



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION CAUSE NO 547 OF 2014

IN THE MATTER OF THE ESTATE OF SAMSON OGENDO ANYANGI (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR THE REVOCATION OF GRANT

BETWEEN

SALOME AOKO OGENDO.....1ST OBJECTOR

PRISKILA ATIENO OGENDO.....2ND OBJECTOR

EMILY ATIENO OGENDO.....3RD OBJECTOR

ROSE ACHIENG OGENDO.....4TH OBJECTOR

MILLICENT ANYANGO OGENDO.....5TH OBJECTOR

DORSILA AKINYI OGENDO.....6TH OBJECTOR

VERSUS

FELIX OMONDI OGENDO..... RESPONDENT

AND

SHADRACK ANYANGE OGENDO.....1ST INTERESTED PARTY

SARAH OMOLO OGENDO.....2ND INTERESTED PARTY

WASHINGTON WERE OGENDO.....3RD INTERESTED PARTY

BOARD OF MANAGEMENT

WACHARE POLYTECHNIC.....4TH INTERESTED PARTY

TRUSTEES AIC OREGO CHURCH.....5TH INTERESTED PARTY

RULING

INTRODUCTION

1. On 8th July 2020, the Objectors herein filed Summons for Revocation of Grant dated 7th July 2020. They sought for orders that the Grant of Letters of Administration of the Estate of Samson Ogendo Anyangi (hereinafter referred to as “the deceased”) that was issued to Felix Omondi Ogendo on 18th September 2014 and confirmed on 12th October 2017 be annulled and in the alternative, the confirmation done on 12th October 2017 be set aside and the estate be redistributed making provisions for the Objectors herein. They also prayed for an order

revoking any sale, sub-divisions, transfer or registration of land parcel numbers Kisumu/Bar/1498 and Kisumu/Bar/633 and the properties revert back into the name of the deceased.

2. In support of the present application, the 1st Objector swore an affidavit on 7th July 2020 on her behalf and behalf of the 2nd, 3rd, 4th, 5th and 6th Objectors. She also swore a Further Affidavit on 14th December 2020. The same was filed on 16th September 2020.

3. They averred that the 1st and 2nd Objectors were the 2nd and 4th wives of the deceased respectively and that the 3rd to 6th Objectors were his daughters. They contended that the Grant of Letters of Administration was obtained without their knowledge as beneficiaries of the deceased. They pointed out that the Chief's letter failed to indicate the daughters as the deceased's beneficiaries as a result of which the said Grant was confirmed on 12th October 2017 without them having been given their respective shares.

4. They averred that the deceased left behind two (2) properties namely Kisumu/Bar/1498 and Kisumu/Bar/633 and that the 1st and the 2nd Objectors had been living on a portion of Kisumu/Bar/633 since the time they were married to the deceased and that the same parcel of land was still in the name of the deceased after the Land Registrar expunged all the illegal entries that had been made by the 2nd Interested Party herein.

5. They pointed out the Respondent, 1st and 2nd Interested Parties had started engaging in the act of selling portions of Kisumu/Bar/633 without their knowledge and the 2nd Interested Party had threatened to evict them. It was their contention that it was only the 2nd Interested Party who would have enjoined the people fencing off Kisumu/Bar/ 633 as they were only known to her.

6. In their Further Affidavit, they contended that the deceased never owned East Kisumu/ Bar 425 and East Kisumu/Bar 426 but that the same belonged to the father in law of Priskilla Atieno Ogendo and the 1st Objector's father in law, Cleopa Anyange and consequently the deceased could never have bequeathed the said parcel of land to Priskilla Atieno Ogendo and the 1st Objector respectively. They were emphatic that the Respondent was never bequeathed Kisumu/Bar/1498.

7. They were categorical that they never gave consent to application of the Grant of Letters of Administration in respect of parcels of land known as Kisumu/Bar/1498 and Kisumu/Bar/633 which belonged to the deceased and denied signing any consent for the confirmation of grant as there was no way they would have signed a document disinheriting themselves. They were also categorical that as per the Certificate of Confirmation of grant, they had been totally disinherited.

8. They added that the said grant was issued to a grandson of the deceased while the deceased had wives and children who ranked higher in the succession ladder. They contended that there was concealment of material facts in procurement of the Grant of Letters of Administration and consequently, the same had been obtained through fraud.

9. In opposition to the Objectors' Summons for Revocation, on 12th October 2020, the Respondent filed his Replying Affidavit. The same was sworn on 6th October 2020. He averred that he was the deceased's grandson and that he bequeathed him Title No Kisumu/Bar/1498 before his demise. He added that the deceased had given all his beneficiaries land or gifts and there was no conflict over occupation of land by any of the beneficiaries.

10. He asserted that the larger family was fussing over Kisumu/Bar/633 after some family members sold their shares to third parties. It was his averment that, nobody had contested his share of Kisumu/Bar/1498 which he argued that all beneficiaries were aware was bequeathed to him. He agreed that succession was not possible in a logical manner since family members followed different paths. He stated further that he took out the letters of administration for the sole purpose of processing title to Kisumu/Bar/1498 and that in the cause of the said succession the whole family was made to join and the court in its own wisdom maintained him as the administrator.

11. He stated that it is after confirmation of the said grant that he processed his title and had the same subdivided to three (3) portions namely Kisumu/Bar/2721, Kisumu/Bar/2722 and Kisumu/Bar/2723 which had already been sold to third parties. He pointed out that Kisumu/Bar/2722 was still in his name.

12. It was his contention that all the family members were involved during the objection process which was settled amicably and the grant confirmed and consequently, the present application was an afterthought. He urged this court to dismiss the present application for the reason that Kisumu/Bar/1498 was no longer in existence.

13. On her part, the 2nd interested party also swore a Replying Affidavit on 7th August 2020. The same was filed on 10th August 2020. It was her contention that the deceased subdivided his land among his four (4) wives in that the 1st and 2nd Objector had each been given East Kisumu/Bar/425 and 426 respectively and which they had sold to third parties. She added that Kisumu/ Bar/1498 was rightly bequeathed to the Respondent being the grandson of Flora Omega Ogendo (now deceased).

14. She averred that she was bequeathed Kisumu/Bar/633 but due to conflicts, a meeting was held on 29th June 2016 where the family members resolved that land parcel no Kisumu/Bar/633 would be distributed to the 1st Objector, the 1st Interested Party, 3rd Interested Party, ALC Wachane Church and Polytechnic measuring 0.7HA, 0.99HA, 0.99HA, 0.15HA and 0.33HA respectively.

15. She averred that the Respondent disclosed to the court that Kisumu/Bar/1498 and Kisumu/Bar/633 formed part of the deceased's estate and hence the distribution of the deceased's estate was done in accordance with the unanimous agreement of the family. She therefore argued that the Objectors' application lacked merit as it did not disclose any ground to warrant revocation of the grant.

16. The 3rd Interested Party also swore a Replying Affidavit on 29th December 2020. The same was filed on 21st January 2021. He averred

that he was a son to the deceased. He averred that he was not aware of the impugned succession process and just learnt of it when he was served with the Summons for Revocation. He pointed out that he did not participate in the succession process in any manner or give consent to the Respondent being an administrator to his deceased's father estate and was surprised to learn that he had been allocated a portion of Kisumu/Bar/633 measuring 0.99HA. He asserted that the Objectors formed part of the beneficiaries and should have been included in the distribution process. He did not therefore object to the present Summons for Revocation of Grant.

LEGAL ANALYSIS

17. The Objectors invoked Section 51 (2) (g) of the Law of Succession Act which provides that in petitioning a grant of letters of administration, the names of the deceased's beneficiaries including parents, spouses, children, siblings and inventory of the deceased's assets and liabilities had to be disclosed. They further relied on the provisions of Section 66 of the Law of Succession Act that gives priority to the surviving spouse to apply for a grant of letters of administration. In addition, they placed reliance on the provisions of Section 71 (1) that states that a court shall not confirm a grant until it was satisfied as to the respective shares and identities of the beneficiaries.

18. They urged this court to invoke the provisions of Section 76 (b) of the Law of Succession Act and Section (sic) 73 of the Probate and Administration Rules to persuade this court to revoke the Grant of Letters of Administration. In this regard, they relied on the cases of Eva Naima & Another vs Tabitha Waithera Mararo [2018] eKLR, Estate of S T M [2017], Ibrahim vs Hassan & Another [2019] eKLR and Musa Nyaribari Gekone & 2 Others vs Peter Miyienda & Another [2015] eKLR where courts revoked grants of letters of administration that were obtained without adhering to the strict provisions of the Law of Succession Act as aforesaid.

19. The Respondent, 2nd and 6th Interested parties submitted that since the deceased subdivided land to his wives and children before he passed on, his wishes should be honoured.

20. On her part, the 2nd Interested Party was emphatic that all family members were aware of the Succession process and were involved and that a meeting was held where the 1st and the 2nd Objectors attended and signed a consent which was used in court for obtaining the grant, a fact that was affirmed by the Respondent and the 6th Interested Party. It was their submission that the portions given as gifts did not form part of the deceased's estate. They all relied on the case of Martha Wanjiku Waweru vs Mary Wambui Waweru (eKLR citation not given) where the court therein upheld the wishes of the deceased person as his family members did not contest his wishes during his lifetime.

21. The Respondent and the 6th Proposed interested party challenged the jurisdiction of this court and pointed out that the issues at hand ought to be handled by the Land and Environment Court as the issues touched on property that had been administered by the Respondent herein as titles had already been issued.

22. In this regard, they placed reliance on the case of Re: Estate of Alice Mumbua Mutua (Deceased) [2017] eKLR where the court therein held that disputes that arise after confirmation of the grant ought to be determined outside that probate matter. They also relied on the case of Salome Wambui Njau (Suing as an administratrix of the Estate of Peter Kiguru (Deceased) vs Caroline Wangui Kiguru [2013] eKLR where the court therein held that the issue of the legitimacy of the title deeds could be ventilated in the Environment and Land Court.

23. 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.”

24. 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.”

25. This court noted that even though the Respondent and the 2nd Interested Party argued that the deceased had subdivided land to his wives and children before his death, they had no documentary evidence to prove their allegations. Notably, the 3rd, 4th, 5th and 6th Objectors were left out of the Succession process, a fact that was confirmed by the 3rd Interested Party and evident from the Chief’s letter dated 17th March 2014 that was annexed to the Petition of the Grant of Letters of Administration.

26. The Respondent herein, a grandchild to the deceased was the Petitioner. His argument that he only applied for the Grant of Letters of Administration to get a Title to Kisumu/Bar/1498 was irregular. He ranked lower in the persons who could apply for letters of administration in a deceased’s estate and inherit a deceased’s estate.

27. Notably, Section 66 of the Law of Succession Act provides that:-

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

- a. surviving spouse or spouses, with or without association of other beneficiaries;**
- b. other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;**
- c. the Public Trustee; and**
- d. creditors:**

28. Going further, Section 39 in Part V of the Law of Succession Act provides that:-

1. Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—

- a. father; or if dead**
- b. mother; or if dead**
- c. brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none**
- d. half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none**
- e. the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.**

2. Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.

29. Further, the Respondent did not get consent from the 3rd to 6th Objectors of the so as to petition for letters of administration intestate. This was contrary to the provisions of the law. Rule 25(2) of the Probate and Administration Rules provides that:-

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.

30. The mere fact that the 3rd to 6th Objectors did not give their consent to the Respondent being issued with the Grant of Letters of Administration rendered the entire process of obtaining the said Grant defective and a nullity. They were persons who were equal and lesser in priority for purposes of applying for the grant of letters of administration and thus ought to have executed Form 38. Had there been disclosure of the 3rd to 6th Objectors in the Petition, the court issuing the said Grant would definitely have required their consent.

31. In order for the orders sought to be granted, an objector must prove that the grounds for revocation have been satisfied. After carefully considering the Affidavit evidence and the Objector’s Written Submissions, this court was satisfied 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 as envisaged in Section 76(b) of

the Law of Succession Act.

32. On the other hand, this court was not persuaded by the submissions of the Respondent, 2nd and 6th Interested Parties that this court did not have jurisdiction to hear and determine the matter herein. This is because the High Court has power under Section 76 of the Law of Succession Act to revoke a grant which has consequences on any properties that may have passed to third parties.

33. In addition, Rule 73 of the Probate and Administration Rules goes further to affirm the court's powers when it states that:-

“Nothing in these Rules shall limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

34. Notably, Section 13 of the Environment and Land Court No 19 of 2011 stipulates that:-

1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

2. In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b. relating to compulsory acquisition of land;

c. relating to land administration and management;

d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e. any other dispute relating to environment and land.

35. The dispute that was before this court was pursuant to Section 76 of the Law of Succession. It was a dispute between a petitioner and beneficiaries of a deceased's estate. It was not a dispute relating to title of land or any of the circumstances envisaged in Section 13(2) of the Environment and Land Court Act. This court thus came to the firm conclusion that this court had jurisdiction to hear and determine the matter herein.

36. This court was therefore persuaded that there was merit in revoking the Grant of Letters of Administration that was issued to the Respondent herein as stipulated in Section 76 of the Law of Succession.

DISPOSITION

37. For the foregoing reasons, the upshot of this court's decision was that the Objector's Summons for revocation of grant dated and filed on 7th July 2020 was merited and the same be and is hereby allowed.

38. For the interest of justice and pursuant to Rule 73 of the Probate and Administration Rules this Court hereby orders the cancellation of any title, if at all, to Kisumu/Bar/1498 and Kisumu/Bar/633 if they stand in the names of third parties and the registrar shall proceed accordingly. For the avoidance of doubt, the ownership of the aforementioned parcels of land shall revert to the deceased for purposes of distribution of his estate in this cause as it is only safe to do so.

39. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF OCTOBER 2021

J. KAMAU

JUDGE