



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

SUCCESSION CAUSE NO. 12 OF 2019

IN THE MATTER OF THE ESTATE OF THE LATE EPHARUS NYAMBURA NDUATI (DECEASED)

MARY NYAMBURA MANASSEH.....PLAINTIFF

VERSUS

PAUL N. NDUATI.....1ST RESPONDENT

CAROLINE WANJIRU KAMAU.....2ND RESPONDENT

AND

TITUS KARIKO NGATIA.....1ST INTERESTED PARTY

TABITHA WARINGA NDUNG'U.....2ND INTERESTED PARTY

JUDGMENT

1. The matter before court is an application by the Applicant dated 5/10/ 2009 which was heard viva voce seeking to revoke the Grant of Letters of Administration made to the Respondents on the 12th February 2008 The application seeks orders that:

i. The grant of letters of administration issued to Caroline Wanjiku Nduati and Paul N. Nduati, the Respondents herein be revoked on the grounds that:

ii. The proceedings to obtain the grant were defective in substance;

iii. The grant was obtained fraudulently by the making of false statement or by the concealment from court of something material to the case;

iv. The grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant.

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2. The application was supported by the Supporting Affidavit sworn by the initial Applicant Manasseh Githinji Kirugu (the initial Applicant and purchaser herein) on 5th October 2009.

3. The application was opposed by both the Respondents and Interested Parties vide the Replying Affidavits dated 10/11/2009 sworn by Titus Kariko Ngatia and Paul N. Nduati respectively.

4. The dispute at hand touches on the distribution of the estate of Epharus Nyambura Nduati, the deceased herein and the ownership of 2 acres of land from Nyandarua/Ol' Joro-Orok Salient/1881 by the purchaser. He alleged that he purchased 2 acres of land from the deceased vide agreements dated 6/9/94 and 28/6/94 and 24/2/95 which were to be excised from original parcel no. Nyandarua/Ol' Joro-Orok Salient/1881. That the purchaser took possession of the land immediately after purchase and put up a perimeter fence, planted trees around the perimeter fence and started cultivating on the land. However, it was his contention that the deceased died before transferring the land to him.

APPLICANT'S SUBMISSIONS

5. The Applicant averred that the question as to whether he bought 2 acres of land, the suit land herein from the deceased is not contested by the Respondents and the Interested Parties. The purchase was concluded while the deceased was still alive and upon his death he automatically became a beneficiary of the estate as purchaser for value. The Applicant contended that the suit land had been demarcated on the ground and he has been put into possession by the deceased himself.
6. The Applicant argued that the fact that he had also been included both in the Chief's introductory letter and in initial summons for confirmation of grant is also not contested and the 1st Respondent stated that he removed the Applicant's name by way of further affidavit proves that he was entitled to the suit land.
7. The Applicant asserted that the Respondents obtained the confirmed grant by way of concealment of a material fact that he was entitled to the suit land having bought it from the deceased because both parties evidence confirmed that he bought the suit land and he was included as a beneficiary in both the petition and summons for confirmation of grant. Further, he confirmed together with his witnesses who were fellow purchasers for value that they actually attended court for confirmation of grant where all their names were read out.
8. He indicated that there is a further affidavit in support of application of grant for letters of administration sworn on 28th October 2008 which identifies him as the beneficiary of 2 acres but what clearly comes out after the initial confirmation is presence of fraud between the Respondents and the 1st Interested Party with assistance from court registry who exchanged the affidavit, removed the initial certificate of confirmation and had another one signed by the magistrate indicating that the certificate of confirmation was obtained fraudulently.
9. It was the Applicant's submission that he could have only denounced his entitlement by way of signing a consent to the proposed mode of distribution removing his name and that he was also supposed to be served with the amended application that removed his name so that he can appear before the court and confirm that he has consented to his entitlement being distributed to another person. Reliance was placed on **Rule 40(8) of the Probate and Administration Rules**. To that end, the Applicant contended that the Respondents clearly obtained the confirmed grant by way of concealment of material facts that he was entitled to 2 acres of land having bought the same from the deceased and therefore the proceedings were defective in substance. The Applicant reiterated that the grant ought to be cancelled by virtue of **Section 76 of the Law of Succession Act**.
10. The Applicant argued that title deeds obtained pursuant to unlawfully acquired certificate of grant cannot stand. Secondly, **Section 82 of the Law of Succession Act** provides that no immovable property of a deceased person shall be sold before confirmation of grant yet the sale agreement produced by the 1st Interested Party confirmed that the sale took place before confirmation of grant. Therefore, it follows that the sale of the 2 acres by the Respondent was illegal null and void and cannot confer any good title to the 1st Interested Party and subsequently to the 2nd Interested Party. Further reliance was placed on **Section 45 & 93 of the Law of Succession Act**, **Succession Cause No. 166 of 2017 Estate of Cyrus Kingori Ngotho alias Kingori Ngotho (Deceased)** and **Monica Adhiambo v Maurice Odero Koko [2016] eKLR**.
11. Lastly, the Applicant prayed that the Respondents and Interested Parties be condemned to pay the costs of the proceedings jointly and severally.

RESPONDENTS AND INTERESTED PARTIES SUBMISSIONS

12. It was submitted that the Applicant's evidence did not challenge the process of obtaining the grant issued on 12/2/2008 and the same is at variance with his pleadings on record. That according to him, his name was included in the initial proceedings which gave rise to the grant yet he did not seek for cancellation and/or setting aside of the certificate of confirmation of grant dated 16/12/2008 in his summons for revocation. The Respondents emphasized that parties are bound by their pleading.
13. The Respondents averred that **Section 76 (a), (b) and (c) of the Law of Succession Act** doesn't not provide for revocation of a certificate of confirmation of grant. Further reliance was placed on **In Re Estate of Juma Shitsebura Linani (deceased) [2021] eKLR** and **In Re Estate of Prisca Ong'ayo Nande (deceased) [2020] eKLR**.
14. The Respondents argued that the Applicant's remedy lies elsewhere as he did not tender evidence to demonstrate that the proceedings to obtain the grant issued on 12/2/2008 should be cancelled in the terms of **Section 76 of the Law of Succession Act** thus the summons should be dismissed with costs.
15. Furthermore, the Respondents contended that the Applicant failed to demonstrate that his name was listed in the further affidavit in support for confirmation of grant filed in **Nyahururu P.M Succ Cause No. 96 of 2007** and that the grant was indeed confirmed in his favour as a beneficiary of 2 acres of land.
16. The 1st Respondent explained that the Applicant's name was not listed at the stage of confirmation as differences arose at the stage of subdivision of land by the surveyor before confirmation and that the Applicant sought for a refund of the purchase price which evidence was supported by the 1st Interested Party who was present during the exercise and who proceeded to purchase the 2 acres of land to enable the 1st Respondent to refund the sale price to the Applicant. That the 1st Respondent confirmed that he swore a further affidavit dated 28/10/2008 and the name of the Applicant was not listed in the affidavit and that the grant was indeed confirmed. The Applicant filed an affidavit listing his name but the said affidavit is not in the original court records implying that it is a forgery.
17. It was submitted that the court proceedings of 28/10/2008 confirm that the administrators and the beneficiaries appeared before Hon M.T. Kariuki Ag. SRM only once and not twice as insinuated by the Applicant and the grant was confirmed without objection as per a further affidavit sworn on 28/10/2008 after the Applicant disagree with the Respondents and demanded for a refund.

18. The Respondents argued that the Applicant admitted that the Land Control Board's consent to the transaction was not sought for and obtained. Additionally, the Applicant had a balance of Kshs. 7,000/- owed to the deceased and he failed to explain why 11 years down the line the land was not transferred to him. Reliance was placed on **Section 6 & 7 of the Land Control Act CAP 302, In re estate of Jeremano M'bengi Kaburu (deceased) [2011] eKLR, In re estate of CNK (deceased) [2020] eKLR, In re estate of Shee Mohammed Athman (deceased) [2017] eKLR.**

19. The Respondents averred that he was willing to refund that purchase price paid but the Applicant refused to receive the see. That the issue of cancellation of the title deeds was only raised in the Applicant's submissions thus the prayer cannot be granted as parties are bound by their pleadings. It was their assertion that the Interested Parties are protected under **Section 93 CAP 160 and Section 26 of the Land Registration Act 2021** and the same are indefeasible.

20. In conclusion, the Respondents contended that the Applicant's claim is statutorily time barred by dint of **Section 7 of the Limitation of Actions Act** as the sale agreement was executed in the year 1994 and the claim for the land initiated through a summons for revocation of grant was filed on 7/10/2009 after a period of 15 years and outside 12 years' period provided for by the law.

ANALYSIS AND DETERMINATION

21. The issue for determination herein is whether the Applicant's application meets the threshold for the revocation of a grant within the meaning of **Section 76 of the Law of Succession Act.**

22. For avoidance of doubt, **Section 76 of the Law of Succession Act** states as follows:

“76. Revocation or annulment of grant

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.”

23. **Section 76** was clearly expounded on by the court **In re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR** where it was stated that:

“Under section 76, a court may revoke a grant so long as the grounds listed above are disclosed, either on its own motion or on the application of a party. A grant of letters of administration may be revoked on three general grounds. The first is where the process of obtaining the grant was attended by problems. The first would be where the process was defective, either because some mandatory procedural step was omitted, or the persons applying for representation was not competent or suitable for appointment, or the deceased died testate having made a valid will and then a grant or letters of administration intestate was made instead of a grant of probate, or vice versa. It could also be that the process was marred by fraud and misrepresentation or concealment of matter, such as where some survivors are not disclosed or the Applicant lies that he is a survivor when he is not, among other reasons. The second general ground is where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he fails to apply for confirmation of grant within the time allowed, or he fails to proceed diligently with administration, or fails to render accounts as and when required. The third general ground is where the grant has become useless and inoperative following subsequent circumstances, such as where a sole administrator dies leaving behind no administrator to carry on the exercise, or where the sole administrator loses the soundness of his mind for whatever reason or even becomes physically infirm to an extent of being unable to carry out his duties as administrator, or the sole administrator is adjudged bankrupt and, therefore, becomes unqualified to hold any office of trust.”

24. The Applicant invited the court to revoke the grant of letters of administration for the reasons that the Respondents obtained the confirmed grant by way of concealment of a material fact that he was entitled to the suit land having bought it from the deceased because

both parties evidence confirmed that he bought the suit land and he was included as a beneficiary in both the petition and summons for confirmation of grant. Further, he argued that there is a further affidavit in support of application of grant for letters of administration sworn on 28th October 2008 which identifies him as the beneficiary of 2 acres but what clearly comes out after the initial confirmation is presence of fraud between the Respondents and the 1st Interested Party with assistance from court registry who exchanged the affidavit, removed the initial certificate of confirmation and had another one signed by the magistrate indicating that the certificate of confirmation was obtained fraudulently.

25. It was the Applicant's submission that the Respondents obtained the confirmed grant by way of concealment of material facts that he was entitled to 2 acres of land having bought the same from the deceased and therefore the proceedings were defective in substance. To that end, he argued that he could have only denounced his entitlement by way of signing a consent to the proposed mode of distribution removing his name and that he was also supposed to be served with the amended application that removed his name so that he can appear before the court and confirm that he has consented to his entitlement being distributed to another person.

26. In addition, the Applicant argued that title deeds obtained pursuant to unlawfully acquired certificate of grant cannot stand. Secondly, **Section 82 of the Law of Succession Act** provides that no immovable property of a deceased person shall be sold before confirmation of grant yet the sale agreement produced by the 1st Interested Party confirmed that the sale took place before confirmation of grant. Therefore, it follows that the sale of the 2 acres by the Respondent was illegal null and void and cannot confer any good title to the 1st Interested Party and subsequently to the 2nd Interested Party.

27. In essence, the Applicant's prayer is that the grant be confirmed but their material contention is on the confirmation process. I have thoroughly perused the record and find that there is overwhelming evidence to ascertain that indeed the Applicant purchased 2 acres out of Nyandarua/Ol' Joro-Orok Salient/1881 from the deceased. In any case, the Respondents also affirmed the same. The dispute between the parties seems to have arose when the Applicant sought to have the grant confirmed. The 1st Respondent explained that the Applicant's name was not listed at the stage of confirmation as differences arose at the stage of subdivision of land by the surveyor before confirmation and that the Applicant sought for a refund of the purchase price which evidence was supported by the 1st Interested Party who was present during the exercise and who proceeded to purchase the 2 acres of land to enable the 1st Respondent to refund the sale price to the Applicant. On the other hand, the Applicant contended that the suit land had already been demarcated on the ground and he has been put into possession by the deceased himself but the 1st Respondent during the survey process wanted to move him away from what had initially been his portion of land as allocated by the deceased when he bought the land.

28. It is indisputable that the purchaser purchased the suit land from the deceased, what seems to be in contention is whether he gave up his rights to the same when the grant came up for confirmation. The initial Applicant who was the purchaser and who is now deceased testified that on 21/08/2008, the application for confirmation of grant was made and there was an affidavit sworn by both Respondents as Petitioners where he was named as the 1st beneficiary for Nyandarua/Ol'joro Orok Salient/1881 to get 2 acres. That together with other beneficiaries, they appeared in court and his name was called first but then there was discovered an error in the affidavit which was again prepared and filed on 28/10/2008. They then appeared again before the magistrate in chambers for the confirmation of grant, where all the beneficiaries were asked whether they were satisfied with the distribution to which they responded positively and the grant was confirmed.

29. It was his testimony that the 1st Interested Party was also present and that he was the one who handed to them copies of the affidavit. That thereafter and sometime in November 2008, a surveyor came and asked him to move to the road reserve but he refused. He then went to court to inquire on the certificate of confirmation but he was informed that he was not one of the beneficiaries and he later found out that the 2 acres had been given to the 1st Interested Party.

30. Both PW2 who is also a beneficiary to the estate by virtue of being a purchaser and PW3 confirmed PW1's account. However, DW1 and DW2 testified that the Applicant was removed from the grant after he asked to be compensated his purchase price after the survey process disagreement and that is how the land was transferred to the 1st Interested Party.

31. From the foregoing and from my thorough perusal of the court's records, it is my view that the Petitioners particularly the 1st Respondent colluded with the 1st Interested Party to disinherit the purchaser. There is evidence in place to prove as much. Once the disagreement on where the purchaser's land was situated occurred the 1st Petitioner occasioned the improper transfer of his portion to the 1st Interested Party. In any case neither the Respondents nor the Petitioners have adduced evidence to prove that the purchaser denounced his interest in the suit land or asked to be refunded and/or if ever the said refund was made to him. The manner in which the confirmation of grant was undertaken is evidently improper. The presence of 2 affidavits both bearing the court's receiving stamp is even more sinister.

32. However, the manner in which confirmation is undertaken is not one of the grounds, under **Section 76**, for revocation of a grant. The only consideration in **Section 76**, relating to confirmation, is where the same is not sought or obtained within one year of the making of the grant. The court shall therefore, not exercise its mind on the aforementioned issue despite the evidence of glaring inconsistencies.

33. The issue of the suit land being sold in contravention of **Section 82 of the Law of Succession Act** was raised by the Applicant. The sale agreement produced by the 1st Interested Party confirmed that the sale took place vide the sale agreement dated 25/10/2008 'TKN2' which was before confirmation of grant which took place on 28/10/2008. I take cognizance of the fact that the Petitioners/Respondents and the 1st Interested Party had knowledge of the fact that the purchaser had purchased land from the deceased and that the grant had not been confirmed but still proceeded with the sale. I am also guided by the finding of the court ***In re Estate of Jamin Inyanda Kadambi (Deceased) [2021] eKLR*** where it was stated that;

"A valid sale of estate property can only be by those to whom the assets vest by virtue of section 79, and who have the power to sell the property by virtue of section 82. Even then, immovable assets, like land, such as Kakamega/Kegoye/30, cannot be disposed of by administrators before their grant has been confirmed, and if land has to be sold before confirmation, then leave or permission of the court must be obtained. That is the purport of section 82(b)(ii) of the Law of Succession Act. Clearly, the sale

transaction that was carried out by the administrators was contrary to sections 45 and 82(b) (ii) of the Law of Succession Act, and was invalid for all purposes. It cannot be asserted at all, and am surprised that persons to whom administration of the estate herein can purport to support a sale transaction that was carried out contrary to the very clear provisions of the law.

a. For avoidance of doubt, sections 45, 79 and 82 of the Law of Succession Act provide as follows:

b. “45. No intermeddling with property of deceased person

(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—

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

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.”

“79. Property of deceased to vest in personal representative

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”

“82. Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best;

Provided that—

ii. no immovable property shall be sold before confirmation of the grant...”

34. For the foregoing reason, I find that the grant should therefore be revoked

35. In Re Estate of Moses Wachira Kimotho (Deceased) Succession Cause 122 of 2002 [2009] eKLR, the court made pronouncements on the importance of disclosing all material facts before a court of law while seeking letters of administration and confirmation thereof. It observed;

“I am certain that had the Applicants been made aware of the application for the confirmation of grant by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of those interests. Further had the Respondent been forthright and candid and included the Applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account their interest in the estate of the deceased. As it is therefore the grant was obtained fraudulently by making of a false statement and or concealment from court of something material to the cause. The Respondent knew of the Applicants’ interest in the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for the confirmation of the grant.

36. The above position was also held by the court in the case of Morris Mwitii Mburungu –vs- Denis Kimathi M’Mburungu [2016] as follows:-

“... Where any person interferes with the free property of the deceased or deals with an estate of a deceased person contrary to the provisions of section 45 and 82 of the Act that is intermeddling, is unlawful and cannot be protected by the court. The transaction is subject to be nullified and set aside at the instance of innocent beneficiaries who may have been affected by the act but were not involved in the same.”

37. **Section 76** envisions that a grant can be revoked where the grant was obtained procedurally, but the administrator, thereafter, got into problems with the exercise of administration, such as where he or she fails to apply for confirmation of grant within the time allowed, or he or she fails to proceed diligently with administration, or fails to render accounts as and when required. I find that the Petitioners failed to proceed diligently with administration as the 1st Respondent caused the 2 acres’ portion of Nyandarua/Oljoro Orok Salient/1881 of the estate

property to be transferred to the 1st petitioner and registered in his name without the confirmation of grant.

38. In light of the above, I invoke the inherent powers of this court granted under **Article 159 of the Constitution** and **Section 76 of the Law of Succession Act** and make the order to revoke the letters of grant of administration issued to the Petitioner and subsequent confirmation as it was obtained fraudulently by the making of false statement or by the concealment from court of something material to the case particularly in relation to the sale of the 2 acre portion of Nyandarua/Oljoro Orok Salient/1881 belonging to the Applicant's husband. Thus the court makes the order that;

(i) The certificate of confirmation of grant is revoked and set aside.

(ii) The titles arising from subdivision of Nyandarua/Oljoro Orok Salient/1881 are cancelled and title reverts back to the name of the deceased awaiting the parties to agree on mode of distribution and /or court to determine same.

(iii) The parties to file consent on distribution within 30 days from dates herein or file separate proposals on distribution within same span in default court to go ahead and make verdict with or without parties input.

(iv) Parties bear their costs.

Dated, Signed and Delivered at NYAHURURU this 16th day of December, 2021.

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CHARLES KARIUKI

JUDGE