REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 217 OF 2008

IN THE MATTER OF THE ESTATE OF THE LATE EPHANTUS MWANGI WAWERU

FRANCIS GICHOHI KAMBO .....APPLICANT

-VERSUS-

ESTHER WANJIKU MWANGI.....RESPONDENT

RULING

This ruling is in respect of the summons dated 28 November 2019 in which the applicant sought a conservatory order to maintain the current ownership or registration status of a land parcel identified as Title No. Nyeri/Watuku/1569 pending the hearing and determination of the summons.

The applicant also sought for revocation of the grant made on 23 July 2018 and amended on 28 May 2018 and for setting aside of all subsequent orders after which the summons for confirmation of grant dated 3 August 2008 should be set down for hearing on merit.

The summons is based on the grounds that the order of confirmation made on 23 July 2018 was irregular and unprocedural; that the application dated 11 March 2019 to amend the grant and allowed on 28 May 2018 was also irregular and unprocedural; that the application for confirmation of grant dated 17 May 2017 and which was allowed on 28 July 2018 was not properly on record because the respondent had earlier filed a similar application dated 3 August 2008 to which the applicant had filed a protest; that the grant was confirmed and thereafter amended in the absence of the beneficiaries. Other grounds are that the proceedings to obtain the grant were defective in substance; the grant was obtained fraudulently and by concealment of material fact; and, that the grant was obtained by untrue allegation of facts.

The applicant has invoked section 76 of the Law of Succession Act, cap. 160 and Rules 44, 63 and 73 of the Probate and Administration Rules.

The summons is supported by an affidavit sworn by Mr Jesse Kariuki, the learned counsel for the applicant. He has sworn that the respondent filed a summons dated 13 August 2008 for confirmation of the grant. In response thereto, the applicant filed a protest dated 19 November 2008.

When the summons and the protest came up for directions on 16 March 2012, the court ordered that the suit be stayed pending the determination of an originating summons on the question of a customary trust.

Subsequently, the Origination Summons was filed in the Environment and Land Court Case No. 630 of 2014. This summons was determined on 15 March 2017. An appeal against the decision of the Court was filed in the Court of Appeal sitting at Nyeri as Appeal case No. 186 of 2017. The appeal is pending determination.

Counsel also swore that he learnt belatedly that there was an application for confirmation dated 17 May 2017 which, in his view, it is unprocedural and irregular because there exists another similar application dated 3 August 2008 and this earlier application is the one that ought to have been confirmed.

Although the record shows that counsel for the applicant consented to the confirmation of grant on 23 July 2018, counsel disputes having given such instructions. On the contrary, he has sworn that on 27 March 2018, the respondent's advocates served him with an application dated 14 August 2017 which was coming for hearing on 23 July 2017! The application was seeking to reinstate the grant which had been revoked due to delay in taking steps to have the cause concluded.

Prior to the hearing date, so counsel has sworn, he called Mr King'ori, the learned counsel for the respondent and they agreed that the application to reinstate the grant should be allowed but not in the terms of the application which, among other things, sought to exclude the applicant from the administration of the estate.

The learned counsel for the applicant denies that he ever issued any instructions for confirmation of the grant because the only application that was scheduled for hearing on the material date was the one dated 14 August 2017. In any event, not all the beneficiaries were present in court when the grant is alleged to have been confirmed by consent.

Counsel has sworn further that the application dated 11 March 2019 was also never served upon him yet his client is a co-administratrix of the deceased's estate and therefore neither his client nor other beneficiaries participated in the proceedings of 28 May 2019. Even then, the amendments sought in the distribution of the estate were unprocedural, irregular and unlawful.

By way of reply, the learned counsel for the respondent filed grounds of objection in which he stated that the applicant's summons is an abuse of the process of the court and that this honourable court has no jurisdiction to entertain the application in any event.

At the hearing of the application, Mr Kariuki for the applicant largely rehearsed the depositions in his affidavit.

Mr King'ori, on the other hand, submitted that the confirmation order of 23 July 2018 is proper in law and conformed to rule 41 of the Probate and Administration Rules. He disputed the existence of any other summons for confirmation of grant besides the one dated 13 August 2008.

Counsel also submitted that the applicant is a son to the sister of the deceased; his mother is still alive yet she has not filed any sort of application to contest or challenge the grant or the proceedings leading to its confirmation.

The record shows that the grant of letters of administration was made in the joint names of the applicant and the respondent on 31 May 2005. The applicant is described in the petition as the deceased's nephew while the respondent is identified as his daughter.

There is a summons for confirmation on record by the respondent dated 13 August 2008; it was filed on the even date. To that summons, the applicant filed an affidavit of protest dated 19 November 2008 in which he swore that the parcel of land known as Title No. Nyeri/Watuku/1569, which is the only asset comprising the deceased's estate was held by the deceased for himself and in trust for his nine other siblings including one Phylis Njoki Kambo who is the applicant's mother.

On 19 November 2008, the court directed that both the summons and the protest be heard by way of oral evidence.

When parties appeared before court for hearing on 13 April, 2011 their respective learned counsel informed the court that the primary issue in dispute was the issue of trust. Based on their representations the court invoked rule 41(3) of the Probate and Administration Rules and directed that that issue be determined first before the grant could be confirmed. The proceedings were therefore stayed pending the determination of the question of trust.

Following the court's directions, the applicant filed an Originating Summons dated 6 February 2012 in High Court Civil Suit No. 26 of 2012 for determination of, inter alia, the question whether the deceased, who as noted was the respondent's father held the suit land for himself and in trust for his siblings. This suit was later transferred to the Environment and Land Court in Nyeri and registered in that court's registry as Nyeri ELC case No. 630 of 2014; in it the applicant is described as the plaintiff while the respondent the defendant.

The grant made in the joint names of the applicant and the respondent was revoked on 25 June 2015 under the mistaken belief that the administrators had not taken the necessary steps to have it confirmed ten years after it had made. As noted, the cause had been stayed by the orders of this court pending the outcome of Environment and Land Court case and so the revocation was obviously unwarranted.

In an application dated 14 August 2017 by the respondent seeking to set aside the order revoking the grant; she exhibited on the affidavit in support of the summons a copy of the judgment of the court in **Nyeri ELC Case No. 630 of 2014** essentially demonstrating that the issue the determination of which held this cause in abeyance had been resolved; and with that, nothing else stood in the way of confirmation of the grant. This point is well illustrated in the part of the judgment of Waithaka, J. which reads as:

> ***54. Upon review of the evidence adduced in this case and the law applicable to the administration of the estate property herein, I find and hold that the plaintiff has failed to prove to the required standard that the deceased held the land in trust for himself and his siblings, more so the married ones. For that reason, I return a negative verdict to questions 1 and 2 of the originating summons herein.***

When the learned counsel for the respective parties appeared before me on 23 July 2008 for the hearing of the application of 14 August, 2017 they entered a consent to the effect that the order of the court of 25 June 2015 revoking the grant be set aside and the grant be issued in the name of the joint names of the applicant and the respondent. They also consented that the grant be confirmed in terms of the summons for confirmation of grant dated 13 August 2008. This order was adopted as the order of the court and the matter marked as settled.

Subsequently, the respondent filed a summons dated 11 March 2019 seeking redistribution of the estate based on sale agreements executed between the deceased and purchasers. I ordered the entire parcel devolve upon the respondent subject to the purchasers' rights.

On 25 June 2019 the respondent filed another application seeking the intervention of this court in transmission of the estate; in particular, she sought for an order to the effect that the Nyeri land registrar dispenses with the production of the original title deed in respect of the suit land in effecting its transmission as ordered by the court. She also sought for an order for removal of the caution registered on the land's title to pave way for transmission and completion of the administration of the estate.

Before the respondent's application could be heard, the applicant filed a summons dated 20 September 2019 seeking for a conservatory or prohibitory order restraining the respondent from alienating or in any other way disposing of the suit property pending the determination of

the summons. He also sought for a conservatory order almost in the same terms but pending the determination of his appeal against the decision in the Environment and Land Court.

On 23 September 2019 I directed that both applications be heard together on 26 November 2019. The applications were heard as scheduled and I delivered my ruling in both applications on the spot. For the reasons I gave in that ruling I dismissed the applicant's application dated 20 September 2019 and allowed the respondent's application dated 25 June 2019.

In my humble view, the present application, though camouflaged as a summons for revocation or annulment of grant under section 76 of the Act, seeks nothing more than what the applicant sought to achieve but failed in her application of 20 September 2019.

This, in my humble view, is an abuse of the process of the court because if, for any reason, the applicant was not satisfied with the decision delivered by this court on 26 November 2019, he ought to have appealed against it and not file another application in which the same issues and arguments are regurgitated.

Even then, the premise upon which the application is made is factually wrong for the following reasons. First, the grant which the applicant now seeks to revoke was made upon a joint petition by both the applicant and the respondent on 30 March 2005. Their petition was granted and the grant was eventually made in their joint names on 31 May 2005. It is baffling, to say the least, that the applicant could petition and obtain letters of administration only to turn around and claim that either the proceedings to obtain the grant were defective in substance or that the grant was obtained fraudulently by concealment of material facts or by means of untrue allegation of fact.

Secondly, the grant was made 15 years ago and as noted, with the knowledge and consent of the applicant. He has actively participated in these proceedings from the very beginning. When the respondent sought to have the grant confirmed, his only concern was the scheme of distribution of the estate and for this reason he filed an affidavit protesting against that scheme proposed by the respondent. As much as the applicant was entitled to seek to revoke or annul the grant at any time, surely, he cannot have waited for 15 years to raise whatever grievance he might have had against the grant.

My reading of the applicant's application is a belated but a desperate attempt to scuttle genuine efforts to distribute and complete the administration of the deceased's estate. To be precise, it is an application made in bad faith.

Thirdly, the applicant has deliberately chosen to mislead the court, again, I suppose out of desperation. While the record shows that the only summons for confirmation on record is the one dated 13 August 2008 and which is the summons that was confirmed by consent on 23 July 2018, the applicant says that there is a summons dated 17 May 2017 that was allowed on 28 July 2018. There is no summons of that date and neither was it heard or allowed on 28 July 2018 as alleged or at all.

Fourthly, talking of the consent, Mr Maina, the learned counsel who held Mr Kariuki's brief when the consent to confirm the grant was entered has not sworn any affidavit to the effect that he did not have instructions from Mr Kariuki to record a consent on his behalf. In the absence of such affidavit, there is no evidence that the consent could possibly have been entered by mistake, fraud, coercion or misapprehension of facts. (**See Flora N. Wasike vs. Destimo Wamboko [1988] KLR 429)**

Finally, and crucially, the applicant's involvement in the deceased's estate was on the understanding that the deceased held the land that now forms his estate in trust. A court of competent jurisdiction has ruled that no such trust exists. As long as this decision has either not been stayed by the same court which delivered it or upset by a decision of a higher court, this court is bound by it. In the meantime, the applicant's perceived link to that estate has been decapitated. For our purposes, this court cannot certainly proceed as if that decision does not exist; under no circumstances should this court be seen to interfere or frustrate a decision of a court of equal status.

Lest we forget, counsel for both parties were always in agreement that the issue central to the determination of this cause was the issue of trust. The presumption was, and it was reasonable to assume, that the determination of this question by the Environment and Land Court, to whose jurisdiction the applicant submitted, would settle the present dispute, one way or the other.

It does not therefore stand to reason that even after the court has made its determination, the applicant would find it suitable to file a plethora of applications that have neither legal nor factual basis.

In the final analysis, I do not find any merit in the applicant's application and it is hereby dismissed. The respondent shall have costs.

Signed, dated and delivered in open court this 21st day of February 2020

Ngaah Jairus

JUDGE