



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 767 OF 2007

IN THE MATTER OF THE ESTATE OF MBALU NZUNZA NDAMBO ALIAS MBALUKA NZUNZA (DECEASED)

SAMUEL KARONG'OI MWANGI.....APPLICANT

-VERSUS-

DAVID NDAMBO MBALU.....1ST PETITIONER/ RESPONDENT

JOHN NZUNZA MBALU.....2ND PETITIONER/ RESPONDENT

ALICE NZISA MBALU.....3RD PETITIONER/ RESPONDENT

RULING

Introduction

1. By Summons for Revocation of Grant dated 3rd August, 2020, the Interested Party/Applicant herein, **Samuel Karongói Mwangi**, seeks the following orders:

- 1) **THAT this Application be and is hereby certified as urgent and service of the same be dispensed with in the first instance.**
- 2) **THAT pending hearing of this Application interpartes, an Order of stay be and is hereby granted staying the execution of the certificate of Confirmation of grant issued on the 22nd of May, 2020 specifically dealings in land registration number Militani/11931/27.**
- 3) **THAT the grant of letters of administration made to David Ndambo Mbalu, John Nzunza Mbalu and Alice Nzisa Mbalu on the 26th of October, 2009 and confirmed on the 21st of May, 2020 be and is hereby revoked.**
- 4) **Any other orders that the Honourable Court deems fit and just to grant.**
- 5) **Costs of this Application be borne by the Respondents.**

Applicant's Case

2. According to the Applicant, on 12th March, 2015 he entered into an agreement with **Alice Nzisa Mbalu** and **Agness Nduku Mwangi** the 3rd Administrator and Beneficiary respectively for the purchase of a parcel of land measuring 30 acres which was to be hived off from Militani/11931/27 with water resources. It was deposed that this transaction was made based on the strength of the certificate of confirmation of grant dated 19th February, 2014 which had allocated the said parcel of land to the 3rd Respondent. However, the certificate of confirmation of grant dated 19th February, 2014 was thereafter revoked and as a result of the revocation the Applicant filed his application dated 22nd May, 2017 in which he sought *inter alia* orders to be included in the list of beneficiaries and in the schedule for distribution in respect of the said portion of Militani 11931/27.

3. Upon hearing the said application, the Court on the 7th of June, 2017 found that the Applicant would have the opportunity to establish his

interests in the deceased's estate in the confirmation proceedings after the filing of the summons for confirmation of grant, and should accordingly be served with the said summons and be at liberty to file an affidavit of protest thereto within 30 days of service. Consequently, as there were orders to maintenance of status quo in place the court declined to grant injunction and directed the 1st and 2nd Petitioners to file and serve the 3rd Petitioner and Applicant with the summons for confirmation of grant within 14 days.

4. The Applicant avers that he was never served with the summons for confirmation of grant and as such did not have his day in court to establish/defend his rights as a beneficiary of the deceased's estate and that he only learnt of the confirmation of grant in this proceedings when he perused the Court file.

5. It is therefore his case that the administrators acted maliciously and fraudulently given that they proceeded to have the grant of letters of administration confirmed without any reference to him or his Advocates. Further, the Respondents acted contrary to the orders of the Court issued on the 8th of June, 2017 and thus the entire process of confirmation of grant was illegal and hence ground for revocation of grant.

6. The Applicant disclosed that having paid more than 75% of the purchase price and having taken possession of the land as per the agreement of sale, he had already commenced developments on the land and indeed incurred substantial expenses towards his project on the land. He was therefore apprehensive that should the distribution of the estate not be halted forthwith and the grant of representation issued herein revoked, his genuine and legal claim would be rendered nugatory.

7. According to the Applicant, this Court cannot promote an illegality by allowing the Respondents to benefit from disobedience of Court orders and unfair practices. He was however aware that he still has a balance of the purchase price as per the sale agreement, but expressed willingness to pay the same before the determination of this case. In the meantime, he is willing to have the same deposited in Court pending determination of these proceedings.

8. The Applicant believed that it is in the interest of justice that the orders sought in this Application be granted in order to cure the miscarriage of justice occasioned by the Respondents.

Respondents' Case

9. In response to the application, the Respondents relied on the replying affidavit sworn by **John Nzunza Mbalu**, the 2nd Respondent, sworn on 24th August, 2020. According to the deponent, since the Applicant's claim is hinged on an irregular agreement for sale with purported beneficiaries, it is unfair for the applicant to seek revocation of the Grant issued on 26th October, 2009, long before his claim on any property in the estate arose.

10. The said irregularity, according to the deponent, was because the said agreement was in respect of property No.LR 11931/27B, which is not amongst the listed properties of the estate of the deceased and that the said agreement was entered into was in respect of a property that had not been distributed to the purported vendors. Further the same was not entered into with the appointed administrators and was in bad faith at a time when the Certificate of Grant was already being contested in this Court. It was contended that notwithstanding the revocation of the said grant in 2014, the parties to the said illegal transaction continued to deal as evidence by the annexures to the application.

11. According to the deponent, the Administrators were never served with the said court order issued on 7th June, 2017.

12. The Respondents lamented that the Succession Cause has taken a long period of time with numerous applications and various advocates representing different members of the polygamous family with the possibility of such confusion. It was disclosed that the family sat down at the beginning of this year and the three houses agreed to appoint a joint firm of advocates, abandon all the pending applications and proceed with the Confirmation of the Grant of 26th October, 2009.

13. It was deposed that the failure to serve the Applicant was not intentional hence the irregularity may be corrected without having to revoke the grant issued on 26th October, 2009 and confirmed on 22nd May, 2020 since LR No.11931/27 measures approximately 600 acres out of which the Estate of the deceased is entitled to 1050 acres. A look at the division of the property as per the schedule of distribution shows that the cumulative acreage of the land is 1050 acres.

14. The Respondents reiterated that the land has never been registered in the names of any of those purported to deal with it hence the agreement for sale was illegal ab initio. In any case the said agreement does not state which part of the vast land the alleged 30 acres were to be hived from, leaving the applicant with the option for mischief.

15. Based on legal advice, the Respondents averred that if the Applicant had any claim on any land belonging to any of the beneficiaries, he ought to have made his claim before the Environment and Land Court and that the Respondents had no problem with suspending all dealings with the 30 acres of LR 11931/27 claimed by the Applicant until such a time as the court gives further directions.

16. There was a further affidavit sworn by the same deponent in which the Applicant's claim to the said portion of land was refuted.

17. In the submissions filed on behalf of the Applicant, it was averred that the Respondents' refusal to disclose to this Court the presence of the Applicant and his interests in the case satisfies grounds for revocation under section 76(b) of the **Law of Succession Act** and reliance was placed on **Re Estate of Yapindet Malambu (Deceased) [2020] eKLR** where **Mwita, J** expressed himself on the issue of non-disclosure as follows;

“From the provisions of this section, it is not in doubt that the respondents obtained the grant fraudulently and without disclosing material particulars to the court that there were other persons interested in the deceased's estate; to wit, the

applicants. Whether they were to get a share of the deceased's estate or not was a matter to be decided by the probate court.”

18. In this case, it was submitted that the Respondents' obtained the grant fraudulently and without disclosing material particulars to the court that the Applicant had an interest in the deceased's estate. The Respondents decided on their own to deny the Applicant the opportunity to establish and defend his rights/interests in the deceased's estate. The Respondents further denied Applicant his rights/share out of the estate, a decision which only this Court can make.

19. This Court's Orders on the 7th of June, 2017, it was submitted were very clear that the Applicant was supposed to be served with the summons for confirmation of grant to enable him establish his interest in the estate of the deceased during the confirmation proceedings. The nature of the orders was that the Respondents' had no choice but to serve the Applicant with the summons for confirmation of grant. To the Applicant, the Respondents' resolve to file their summons for confirmation of grant and fail to serve the Applicant before proceeding with the confirmation is tantamount to contempt of Court. In this regard reliance was placed on the case of **Republic vs. Kenya School of Law & 2 others Ex parte Juliet Wanjiru Njoroge & 5 others [2015] eKLR**.

20. On their part, the Respondents reiterated the position in the replying affidavits and submitted that no ground has been set out that warrants the revocation of the Grant issued herein. To the Respondent, the Applicant must choose whether he wants to challenge the Grant of Representation or the process of obtaining the Certificate of Confirmation. In this regard reliance was placed on the decision of **Mrima, J in Daniel Otieno Migore vs. South Nyanza Sugar Co. Ltd [2018] eKLR**, and it was submitted that since the evidence adduced by the Applicant that relates to the process of confirmation of Grant is at variance with the prayers he seeks from this Court, the application should fail.

Determination

21. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

22. Section 76(a), (b) and (c) of the **Law of Succession Act** provides as hereunder:

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;

23. On 7th June, 2017, this Court (Nyamweya, J) ruled as follows:

“The Applicant shall have the opportunity to establish his interest in the deceased's estate in the confirmation proceedings after the filing of summons for confirmation of grant and shall accordingly be served with the said summons for confirmation of grant and be at liberty to file an affidavit of protest thereto within 30 days of service.”

24. The Applicant contends, a contention which is not disputed that at the said confirmation proceedings, he was never served and was therefore unaware of the same. The Respondents on their part contend that the said order was never served on them. However, from the record, it is clear that the said order was made in the presence of their counsel, **Mr Ombwayo**. The Court of Appeal in **Samuel Ayienda Mokuva vs. Tinga Trading Co. Ltd. Civil Application No. Nai. 240 of 2002** held that advocates properly on record have implied authority to bind their clients. Even if the said advocate had not been present it is my view and I hold that that would not sanitise an action taken contrary to a court order.

25. In **Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006**, the Court of Appeal held that judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law. The consequences of failure to obey Court orders are that any action taken in breach of the court order is a nullity and of no effect. See **Commercial Bank of Africa Ltd. vs. Isaac Kamau Ndirangu Civil Appeal No. 157 of 1995 [1990-1994] EA 69**. Where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken in pursuance of actions taken in breach of a Court order must therefore break-down once the superstructure upon which it is based is removed since you cannot put something on nothing and expect it to stay there as it will collapse. See **Macfoy vs. United Africa Co. Ltd [1961] 2 ALL ER 1169 at 1172 & Omega Enterprises (Kenya) Ltd. vs. KTDC & 2 Others Civil Appeal No. 59 of 1993**.

26. In my view it does not matter that the person alleged to have acted in contempt of court was unaware of the existence of the order. Whereas he may not be committed for contempt of a court order which he was not aware of, his unawareness does not sanitise the illegal action which would still be null and void.

27. It would seem that the respondents' position is that since the manner in which the Applicant acquired his alleged interests was unlawful

no useful purpose would be served by affording him a hearing. However, in Onyango Oloo vs. Attorney General [1986-1989] EA 456 where the Court of Appeal expressed itself as follows:

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...*A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...*It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone’s advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...*Denial of the right to be heard renders any decision made null and void ab initio.*” [Emphasis mine].

28. This was a restatement of Lord Wright’s decision in General Medical Council vs. Spackman [1943] 2 All ER 337 cited with approval in R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007 that:

“If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision.”

29. In Ridge vs. Baldwin [1963] 2 All ER 66 at 81, Lord Reid expressed himself as follows:

“Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void.”

30. This Court cannot therefore decline to hear a party simply because the Court feels that what that party intends to say will be inconsequential. As was held by Madan, J (as he then was) in Official Receiver vs. Sukhdev Nairobi HCCC No. 423 of 1966 [1970] EA 243:

“In a court of justice parties are entitled to be heard and to insist upon every possible objection. It would be wrong for this or any other court to refuse to hear an objection even if it appears meritless and tedious. Woe be to the day when this will be allowed to happen. It would be honourable to abdicate from the seat of justice than to allow such a performance of denial to take place. The court may disallow an objection, reject a motion or refuse a plea but it must never refuse to hear it. A court of law is for the preservation not usurpation of rights of the parties.”

31. In Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000 the same court expressed itself thus:

“A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...”

32. If I understand the Respondents rightly, taking into account the history of this matter and as the parties have now agreed on the manner of distributing the deceased’s estate, the reopening of the matter is only likely to create confusion. The Supreme Court of Uganda (Odoki, JSC) in Rukidi vs. Iguru and Another [1995-1998] 2 EA 318 however, expressed itself as hereunder:

“Any party is free to pursue his rights irrespective of whatever intervening events have taken place since the court is entitled to pronounce on the rights of the parties.”

33. Since this Court has the power even on own motion to revoke a grant or certificate of grant I find no substance in the submission that the Applicant ought to have expressly sought for an order for revocation of the certificate as opposed to the grant itself.

34. In Titus Muraguri Warothe & 2 Others vs. Naomi Wanjiru Wachira Nyeri HCSC No. 122 of 2002, Makhandia, J (as he then was), while revoking the grant in question expressed himself as hereunder:

“Section 76(c) of the Law of Succession Act and rule 44(1) of the Probate and Administration Rules allows any person interested in the estate of the deceased to have a grant revoked or annulled. The grounds upon which a grant can be annulled are set out in section 76 thereof. It is also important to note that a grant of representation, whether or not confirmed may at

any time be revoked. In the instant case the applicants are purchasers for value of a portion of the deceased's estate comprised in the grant. There is uncontested and unchallenged evidence that before the deceased passed on he had sold various portions of land to the applicants and he had been fully paid and had indeed put each one of the applicants in possession of their respective portions that they had purchased. The applicants have to date been in continuous and uninterrupted occupation of those portions and have extensively developed them. The respondent who is the wife of the deceased was all along aware of these transactions involving her deceased husband and the applicants. The deceased, pursuant to the sale agreement and as required by law made an application to the Land Control Board for necessary consents to the subdivision of the said parcels of land and subsequent transfer to the applicants of the portions they had purchased. However, he passed on just before he could attend the board meeting. Yet the respondent knowing very well the interest of the applicants in the suit premises when she petitioned for the grant of letters of administration and later had the same confirmed completely ignored that interest of the applicants in the suit premises. Had the applicants been made aware of the application for the confirmation 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 these 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 the making of a false statement and 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 confirmation of the grant. In her distribution proposal she completely ignored the part of the estate that was purchased by the applicants yet she was aware of the purchase as she was present when the transactions were concluded. In any event the applicants were put in possession of their portions of the suit premises by the deceased before he passed on and with full knowledge of the respondent and since then they have been in continuous and uninterrupted occupation of the suit premises which they have extensively developed over the years."

35. Though the Respondents contended that the Applicant's interests ought to be litigated elsewhere, that is a matter that can only be determined after affording the Applicant an opportunity of being heard since as appreciated by **Gikonyo, J** in **Simon Kamundi vs. Tabitha Gatiria Maingi & 3 Others [2016] eKLR**:-

"[9] Other than the consent discussed above, the circumstances of this case are that the purchasers herein bought the estate property from the personal representative of the estate. Such purchasers are entitled to defend their acquisitions in this cause especially now that revocation of the grant of representation pursuant to which they were sold the land has been sought and their acquisitions are being challenged too. Accordingly, although Section 93 of the Law of Succession Act has been invoked before it is appropriately applicable, but its purport is indicative that, a purchaser of the property of the estate from a person to whom representation has been granted should, of necessity, be a party in the cause where revocation is sought and transfers of estate property to him is being questioned. A decision on revocation application will invariably be a matter of direct concern to a purchaser of a property of the estate from a person to whom representation has been granted. As a matter of substantive justice, anything short of the above will be great injustice to confront a purchaser for value of the estate property with a decree which takes away his rights without his participation. It bears repeating that each case should be decided on its merit rather than making a hard and fast rule that all claims by third parties must be litigated in separate proceedings."

36. In this case the Court having directed that the Applicant be served with the Summons for confirmation of grant, the failure to do so amounted to a violation of the rules of natural justice and that rendered the proceedings to obtain the confirmation of grant defective in substance.

37. That said, as was appreciated in **Re the Estate of the Late Suleman Kusundwa [1965] EA 247**:

"The court is...not obliged to revoke the existing grant, and should only exercise its discretion to do so if useful purpose would be thereby achieved or any right of the applicant safeguarded which could not otherwise be safeguarded. In the present case such rights of inheritance as the applicant possesses, outside the will, are sufficiently safeguarded by the assurance given by the Administrator-General. Therefore I decline to revoke the existing grant, a revocation which would entail needless expense; but it is qualified by declaring that the provisions of the annexed will, in which he purported to leave the whole of his property to his nephew, the second respondent, shall be given effect to only in respect of such portion of the deceased's property as he was entitled to dispose of by will under the applicable law of inheritance."

38. In this case, however, since the Applicant's claim is for just a portion of the estate measuring 30 acres which was to be hived off from Militani/11931/27 with water resources, instead of revoking the grant I hereby order that the Confirmation of the grant herein be rectified to the effect that 30 acres of Militani/11931/27 with water resources be excluded from the confirmed grant. Accordingly, that portion be set aside pending determination of the Applicant's protest to be filed and served within 7 days from the date of this ruling.

39. No order as to costs.

40. It is so ordered.

Read, signed and delivered in open Court at Machakos this 16th day of November, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Adoli for the Applicant/Interested Party

Mr Mukula for Mr Mulwa for the Respondent

Mr Mutuku for the Respondent

CA Geoffrey