



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 340 OF 2012

IN THE MATTER OF THE ESTATE OF KAMATU KABARA (DECEASED)

GRACE WANJIRU MITAMBO.....APPLICANT

-VERSUS-

BUNDI KAMATU..... RESPONDENT

ZACHARIAH KINYUA MAGONDU..... 1ST INTERESTED PARTY

PENELOPE JUNE MURUGI..... 2ND INTERESTED PARTY

J U D G M E N T

1. This succession cause relates to the estate of the late Kamatu Kabara who died intestate on 08/07/1987 aged 75 years. His estate comprised of land parcel no. KABARE/MUTIGE/176 (hereinafter referred to as the “suit property”). As per the chief’s letter dated 23/02/2012, the deceased was survived by:

- a. Susan Kariuki Kamatu – Daughter
- b. Francis Munene Kamatu – Son (Deceased)
- c. Peter Muchiri Kamatu – Son
- d. Bundi Kamatu – Son (Deceased)

2. On 10/08/2012, letters of administration were issued to Francis Munene Kamatu (now deceased) in **Kerugoya Senior Resident Magistrate’s Succession Cause No. 147 of 2012**. Following the death of the said Francis Munene Kamatu on 15/02/2014, the Respondent herein substituted him on 10/06/2015 as the administrator of the subject estate. Consequently, the Respondent filed summons for confirmation of grant on 01/07/2015 and the same was confirmed on 08/03/2016.

3. Before this court is the Summons for Revocation of Grant dated 25/07/2017. The same is brought pursuant to **Section 76 of Law of Succession Act** (the “Act”) and **Rule 44 of the Probate and Administration Rules** (the “Rules”) and is premised on the grounds THAT:

- a. The proceedings to obtain grant were defective in substance.
- b. The grant was obtained fraudulently by making false statements or by the concealment from court of something material to the case.
- c. The grant was obtained by means of untrue allegations of facts essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

4. The application was canvassed by way of viva voce evidence.

Applicant’s Case

5. The Applicant testified as PW1. She is the widow to the aforementioned Francis Munene Kamatu (deceased) and is therefore the daughter-in-law to the deceased herein. In her affidavit that was sworn on 25/07/2017, the Applicant claims that the proposed mode of distribution in

respect to the deceased's estate deliberately left out her out and added strangers as beneficiaries to the subject estate. She therefore prayed for the grant to be revoked.

6. PW2 was Simon Kamau Kambo, an elderly man who claims to have known the deceased. He testified that it was the deceased wish to have his estate distributed equally among his four children. Just like PW1, he stated that he was not aware whether PW1's late husband had sold his portion of the land he was supposed to get out of the estate.

Respondent's Case

7. The 1st Interested Party testified as DW1. He relied on the affidavit he swore on 12/10/2018 in response to the present application. Annexed to the affidavit is a sale agreement dated 16/04/2012 and two supplementary agreements dated 16/05/2012 and 06/06/2012 respectively. DW1 relied on the said documents to buttress his position that he bought one and a half (1½) acres of land from the deceased's estate and paid the entire purchase price.

8. The 2nd Interested Party testified as PW2. She also relied on the affidavit that she swore on 12/10/2018 as well as the annexures thereto. She alleged that out of the purchase price of Kshs. 450,000/=, there was a balance of Kshs. 78,000/= that remained to be paid after the succession cause was finalized. She also alleged that the Applicant was aware of the transaction and that she had even received part of the payments through Mpesa after the Applicant's husband died. She further testified that all the other beneficiaries of the deceased were aware of the land sale.

9. The Respondent was allowed to put in his response to the application. On 27/07/2021, this court was informed that the Respondent was deceased. Given the nature of the present application, the court ordered that it would proceed to give the judgment and that the Respondent would be substituted thereafter. Below is therefore an analysis of the issues raised by the parties.

Issue for determination

10. The main issue for determination by this court is whether the Applicant has established any of the statutory grounds warranting the revocation of the subject grant.

Analysis

11. The circumstances under which a grant of representation may be revoked by this court are provided for under **Section 76** of the **Law of Succession Act**. This provision was construed in the case of **Matheka and Another vs Matheka [2005] 2 KLR 455** where the Court of Appeal laid down the following guiding principles.

“i. A grant may be revoked either by application by an interested party or by the court on its own motion.

ii. Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.”

12. There is no dispute that the suit property forms part of the estate of the deceased. The Applicant contends that the proposed share of the estate deliberately omitted her name and disinherited her of her rightful share of the subject estate. From the confirmed grant, I have noted that below was the proposed mode of distribution of the deceased's estate:

| <u>Name</u> | <u>Description of Property</u> | <u>Share of Heirs</u> |
|-------------------------------|---------------------------------------|------------------------------|
| Penelope June Murugi | KABARE/MUTIGE/176 | 0.20 Ha |
| Susan Kariuko Kamatu | ” | 0.20 Ha |
| Grace Wanjiru Mithambo | ” | 0.25 Ha |
| Zacharia Kinyua Magondu | ” | 0.60 Ha |
| Bundi Kamatu | ” | 0.14 Ha |
| Peter Muchiri Kamatu | ” | 0.14 Ha |

13. It is therefore not true that the Applicant was left out in the proposed mode of distribution as she was allocated 0.25 Ha out of the estate. The Applicant afterwards abandoned this claim in her testimony, and averred that she was entitled to one acre of the estate of the deceased and that the Interested Parties herein had been allocated part of her share of the land leaving her with only half an acre.

14. The interested parties opposed the application claiming to be innocent purchasers for value and therefore entitled to the shares indicated in the confirmed grant. They relied on the sale agreements attached to their respective affidavits in response to the application. I have perused

the said agreements and it is evident that the same were made after the death of the deceased and were entered into between the interested parties and some of the deceased's beneficiaries. They were also made before confirmation of the grant of representation.

15. It is trite law that a purchaser is not a beneficiary of an estate that is subject to a succession cause if the sale agreement was done after the death of deceased and before the confirmation of the grant. Such a sale violates the **Law of Succession Act**, and such purchasers should not be entertained in such proceedings. It is evident that the two purchasers bought the land from the respondent after the death of the deceased and before the grant was confirmed. There are two issues;

The first issue is that the Law of Succession Act, (Cap 160 Laws of Kenya) prohibits intermeddling with the estate of the deceased, **Section 45** of the **Act** makes it an offence for a person to intermeddle with the estate of the deceased. **Section 45 Law of Succession Act** provides:-

“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”

(2) Any person who contravenes the provisions of this section shall-

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

The second issue is that the Act prohibits sale of immovable property before confirmation of the grant. **Section 82(b)ii Law of Succession Act** provides that:-

“ No immovable property shall be sold before confirmation of the grant.”

Though the Act protects purchaser of properties from the estate of the deceased, the protection does not extend to person who purchased immovable property of the deceased before the grant of letters of administration was confirmed. **Section 93(1)** of the **Act** provides for the protection of purchaser from the estate. **Section 93(1) of the Law of Succession** Provides:-

“(1) A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.”

The respondent intermeddled with the estate by selling properties of the deceased before the grant was confirmed. The interested parties are not protected under **Section 93** as they bought the property before the grant was confirmed.

16. For purposes of directing the alleged purchasers of the subject estate, it suffices to cite Musyoka J **In re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR** that:

“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates' courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.”

17. Pursuant to the provision of **Section 71(2)(a)** of the **Law of Succession Act**, it follows that where the deceased died intestate, as is the case here, the grant of letters of administration should not be confirmed until the court is satisfied about the identities of and shares of all persons beneficially entitled.

The Section provides:-

2)”Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may-(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, the estate according to law, confirm the grant.”

18. There was no evidence that the interested parties had a dealing with the deceased before his demise that touched on the suit property. There is also no evidence to prove that they were dependents of the deceased. This being a probate court, it follows that its jurisdiction is limited to ascertaining what assets are available to the estate, who the beneficiaries are and the mode of distribution of the estate.

19. As noted above, the Interested Parties were not dependents of the deceased and their claims of being creditors of the deceased estate are

yet to be determined by a court of law with competent jurisdiction. This court should therefore not delve into determination of those claims in these proceedings. As such, it is my view that the subject grant was obtained and confirmed through concealment of material facts, specifically on the issue of the rightful beneficiaries of the estate and should thus be revoked.

CONCLUSION

20. From the foregoing, I opine that the present application is merited and should be allowed. In addition, given that the application rides on the back of the grant that was issued to the Respondent who is now deceased, the grant has become useless and in-operative through subsequent circumstances. That is the death of administrator, under **Section 76(e) of the Law of Succession Act**. I order that the grant issued on 1/7/2015 and confirmed on 8/3/2016 is revoked. The applicant Grace Wanjiru Mitambo is appointed as the administratrix of the estate. She will move the court for confirmation of grant. I make no order as to costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 20TH DAY OF DECEMBER 2021.

L.W. GITARI

JUDGE

20/12/2021

The Judgment has been read out in open court.

L. W. GITARI

JUDGE

20/12/2021