the grant ought to be revoked as per section 76 of the law of succession Act due to concealment of material facts.

PETITIONER'S SUBMISSION

16. The petitioner submitted that the protestor has brought this application too late being 5 years after the grant was issued. That the grant was issued on 11th February 2016 and not 20th April 2016 and from averments in the affidavits filed in court, it was confirmed that the protestor participated in the succession matter and was present in court when the grant was being confirmed.

17. The petitioner further submitted that a party cannot seek revocation of the entire grant on the issue of the confirmation of the grant and cited the case of **Re Estate of Ngugi (deceased) 2klr 434** where the court held as follows:-

“ where a party is unhappy with the process, it is not prudent to seek revocation of the parent grant, instead the confirmation process should be dealt with without affecting the parent grant”

18. And the petitioner being the surviving spouse of the deceased had the blessings of all children including the protestor in filing the succession and property **Nakuru/Municipality Block 1/447 Langa Langa** does not automatically pass to the protestor under the doctrine of survivorship. That **Section 91(8) of the Registered Land Registration Act 2012** provide as follows:-

“on and after the effective date, except with leave of court, the only joint tenancy that shall be capable of being created shall be between spouses, and any joint tenancy other than between spouses that is purported to be created without the leave of a court shall take effect as a tenancy in common”

19. The petitioner submitted that the issue in dispute falls within the ambit of ownership of land which ought to be addressed in a land court and the application for revocation has been brought after a long period of 5 years since the confirmation of grant and the petitioner has already taken possession of the property and developed it.

ANALYSIS AND DETERMINATION

20. Record show that grant of letters of administration was issued to the petitioner on 8th July 2015. I have considered averments and submissions herein and wish to consider the following as issues for determination:-

- a. Whether threshold for revoking Grant of letters of administration have been met
- b. Whether the property Nakuru/Municipality block 1/447 falls within the estate of the deceased?

(i)Whether threshold for revoking Grant of letters of administration have been met

21. The revocation or annulment of grant is provided under **Section 76** of the Law of Succession Act.which provide as follows:-

“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.**

22. In respect to an application for revocation, a party has to demonstrate existence of any, some, or all the grounds set above. The protestor

averred that the grant was obtained through fraud and concealment of material facts. His argument is that, during the process of obtaining the grant, Counsel Kiongo did not advise them on the issue of the joint tenancy in the property and the petitioner failed to disclose to the court ownership of property L.R Nakuru /Municipality Block 1/447 and further, the confirmation gives no schedule of assets and he did not therefore know which property was devolving to his mother.

23. I have perused the summons for confirmation of the grant filed and I note that it has the schedule of assets with the description of each property with all the properties devolving to the petitioner; a consent by all other beneficiaries including the protestor is attached. The protestor cannot therefore allege that he did not know that the property was included in the summons for confirmation of grant.

24. The documents filed confirm assertion by the petitioner that the protestor was involved in the process of obtaining and confirmation of the grant and he voluntarily gave his consent when filing petition for grant and during the confirmation of the grant. Counsel Nathaniel Kiongo averred in an affidavit dated 7th October 2020 that the consent of the protestor was obtained before the confirmation of the grant.

25. It is evident that the petitioner made disclosure to all the beneficiaries and obtained their consent when filing the petition for letters of administration and summons for confirmation; and assets of the deceased were listed.

26. There is no evidence adduced to demonstrate concealment of material facts on the part of the petitioner as alleged by the protestor; the protestor participated in the succession proceedings.

(ii) Whether the property Nakuru/Municipality block 1/447 falls within the estate of the deceased?

27. The primary duty of a succession court is to identify the beneficiaries, ascertain the assets and ultimately distribute the deceased's estate to the rightful beneficiaries. The court is assisted by the parties who provide evidence as to who is a beneficiary and which are the assets and liabilities of the estate. In the present case, both the Petitioner and the protestor assisted the court in providing the names of the beneficiaries, the list of properties of the deceased, and how the distribution is to be distributed.

28. The protestor's argument is that property LR Nakuru/Municipality block 1/447 does not form part of the deceased's estate as it was jointly registered in his and the deceased's name. In the case of *Isabel Chelangat vs. Samuel Tiro Rotich & 5 others (2012) eKLR*, the court distinguished tenancy in common and joint tenancy in the following terms –

‘At this juncture, I must distinguish between joint ownership of land and land held in common. These are two different types of tenancies by which two or more people are entitled to simultaneous enjoyment of land. To expound on this point I have borrowed heavily from two texts, Megary & Wade, The Law of Real Property and Cheshire & Burn's, Modern Law of Real Property, According to Burn,

“...a joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares...”. Further, that “there is a thorough and intimate union between joint tenants. Together, they form one person.”

A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and “four unities”. The right of survivorship (jus accrescendi) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under the will or intestacy of a joint tenant so long as there is a surviving joint tenant as the right of survivorship takes precedence. The four unities that must be present in a joint tenancy are

(i) The unity of possession.

(ii) The unity of interest.

(iii) The unity of title.

(iv) The unity of time.

On the unity of possession, each co-owner is entitled to possession of any part of the land as the other/s. One co-owner cannot point to any part of the land as his own to the exclusion of the other/s. If he could, then this would be separate ownership and not co-ownership. No one co-owner has a better right to the property than the other/s so that an action for trespass cannot lie against another co-owner. Unity of interest means that the interest of each joint tenant is the same in extent, nature, and duration, for in the theory of law, they hold just one estate. Unity of title means that each joint tenant must claim his title to the land under the same act or document. This is satisfied by having the joint tenants acquire their rights by the same conveyance and being so registered as joint tenants. Unity of time means that the interest of each tenant must vest at the same time.

Tenancy in common on the other hand is different from a joint tenancy. In a tenancy in common, the two or more holders hold the property in equal undivided shares. Each tenant has a distinct share in the property which has not yet been divided among the co-tenants. In other words, they have separate interests only that it remains undivided and they hold the interest together. The largest factor that distinguishes a joint tenancy from a tenancy in common is the absence of the doctrine of survivorship in the latter. The share of one tenant is not affected by the death of one of the co-owners. The share of the deceased devolves not to the other co-owner, but to the estate of the deceased co-owner. Although the four unities required

for a joint-tenancy may be present, only one, the unity of possession is essential.

A joint tenancy can be converted into a tenancy in common by the doctrine of severance. But unless this is done the rights of joint holders so remain.'

29. The applicant herein attached a search showing that the property herein was registered in the name of both the deceased and the protestor. Section 91(8) of the Registered Land Registration Act 2012 provide as follows:-

“on and after the effective date, except with leave of court, the only joint tenancy that shall be capable of being created shall be between spouses, and any joint tenancy other than between spouses that is purported to be created without the leave of a court shall take effect as a tenancy in common”

30. From the foregoing, the property herein having been jointly registered in the name of the deceased and the protestor, the property in dispute was held in common by the deceased and the protestor herein;it would be the burden of the protestor to prove his share in the said property Property L.R Nakuru/Municipality Block 1/447 which in my view should be before land and environment court. In so far as this matter is concerned, I have found that no material facts were concealed from the applicant and he fully participated in the proceedings leading to confirmation of Grant. He never raised any claim in respect L.R Nakuru/Municipality Block 1/447. This court is therefore **functus officio** in respect to distribution of the estate. The protestor may prove his claim in ELC Court if he wishes.

31. From the foregoing I find that the protestor has failed to demonstrate sufficient grounds to revoke the grant issued to the petitioner on 8th July 2015 and confirmed on 11th February 2016.

32. FINAL ORDERS

1) Application dated 6th August 2020 is hereby dismissed.

2) Each party to bear their own costs.

RULING DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 28TH DAY OF OCTOBER, 2021

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:

JENIFER - COURT ASSISTANT

MR. KAMONJO COUNSEL FOR PETITIONER/ADMINISTRATOR

MS. NYABUTO HOLDING BRIEF FOR MAKORI COUNSEL FOR PROTESTOR