



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 40 OF 1985

IN THE MATTER OF THE ESTATE OF ALUMASA LUNGAHO (DECEASED)

AND

HEMAN CHAGALA ALUMASA OBJECTOR/APPLICANT

VERSUS

STEPHEN ALUMASA ASENA PETITIONER/RESPONDENT

R U L I N G

1. The Objector/applicant has filed summons for revocation of grant dated 28th April, 2018 seeking for orders that:-

1. The grant of letters of administration intestate issued to the petitioner/respondent on the 29/5/1985 and confirmed on 14/1/1986 be revoked and or annulled.
2. A new grant be issued in the name of the objector/applicant.
3. The registration of the petitioner/respondent as owner of land parcel North Maragoli/Bukulunya/627 be cancelled and the title reverts to the name of the deceased herein, Alumasa Lugaho.

2. The application was premised on the grounds on the face of the application and supported by the affidavit of the applicant.

3. The applicant states in his affidavit that the deceased in these succession proceedings was his father who was also the father to the respondent. That the deceased had six sons. He left behind two parcels of land – North Maragoli/Bukulunya/627 and North Maragoli/Chavakali/101. That the petitioner/respondent filed this succession cause secretly without the knowledge of the other beneficiaries. That he did not disclose one of the parcels of land No. North Maragoli/Chavakali/101 which forms part of the estate of the deceased. That upon confirmation of the grant the respondent registered himself as the sole owner of land parcel North Maragoli/Bukulunya/627 thereby disinheriting the other beneficiaries. That it is now 32 years since when the grant was confirmed and the respondent has not acted to distribute the estate. That the grant issued to the respondent should be revoked and a fresh one issued to the applicant so that he can distribute the estate.

4. The application was opposed by the petitioner/respondent vide his affidavit in answer to the summons for revocation of grant. The respondent depones that at the time that he filed the succession cause he was not aware that land parcel North Maragoli/Chavakali/101 was registered in the name of the deceased as the objector is the one who was holding the documents to the parcel of land. That there is no truth that he was driven by fraud when he instituted the succession cause as the documents that he filed disclosed the names of all the beneficiaries and survivors of the deceased. That land parcel North Maragoli/Bukulunya/627 was registered in his name in error as he relied on the court registry staff to draw the documents. However that since the time that he was issued with a title to the land in 1986 he has been holding the land as a trustee for all the beneficiaries. That he is not opposed to equal sharing of land parcel North Maragoli/Bukulunya/627 to all the beneficiaries as marked on the ground. That he has made the relevant application to the Land Control Board for subdivision of land parcel 627 into six equal shares to enable transfer of the portions to the respective beneficiaries subject to them re-embursing his costs of Ksh. 75,000/= towards his filing of this succession cause.

5. In addition to the affidavit in answer to the summons for revocation of grant the respondent has filed an application dated 4th September, 2018 seeking that the grant issued to him be rectified to include L.R North Maragoli/Chavakali/101 as additional estate of the deceased due for distribution among the heirs. He further proposed that upon rectification the said parcel of land be shared out equally between the beneficiaries of the deceased.

6. On his part the applicant contends that failure by the respondent to distribute the estate for the last 32 years since when the grant was

confirmed is a clear indication that he cannot be trusted to continue being the administrator of the estate. That the application for rectification of grant cannot be used to rectify the respondent's failure to diligently administer the estate and should therefore be dismissed.

Submissions

7. The advocate for the applicant, **E. O. Getanda Advocate**, submitted that the respondent failed to disclose to the court the entire estate of the deceased and left out land parcel North Maragoli/Chavakali/101. That this was a move designed to disinherit the other beneficiaries of the estate. Further that the respondent did not obtain consent of the other beneficiaries of the estate when he filed the succession cause. Further that he did not obtain consent of the other beneficiaries before applying for confirmation of grant. Therefore that the grant issued was irregular, illegal and invalid.

8. The advocate submitted that the application for rectification of grant is an afterthought designed to circumvent the purpose of the objector's application of revocation of grant. That the respondent has come to court with unclean hands. That it is 32 years since when the grant was confirmed and the respondent has not bothered to distribute the estate to the beneficiaries. Therefore that the respondent is not a trusted administrator and the grant should be revoked.

9. The advocate for the respondent **A. B. L. Musiega & Co. Advocates**, submitted that the respondent has explained that land parcel No. 627 was registered in his name in error. That land parcel 101 was left out because he did not have details to the land which information was being withheld by the applicant. That though the respondent registered the land in his name he had not dealt with it in an adverse manner. That the respondent is willing to distribute the land to the beneficiaries subject to them meeting the costs. That the other beneficiaries should refund his costs that he has incurred towards this succession cause.

Analysis and determination

10. The application for revocation of grant is made under Section 76 of the Law of Succession Act and Rule 44 of the Probate and

Administration Rules. Section 76 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 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 has ordered or allowed; or

(ii) to proceed diligently with the administration of the estate; or

(iii)

(e)

11. The applicant says that the respondent filed the grant secretly without the knowledge of the other beneficiaries. The respondent is a brother to the applicant. Rule 26 (2) of the Probate and Administration Rules requires a person having an equal or prior right to a grant of representation to give his consent before the grant is issued to another person. The applicant herein and his other brothers had an equal right to that of the respondent in applying for grant of letters of administration. They did not give their consent in Form 38 for the grant to be issued to the respondent. The respondent did not file the said form. This supports the contention by the applicant that the respondent filed the petition secretly without their knowledge. This was a defect in the manner the grant was obtained.

12. Rule 40 (8) of the Probate and Administration Rules requires for the applicant for summons for confirmation of grant to file a consent in Form 37 of all dependants or other persons who are beneficially entitled consenting to the confirmation of grant. The respondent herein did not file such a consent. This is further indication that the grant was obtained unprocedurally.

13. The grant of letters of administration issued to the respondent on 29th May, 1985 were categorical that the grant was issued to him as a personal representative in respect of title No. North Maragoli/Bukulunya/627 for the purposes of the administration of the estate. The search certificate filed with the court in respect to the said land indicates that the respondent was issued with a certificate of title to the said land on the 25th February, 1986 and is now the absolute proprietor of the land. The grant did not give power to the respondent to register himself as the absolute proprietor of the land but only as an administrator. The assertion by the respondent that the land was registered in his name in error cannot be true. He cannot blame the court registry staff for something that he did himself at the lands office. It is now 33 years since the registration and he has not tried to rectify the error. The respondent has clearly failed to administer the estate diligently and has instead

defrauded the other beneficiaries of the estate.

14. The act of the petitioner/respondent in registering himself as the absolute owner of the deceased's parcel of land No. North Maragoli/Bukulunya/627 is prove that he is not an honest administrator of the estate of the deceased. This dishonesty is further proved by the fact that he filed the succession cause without the knowledge of the other beneficiaries. He obtained the grant without their consent. That he has not distributed the estate for the last 33 years is a clear indication that he had no intention of doing so. These are sufficient grounds for stripping the petitioner/respondent of the powers of an administrator. There is need to revoke the grant issued to the respondent and also to cancel his title to land parcel North Maragoli/Bukulunya/627 so that the estate of the deceased can be distributed to the beneficiaries. The application by the respondent to include the deceased's parcel of land that was left out when the petition was filed is on the hand merited.

15. The upshot is that the notice of motion dated 28th April, 2018 is allowed as prayed. Consequently the grant issued to the Petitioner/respondent is hereby revoked and a fresh grant is to issue to the objector/applicant. The registration of the petitioner as owner of land parcel No. Maragoli/Bukulunya/627 is hereby cancelled and title ordered to revert to the name of the deceased herein, Alumasa Lugaho.

In addition to the above orders, the application by the respondent dated 4th September, 2018 seeking to include land parcel No. North Maragoli/Chavakali/101 as part of the estate of the deceased herein is allowed as prayed.

Orders accordingly.

Each party to bear its own costs.

Delivered, dated and signed in open court at Kakamega this 30th day of April, 2019.

J. NJAGI

JUDGE

In the presence of:

Miss Namenge holding brief for Getande for objector/applicant

No appearance for petitioner/respondent

Parties:

Objector/applicant - absent

Petitioner/respondent - absent

Court Assistant - George