



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

SUCCESSION CAUSE NO. 720 OF 2008

IN THE MATTER OF THE ESTATE OF THE LATE NZUTA

MUTAVI MAANDU *alias* NTHUTA MUTAVI MAANDU (DECEASED)

VERONICA MUTHOKI NTHUTA.....PETITIONER/RESPONDENT

VERSUS

JAMES KYALO KIVUVA.....OBJECTOR/RESPONDENT

R U L I N G

1. The Objector/Applicant herein filed a summons dated 9/10/2018 seeking the following reliefs.

i. That the grant of letters of administration issued to Veronica Muthoki Nthuta on 9/02/2009 be revoked and instead the same be issued to the Objector/applicant James Kyalo Kivuva.

ii. That the Objector/Applicant be allowed to file summons for confirmation of grant upon grant of prayer (i) above.

iii. Costs be provided for.

2. The application is supported by grounds on the face thereof as well as by a supporting affidavit of the Objector/Applicant sworn on even date and which raised the following issues:

i. That he had purchased from the deceased a portion of his land known as NZAUI/IKANGAVYA/33 and which sale transaction was witnessed by the Petitioner herein.

ii. That the petitioner while instituting the cause did not include the applicant as a beneficiary and that he moved this court which duty revoked the certificate of confirmation of grant and ordered the petitioner to file fresh summons for confirmation of grant to enable him file an affidavit of protest.

iii. That the petitioner has ignored the court order and proceeded to subdivide the land and obtained new titles in defiance of the order.

iv. That due to the failure of the Petitioner to administer the estate as by law required it is only prudent that the grant be revoked and issued to the objector to exercise his share upon confirmation of the grant.

v. That it is in the interest of justice that the application be allowed.

3. The application was duly served upon the Petitioner/Respondent but she failed to file a response thereto. Hence the application is clearly unopposed and ought to be allowed as prayed. However before coming to that I need to point out a few salient issues as gleaned from the court record. Vide a Ruling dated 15/03/2016 this court revoked the certificate of confirmation of grant and directed the Petitioner herein to file and serve fresh summons for confirmation of grant that shall take into account the interest of the Objector herein. The court further directed the objector herein to file and serve his affidavit of protest if need be upon being served with the fresh summons for confirmation of grant and that the said summons and affidavit of protest were to proceed by way of viva voce evidence. The court finally ordered that there would be no further transfer of the properties of the deceased pending the hearing and determination of the summons for confirmation of grant and affidavit of protest. It seems the Petitioner failed to adhere to the said orders and which has now compelled the Objector herein to move the court as herein. The issue for determination is whether the application should be allowed.

4. The issue of revocation of grant is found in Section 76 of the Law of Succession Act which gives the court jurisdiction to revoke or annul grants. The section provides 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 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 grant within one year from the date hereof or such longer period as the court has ordered or allowed; or

ii. 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 or any material particular;

(e) That the grant has become useless and inoperative through subsequent circumstances.

In the present application, the Objector has presented evidence of a sale agreement between him and the deceased over a portion of the **NZAU/IKANGAVYA/33** and in which the petitioner was a witness thereto and even received part of the purchase monies. This fact was established by this court when it made the ruling dated 15/03/2016. Clearly the Objector having bought land from the deceased is a creditor of the estate since by dint of Section 66 of the Law of Succession Act purchasers of deceased's property during his or her lifetime is protected and that such purchasers are classified as creditors to whom a grant of representation with respect to the estate of a deceased person can issue.

The objector vide his affidavit has deponed that the Petitioner has deliberately failed to comply with the court orders of 15/03/2016. The objector now appears not to have any other option but to proceed to file the requisite summons for confirmation so as enable him ventilate his protest. It is clear that the Petitioner is out to throw the Objector under the bus despite being aware that the Objector had indeed purchased a portion of the land from the deceased going by the fact that the Petitioner witnessed the transaction and even received some of the payments. By refusing to file the summons for confirmation of grant as directed, the Petitioner is out to lock out the Objector from actualizing his interest in the estate by denying him an opportunity to ventilate his protest. The only way for the Objector is to seek to have the grant revoked and a fresh one issued to him so as to enable him file the requisite summons for confirmation of grant. In any event the Objector being a creditor to the estate under section 66 of the Law of Succession Act is one of the persons to whom a grant of representation with respect to the estate of a deceased person can issue. Hence issuing a grant in favour of the Objector is quite legitimate in the circumstances. It is the conduct of the Petitioner that has created this state of affairs. The Petitioner was expected to act in good faith and to ensure that the Objector who is a creditor to the estate is protected but the opposite is the case. It has also been averred by the objector that the Petitioner has disregarded the court order and proceeded to deal with the property in a manner likely to extinguish the Objector's interest in the estate. The eye of equity will not allow the Petitioner to trample upon the rights of the objector yet the petitioner is fully aware of the Objector's interest in the estate. Under the provisions of section 47 of the law of Succession Act the High Court has jurisdiction to entertain any application and determine any dispute and to pronounce such decrees and make such orders therein as may be expedient. Again under Rule 73 of the Probate and Administration Rules the court has inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. It is evident from the averments of the Objector which have not been rebutted by the Petitioner that the Petitioner has disobeyed the court order and even gone ahead to purport to secure new numbers for the deceased's land in a bid to defeat the interest of the Objector. Such kind of behaviour should not be condoned by the court. The court cannot act in vain and in this regard the Petitioner's conduct must be stopped in the interest of justice and to prevent further abuse of the court process. The Petitioner has herself to blame for the present circumstances. The surest way to right things in the circumstances is to order for the revocation of the grant issued to the petitioner and a fresh one issued to the objector so as to enable him file the requisite summons for confirmation of grant. In the event that new titles have been created out of the deceased's parcel **NZAU/IKANGAVYA/33** an order is to issue for revocation of the same and that the property should revert back as **NZAU/IKANGAVYA/33** in the names of the deceased **Nzuta Mutavi Maandu**.

5. In the result, it is my finding that the Objector's application dated 9/10/2018 has merit. The same is allowed in the following terms.

a. The grant of letters of administration issued to Veronica Muthoki Nthuta on 9/02/2009 be and is hereby revoked and a fresh one be issued in the names of the objector herein JAMES KYALO KIVUVA.

b. The Objector herein upon the issuance of the fresh grant do proceed to file and serve summons for confirmation of grant within 60 days from the date hereof.

c. The hearing of the summons for confirmation of grant and affidavit of protest if any shall proceed by way of viva voce evidence.

d. Any new titles generated out of land reference number NZAU/IKANGAVYA/33 are hereby revoked and the Land Registrar

Makueni is hereby ordered to ensure that the property namely NZAUI/IKANGAVYA/33 reverts back in the names of the deceased NZUTA MUTAVI MAANDU alias NTHUTA MUTAVI MAANDU.

It is so ordered.

Dated and delivered at **Machakos** this **23rd** day of **April, 2020**.

D. K. Kemei

Judge