



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CAUSE NO 82 OF 2018

IN THE MATTER OF THE ESTATE OF PETER KAREGA

KAMAU alias KAGERA KAMAU (DECEASED)

GITAKA KAGERA MUIGAI.....APPLICANT

PETER KAGERA N. NYAMBURA.....APPLICANT

VERSUS

SAMUEL KAMAU KAGERA.....RESPONDENT

RULING

1. By the summons for revocation filed on 3rd July 2015 the Applicants herein, **Gitaka Kagera Muigai** and **Peter Kagera N. Nyambura** (hereafter the 1st and 2nd Administrator respectively), seek that the amended (rectified) grant issued on 19th June 2015 be revoked. On grounds that the application for rectification of the grant did not have the blessings of the administrators and that the amendment was made in terms of an application dated 7th December 2011 which purported to have been made by the Applicants and that as a result of the rectification, the Applicant therein, **Samuel Kamau Kagera** (the Respondent) received the largest share of the estate. That this was achieved because the mode of distribution in the said application had been altered by the Respondent. Such is the state of the depositions in the affidavit of the Applicants that only the above can be concisely gleaned therefrom.

2. The Respondent filed a Replying affidavit on 29th January 2016. He deposed that the grant to the administrators was confirmed on 6th September 2013 vide the administrator's application dated 7th December 2011 and that subsequent to the issuance of the certificate of confirmed grant, he realized that the mode of distribution did not accord with the affidavit supporting the summons for confirmation. That he therefore applied to rectify the grant by way of an application filed on 10th April 2015, which was allowed by the court, leading to the rectified certificate of confirmation of grant. He therefore opposed the application by the administrators.

3. In submissions, the Applicants point out several defects in the proceedings before the lower court, including the fact that the summons to confirm the grant dated 27th September 2012 was not filed by the holders of the grant, and that a second application purported to be dated 7.12.2011 and filed on 7.4.12 which does not bear the signatures of the administrators had been surreptitiously introduced into the court record and was the basis of the subsequent application to rectify the grant containing as it did, a totally different mode of distribution from the application dated 27th September 2012.

4. Thus, the administrators assert that the respondent hijacked the proceedings by irregularly obtaining the confirmation of the grant and subsequent rectification contrary to section 71(1) of the Law of Succession Act. They argue that the application dated 7.12.2011 purportedly made by the administrators had never been determined by the court and the affidavit thereof should not have formed the basis of the rectification thus, the administrators contend that all the proceedings subsequent to the date of the issuance of the grant are defective and that they should be declared null and void.

5. For his part, the Respondent swears by the administrators' alleged summons to confirm grant dated 7th December 2011 and alleged consent of the Respondent thereto. He submitted that upon the grant having been confirmed on 6.9.2013 there occurred a typographical error which necessitated the application for rectification which was allowed on 26th June 2015. He asserts that the summons leading to the confirmed grant were executed by the administrators and that there is no demonstration of misrepresentation and violation of the law by the Respondent.

6. The court has considered the affidavit material and submissions by the parties. More importantly, the Court has attempted to piece together the facts and history of these proceedings by studying the court record in Thika CM's Succession Cause No. 391 of 2008. There is no dispute between the parties that the grant in respect of the estate of Peter Kagera Kamau alias Kagera Kamau, the deceased herein, was issued to the two administrators on 14th September 2009. Events subsequent to that date are in my opinion best collated from the record of

the court rather than the depositions and allegations of the parties. Although the record of the lower court appears to be in disarray, there is on record a letter by the Respondent addressed to the Executive Officer Thika Law Courts, dated 11.1.2012. This letter filed into court on the same date states in part that:

“I am one of the sons of the deceased herein and the administrators are my brothers. They have refused to apply for the confirmation of the grant and therefore I am requesting for a mention date for directions as this is an old case and the same ought to have been finished” (sic).

7. It appears that subsequent to this letter there were several mentions before the court and apparently, the application dated 7/12/2011 was filed on 4.4.2012 but could not proceed, because on all occasions, as was the case with preceding mentions, only the Respondent appeared. Indeed on 25/9/12 the record indicates that only the Respondent was present and the court noting that the Applicants were absent stated that the matter could not proceed. Pausing there, the summons dated 7th December 2011 had been filed on 4.4.12 purportedly by the administrators but it is unsigned. The affidavit supporting it is unsworn. The only signed document therein is the supposed consent to confirm the grant executed by the Respondent.

8. It appears that following the order of 25/9/12 in relation to the application dated 7th December 2012, the Respondent took matters into his own hands. The handwritten memorandum endorsed on the file on 27/9/12 records the filing of an application of even date, to confirm the grant by the Respondent scheduled for hearing for 14.11.2012. The ground on the face of the application is that the grant holders had failed to apply to confirm the grant. When it was adjourned on the latter date, and subsequently, the record shows that the Respondent on several occasions fixed dates in the registry resting with the fixing on 7/8/13. Eventually, on 6.9.13, the application dated 27/9/12 was heard. The record indicates that a protestor and the applicant (no names indicated) were present and that the protestor withdrew the affidavit of protest.

9. If this reference is to the affidavit of protest filed on 10/5/13, the same was by the 1st administrator. However, the record does not indicate the identity of the protestor or the beneficiaries said to be present on the material date or whether they agreed with the purport of the summons. Nevertheless, from the order of the court, the summons allowed on 6.9.13 was a summons dated 27th September 2012 and brought by the Respondent. Unfortunately for the Respondent the certificate of confirmed grant appeared to adopt the mode of distribution contained in the withdrawn affidavit of protest of 10.5.13. Obviously unhappy with this outcome, the Respondent filed an application on 18.12.2013 seeking to “nullify” the orders of 6/9/13 and the “cancellation” of the certificate of confirmation of grant, on grounds *inter alia* that the application to confirm grant, presumably the one dated 27th September 2012 had been withdrawn on 6/9/13 and hence there was no basis for such orders.

10. Of particular relevance is the deposition in paragraphs 4 to 10 of the Respondent’s affidavit sworn to support the said motion. He deposed that:

“4. THAT the two administrators refused to apply for confirmation of grant and by mistake I applied for the confirmation of grant on 27/9/12 and annexed hereto and marked SKK – 1 is a photocopy of the said application but later came to know that two administrators were entitled to apply for the grant and not me ...

6. THAT when my said application came up for hearing on 6/9/2013 I withdrew the same when my attention was drawn to me that the application was faulty because Section 71(1) of the Law of Succession Act talks of a holder of a grant.

7. THAT the administrators had not made an application for confirmation of grant before or after I withdrew my application

9. THAT the said confirmation of grant was allegedly issued on 6/9/2013 when there was no application filed by the administrator and in my absence.

10. THAT after the withdrawal of the application of 27/9/12 on 6/9/13 there was no application for confirmation of grant before the court.” (sic)

11. The court was not persuaded but however, apparently confusing the withdrawal of the affidavit of protest with withdrawal of the application (dated 27/9/12) by the Respondent, found that there was on record an application dated 7th December 2011 when the grant was confirmed. This despite the record of proceedings on 6/9/13 showing clearly that the application allowed was the Respondent’s application of 27/9/12. Nevertheless the court stated that it lacked the power to cancel the confirmed grant in view of the provisions of Section 48(1) of the Law of Succession Act at the time. The Applicant was advised to move the High Court.

12. Until that point, the administrators while taking issue with the lack of authority by the Respondent to apply for confirmation of grant appeared content with the outcome of the proceedings of 6/9/13 as their affidavit of protest had been upheld in the confirmed grant. It seems that the Respondent opted to take matters in his own hands again and rather than taking the advice of the lower court, he filed an application in the lower court to rectify the grant, on 10th April 2015. Claiming that the grant had been confirmed *vide* the summons dated 7th December 2011, the Respondent asserted that the confirmed grant ought to be rectified to include the mode of distribution in the affidavit supporting the said summons.

13. The administrators opposed the application pointing the court to ruling previously made by the court on the Respondent’s earlier application. The court in a brief ruling delivered on 19.6.2015 allowed the rectification application. That ruling prompted the present application filed on 3rd July 2015.

14. The record of proceedings in the lower court as outlined above contains several glaring defects. The first was the filing on 4.4.2012 of a

summons to confirm the grant which was not signed by the purported Applicants and which on all accounts was the work of the Respondent, given his actions prior to and subsequent to the filing of the summons. The second was the filing of the second summons on 27/9/2012 by the Respondent who did not hold on grant in his name and the confirmation of the grant on the basis of the defective and unlawful summons. Section 71(1) of the Law of Succession Act clearly states that the application to confirm a grant is to be made by the holder of the grant. If, as appears to have been the case, the administrators had neglected the duty to apply for confirmation, the remedy available to the Respondent was to apply to revoke the grant as provided in Section 76(d)(i) of the Law of Succession Act.

15. The third defect was that, despite the Respondent having admitted that the summons dated 27th September 2012 was irregularly filed by him, and despite the court's ruling of 25th July 2014, the Respondent once more usurped the power of the administrators by making an application to rectify the grant. The clear purpose being to obtain what he could not obtain in the ruling of 25th July 2014. Superior courts have stated time without number the rectification of errors envisaged under Section 74 of the Law of Succession Act does not include an application to redistribute the estate thereby interfering with the concluded distribution of an estate . The Section states that:

“Errors in names and descriptions, or in setting forth the time and place of the deceased’s death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.”

16. The effect of the purported rectification in this instance was to redistribute an already distributed estate. And worse, on the basis of an unexecuted application dated 7th December 2011 and a supporting affidavit that is neither signed nor commissioned. The person who stood to benefit the most in the rectified certificate of grant was the Respondent. Hence, there is no doubt in my mind that the proceedings to obtain the certificate of confirmation of grant were in violation of Section 71(1) of the Law of Succession Act as the Applicant was a stranger, not being the holder of the grant issued herein.

17. Equally, the Respondent had no authority to seek rectification of the certificate of grant and purported rectification went outside the scope envisaged in Section 74 of the Law of Succession Act in addition to being based on a defective pleading (summons dated 7th December 2011) which the Applicants herein have strongly disputed. This case falls squarely within ground (a) of Section 76 of the Law of Succession Act which is to the effect that:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on an application by any interested party or of its own motion –

(a) that the proceedings to obtain the grant were defective in substance

(b) ……”

18. In the circumstances, the court hereby annuls not only the rectified certificate of confirmed grant as sought by the administrators but will further annul the grant confirmed on 6/9/13 as it too was the product of defective proceedings. The administrators are hereby directed to file a fresh and proper summons to this court to confirm the grant issued to them on 14th September 2009 without undue delay, in view of the age of this cause. Parties will bear own costs.

SIGNED AND DELIVERED ELECTRONICALLY THIS 25TH DAY OF SEPTEMBER, 2020.

C. MEOLI

JUDGE