



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO.55 OF 2016

IN THE MATTER OF THE ESTATE OF WILSON NGUMBI KATHESYE (DECEASED)

SABINA MUMBUA NGUMBI.....PETITIONER/RESPONDENT

-VERSUS-

ALICE MWIKALI NGUMBI

AMOS KYONDU NGUMBI

STEPHEN MUSELI NGUMBI

JOHN CARTHESE NGUMBI

PETER NGILA NGUMBI

JOSEPH MUNYENYI NGUMBI

CHRISTINE NGINA NGUMBI.....OBJECTORS

RULING

1. This ruling relates to two applications that shall be addressed chronologically.

a). Application for revocation of grant

2. The petitioner/ respondent herein petitioned for letters of administration and the same were granted on 18.11.2016 and confirmed on 18.1.2017.

3. The applicants herein then filed summons dated 20.11.2017 under Section 76 of the Succession Act and Rule 44(1) and 73 of the Probate and Administration Rules seeking revocation and/ or annulment of the grant that was issued on 18.11.2016 to Sabina Mumbua Ngumbi and confirmed on 18.1.2017 as well as injunctive orders against the petitioner from dealing in the deceased's properties and more specifically LR 337/449 Athi River.

4. It is supported by an Affidavit sworn on 20th November, 2017 by **Alice Mwikali Ngumbi** with the authority of the 2nd to 8th Objectors and filed the same day. In the said affidavit, the deponent avers that she was the 2nd wife of the deceased and the objectors are her children. She averred that she jointly filed for grant of letters of administration and the same had stalled, however she discovered that before the grant was confirmed, a search on LR 337/449 revealed that the same had been transferred to the petitioner/respondent. She also discovered that the petitioner/respondent secretly applied for her removal as an administrator to the estate of the deceased and as such the said grant was used to effect the transfer and the petitioner/ respondent is carrying out dealings on the land to the exclusion of the objectors.

5. The 1st objector filed a further affidavit dated 29th March, 2018 in support of her application. She denied that there was a family meeting to rescue the charged property and stated that the loan on the charged property was paid for by the deceased. She denied ever being consulted for consent to the confirmation of the grant and averred that her sons had been paying plot rates in respect of the property and attached copies of the receipts.

6. The Respondent opposed the application vide a replying affidavit filed on **8.3.2018**. The said respondent averred that the disputed property was charged and the loans were due and the bank threatened to auction the same and thus the family members agreed that she pay the loan.

She attached copies of receipts to that effect. She averred that because she cleared the loan, she was entitled to the property and the beneficiaries to the estate refused to execute consent to confirmation of grant which stalled the process prompting her to apply to court to remove the 1st objector and the same was served on the 1st objector. She lamented that the court ought to order her to deposit the rent that she had been collecting from the suit property since 1994 and urged the court to dismiss the application.

7. The application was allowed in the interim in terms of the order dated 26.3.2018 where the court ordered that the application be heard by viva voce evidence. The applicant then filed an application dated 21.3.2018 that shall be analyzed in the next heading. However the court directed that the said application be heard together with the application dated 20.11.2017 by way of viva voce evidence.

b). Application for accounts, deposit of rent in court and eviction of tenants in respect of LR No. 337/449-Athi River

8. The Respondents/Applicant filed application under Section 45, 47 and 79 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules that sought that she be allowed to collect rent, or evict the tenants in the property **L.R No. 337/449- Athi River** and that the Objectors furnish accounts in respect of the said property from 1994 to date.

9. The application was grounded on the following facts as per the application and supported by affidavit of Sabina Mumbua Ngumbi dated 21st March, 2018; That the suit property was charged for a sum of Kshs 404,981 and none of the respondents was willing to offset the same and that there were rental properties on the suit land where the respondents have been collecting rent from. She maintained that she solely offset the loan amount plus accrued interests to save the property from auction but received no cent from the respondents since 1994 and she thus sought that the application dated 21.3.2018 be allowed.

10. In reply to the application, the 1st Objector vide affidavit dated 6th April, 2018 opposed the application. She deponed that in 1999 she discovered that the loan had been insured and the insurance had paid the same and the families agreed that the income from the rent on the suit property be shared between the two houses and that the tenants are not privy to the suit and therefore it would be unfair to order their eviction. She also averred that the houses were in a dilapidated state and her sons refurbished the same. A copy of the receipts in respect of the same was attached to the application. She prayed that the sum spent in repaying the loan be refunded to the applicant after sharing the same between the two houses and also the amount spent in renovation be refunded to the objectors.

11. The viva voce evidence began in earnest on the 5.2.2019 starting with the objectors. Ob.Pw1 was Stephen Museli Ngumbi who testified that the deceased was his late father who had 2 wives, Monica and Alice. He testified that he is from the 2nd house and that the petitioner is a daughter from the 1st house. He testified that the deceased had the suit property that was developed with 22 rooms, as well as unsurveyed lands at Kambo, Land at Wamunyu and plot 17 at Kariokor. He averred that he received information that the petitioner had secretly transferred the suit property to herself and on investigation, he discovered that the petitioner proceeded with confirmation in the absence of the objectors. He testified that the petitioner's mother collected the rent from the suit property in 1999 and shared half of it between the two houses, however the property was used to secure a loan that had been insured and paid for by the insurance company. He testified that it is not true that the petitioner serviced the loan. He maintained that his family made improvements on the suit land and yet the petitioner is out to grab the same as well as the properties of the deceased and thus she should be removed as an administrator due to her conduct. On cross-examination, he testified that he had no evidence that the Ziواني plot belonged to the deceased and that he did not reside on the suit land. He also did not know the insurance company that paid the loan. He admitted that the petitioner never collected the rent to the suit property and that the family never sat to deliberate on the repayment of the loan. He admitted he had no evidence of the renovations done on the suit land. On re-examination, he testified that if there is a debt then the estate ought to pay as the family did not give the petitioner a go ahead to repay the loan.

12. Ob.Pw2 was Joshua Ngumbi who sought to adopt his statement dated 2.5.18 and testified that the petitioner evicted him from the Ziواني Plot where he used to reside. He admitted that he was not involved in the succession cause and that he did not give his consent. On cross-examination, he testified that he had no documentation for the Ziواني Plot and admitted that the petitioner is not being given the rental income from the suit property and that the family had never sat down to discuss the family properties. On re-examination, he admitted receiving rental income for five rooms that were allocated to him.

13. Ob.Pw3 was Mary Kibuba who sought to adopt her statement dated 2.5.18. She admitted that she receives rent for six rooms that were allocated to her husband. On cross-examination, she testified that she had no documentation for the plots. The objectors closed their case and the petitioner led their evidence.

14. Pet.Pw1 was the petitioner herself. She testified that she repaid the loan for the suit property because the same was about to be auctioned and it was agreed that she takes over the same. She had records of evidence of payment and wanted the suit plot to be given to her. She was unaware of other properties of the deceased. She admitted that she never received rent from the suit plot but she processed the title documents to the said plot in her names. She disagreed with the suggestion that the loan repayment should be shared between the two houses. On cross-examination, she testified that she did not know the details of the Kambu land but that she grew up in Ziواني Plot 17 and is not aware that it was sold. She testified that she paid the loan alone as she was saving the family land from being auctioned and is not aware that the loan was insured. She maintained that the objectors were served with court documents and is agreeable to being refunded with interest the money that she used to repay the loan. She testified that the suit land is not available for distribution

15. The court directed the parties to file and exchange submissions.

16. Counsel for the objectors submitted that lack of the objectors consent to the distribution warrants the grant to be revoked. He submitted that the objectors were kept in the dark when the grant was being obtained and confirmed by the petitioner. He also submitted that the orders in the application dated 21.3.2018 cannot be granted for it has not been properly demonstrated and that once the grant is revoked, the parties will agree on the distribution of the estate of the deceased.

17. Counsel for the Petitioner vide written submissions filed on 6.3.2019 framed seven issues for determination. On the issue of failure to call

Alice Ngumbi Mwikali, the deponent of the affidavits, counsel submitted that her affidavits ought to be disregarded by the court and relied on the case of **Moses Wanjala Lukoye v Bernard Alfred Wekesa Sambu & 3 Others (2013) eKLR**. On the issue of whether the court process was challenged, counsel submitted that the process server was not sought to be cross-examined and therefore the contents of his affidavits are presumed to be proper. Counsel cited the case of **Kenya Orient Insurance Limited v Cargo Stars Limited & 2 Others (2017) eKLR**. On the issue of whether the existence of the Wamunyu and Ziwani plot was proved, counsel submitted that there is no evidence to that effect and cited the case of **Estate of Tumbo Lavu (2019) eKLR**. On the issue of whether the objectors have proved their case to the required standard, counsel detailed the provisions of Section 107 and 108 of the Evidence Act and Section 76 of the Law of Succession Act. Counsel submitted that this issue be answered in the negative for there is no evidence to satisfy the requirements under the said Section 76 and hence the application should be dismissed with costs. On the issue of whether the deceased had an existing loan in respect of the suit property, counsel submitted that the same was admitted by Alice in her affidavit deponed on 29.3.2018. On the 6th issue of who paid the outstanding loan, counsel submitted that the evidence of the petitioner vide bank statements exhibits the same and on the flip side there is no evidence to show that the same was paid by insurance hence the petitioner has discharged her evidentiary burden. On the 7th issue of the remedies available, counsel submitted that the petitioner should be allowed to keep her property as per the confirmed grant and in the alternative, the petitioner should be refunded the money that she paid to the bank and that the application for revocation should be dismissed with costs.

18. On the aspect of rendering accounts as elicited vide the application dated 21.3.2018, counsel cited the provisions of Section 45(1)(b) of the Law of Succession Act that provides that any person who intermeddles with the estate of a deceased “**shall be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration**” and for this reason the objectors having admitted to collecting rent from the suit property do render accounts as prayed.

19. In this application, it appears that the contest is whether or not the objectors have demonstrated interest so as to defeat the registered interest of the petitioner over the disputed property. After going through the evidence on record, I find the following issues necessary for determination:

- i. **Whether the Applications have merit**
- ii. **Whether the court may grant the orders sought and**
- iii. **What orders may the court grant?**

20. The petition herein was filed in Nairobi vide Succession Cause 2184 of 1994 and the grant was issued to the petitioner and the 1st objector and the same was confirmed whereupon the deceased’s properties were distributed and the suit property was given to the petitioner while the unsurveyed land in Kambu divided between the two houses. The said grant was rectified after application dated 17th August, 2015 was allowed and by that time it was Machakos Succession Cause 55 of 2016. A fresh grant was issued in the names of the petitioner on 18th November, 2016 and confirmed on 18th January, 2017 whereupon the properties of the deceased were distributed as per the schedule. With regard to the disputed property, the 1st respondent is accused of what is referred to as intermeddling with assets that form part of the deceased estate. The petitioner on the other hand had already registered the suit property in her names and being the registered owner from 13.10.2017 after having repaid a loan in respect of the property she should now be entitled to the said property.

21. Section **82(a) of the Law of Succession Act** provides that;

“Personal representatives shall, subject only to any limitation imposed by their grant, have powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate”

22. Section **45 of the Law of Succession** is to the effect that no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

23. The court takes the view that the actions of the petitioner in dealing with the disputed property are well within the law because she has a title to her name. Further the actions of the objectors in collecting rent on the disputed property after 2017 do not amount to intermeddling for the owner is well alive. However the actions before the grant was issued and before it was rectified, the same would amount to intermeddling. Nevertheless any action to punish the same would be akin to flogging a dead horse because the title has already changed hands and is registered in the names of the petitioner.

24. The application for revocation would necessitate a fulfillment of the circumstances in which a grant may be revoked or annulled as set in section 76 of the Law of Succession Act as follows:

Revocation or annulment of 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.;

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.;

25. The 1st objector has averred that the grant was obtained fraudulently and concealment to the court of the presence of other beneficiaries. The purpose of succession proceedings is to distribute the estate of the deceased. A look at the court record indicates that the properties of the deceased have been distributed and all the families have been catered for. Therefore in addition to there being no demonstration of fraud on the part of the petitioner, revocation of the grant shall serve no useful purpose. None of the objectors reside on the suit land despite admitting receiving rent from the suit plot. However the registered owner has every right to assert her claims to the same so as to stop the gravy train and ensure that the objectors may concentrate on the property that has been allocated to them.

26. The objectors have sought for an injunction or similar reliefs. The celebrated case of **Giella v Cassman Brown & Co. Ltd (1973) E.A 358** sets out the grounds for granting an injunction. On the first principle as set out in the case, I am not satisfied that the 1st objector has established a prima facie case as described in **Mrao v First American Bank & 2 others [2003] KLR, 125**. It was evident from the facts tendered in court and my analysis above that part of the estate of the deceased had been subjected to what amounts to intermeddling in the estate by the objectors and because of the title deed in the names of the petitioner as well as the evidence on record that she repaid the loan there is nothing to prevent her from enjoying her properties. It emerged from the evidence that the objectors were out to lock out the petitioner from accessing the suit property yet she had assisted in saving the said property from being auctioned by clearing the loans. As soon as the property had been salvaged the objectors embarked on the gravy train by sharing out amongst themselves the rent proceeds without even a glance at the petitioner. Some of the objectors exhibited open hostility towards the petitioner and their own mother which left no doubt that they are out to disinherit them from enjoying their entitlement under the estate vide the confirmed grant. There were telltale signs from the objectors that they had allowed the petitioner to salvage the suit property and to keep it for herself while they get the Kambo and Wamunyu properties but they turned around and disowned her as soon as the property had been secured. I found the objectors to be untruthful in their testimonies.

27. I am satisfied that if the order sought by the 1st applicant is declined, there will be no irreparable loss to the objectors that cannot be compensated by damages. They already have their allocation of land as per the confirmed grant. In **Ann Wairimu Wachira v Jerioth Wangui Maina and 2 others (2016) eKLR**, court observed that the applicant must demonstrate that the loss alleged cannot be compensated by damages. The facts speak for themselves and save for non-enjoyment of the gravy train from the suit property, the objectors may benefit from their allocation as per the confirmed grant.

28. With regard to the application dated 21.3.2018 the issue to be determined is whether or not the applicant has raised sufficient grounds to warrant an order for account. The objectors have admitted receiving rent from the suit property and in light of my analysis above, an order for account would not be appropriate because the registered owner of the suit property is still alive and all she needs to do is stamp her authority on the same. Be that as it may, she may seek recourse in the ELC court in terms of Section 13 of the ELC Act. Hence I advise her to file pleadings in the court with the requisite jurisdiction for redress.

29. Having outlined the details of the arguments of the parties so as to address the issues framed at the onset of my analysis, the facts before the court do not disclose sufficient reason to revoke the grant. There is also no reason to order for an account and I hold the view that any other grievances with respect to the suit property can be channeled to the ELC Court.

30. From the foregoing, I am not satisfied that the principles for granting injunctions as set out in the celebrated case of **Giella v Cassman Brown & Co. Ltd 1973 EA 358** have been met by the concerned parties herein.

31. In the result I make the following orders:

i. The applications dated 20.11.2017 and 21.3.2018 are dismissed.

ii. Each party shall bear their own costs.

It is so ordered

Dated and delivered at Machakos this 30th day of July, 2019.

D.K.KEMEI

JUDGE