



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO.40 OF 2005

REBECCA VETA PHILIP.....1ST APPLICANT

MARGARET MARIGU PHILIP.....2ND APPLICANT

VERSUS

JOHANA NJUE NDWIGA.....1ST RESPONDENT

SHADRACK MURIITHI NJERU.....2ND RESPONDENT

RULING

A. Introduction

1. This is a ruling to the application dated 11/09/2018 is by the applicants/adminstratix, beneficiaries of the estate of the deceased Jamiu Karanja alias Philip Jamiu Karanja, who are seeking the removal of restrictions placed on land LR. No. Kagaari/Gikuuri/ T.217 and LR. No. Kagaari/Kigaa/867 by the respondents.
2. It is the applicants' case that they require to complete their duties as administratrixes and transfer the estate to beneficiaries of the deceased as the court issued an amended certificate of confirmation of grant issued on the 24/06/2014. The applicants further state that the respondents are not beneficiaries of the deceased's estate and that they did not file any objections or protest during the succession proceedings.
3. In rejoinder, the 1st respondent, also a beneficiary of the deceased, filed summons for revocation of grant in which he stated that he had paid the 2nd applicant and other beneficiaries Kshs. 52,000/= on the promise that he would get 0.10 ha. out of land parcel Kagaari/Kigaa/867. It is the 1st respondent's case that the deceased's family has never met him to discuss the filing of the succession case.
4. The 1st respondent further states that if the deceased's estate is shared as per the amended certificate of confirmation of grant issued on the 24/6/2014, he will be left without land.
5. The 2nd respondent on his part states that he registered caution over Kagaari/Gikuuri/T.217 as his deceased father, Justus Njeru Douglas had purchased the said property from the deceased and further as he and his family claim interest over the land by adverse possession as is evidenced in Embu ELC Case No. 48 of 2018.
6. The application dated 25/09/2018 seeks for orders for revocation of grant in respect of the grant confirmed on 24/06/2014. The grounds in support are that the applicant Johana Njue Ndwiga is a beneficiary and is in occupation of the sai9d land having partly paid the 1st and 2nd respondents/administrators Kshs. 52,000/= as part of the purchase price in 2008.
7. In response to the summons for revocation of grant it is the 2nd applicant/administrator stated that the 1st respondent was a grandson of the deceased's estate and further that they had an agreement to sell the 1st respondent 0.10 ha. out of Kagaari/Kigaa/867 only that the 1st respondent had not completed the payment for the transfer which was Kshs 75,000/=.
8. The 2nd applicant also deposes that they have not reneged on the transfer but will transfer the same after the grant is fully implemented and as such the 1st respondent should withdraw the caution over Kagaari/Kigaa/867. The applicant further deposes that the 1st respondent's application will prejudice the deceased's other beneficiaries and should therefore be dismissed.
9. The 1st applicant on her part opposes the application for revocation of grant by the 1st respondent and deposes that the 1st respondent was not a beneficiary of the deceased but a creditor to the individuals he bought land from and as such he should wait for those people to get their shares and subsequently pursue them.

10. The parties disposed of the suit determined by their affidavits.

B. Analysis & Determination

11. I have carefully considered the application, the affidavits tendered by both parties in support and in rebuttal of issues herein as well as the judicial precedence.

12. The issues for determination herein are:

a) *Whether the summons for revocation of grant dated 25/9/2018 are merited*

b) *Whether the restrictions registered over land parcels no. Kagaari/Gikuuri/T.217 and Kagaari/Kigaa/867*

13. It is the applicants' case that they need to complete their duties as Administratrix and transfer the estate to beneficiaries of the deceased and as such the restrictions and caution placed over the suit lands by the respondents need to be removed. The 1st respondent justifies his placing a restriction over land parcel number Kagaari/Kigaa/867 on the fact that he had entered into an agreement with the 2nd applicant for a share of the aforementioned land in return for consideration. The 2nd applicant does not deny this but states that the transaction can only be completed once the grant is fully implemented. The 1st respondent has thus filed a summons for revocation of grant in pursuant of his claims. The 1st applicant on her part states that the 1st respondent is not a beneficiary of the deceased and that he should wait for the grant to be implemented to proceed and claim his share from his debtors.

14. Section 76 of the Law of Succession Act provides five grounds upon which a grant can be revoked by this court either on an application by a interested party or on its own motion in brief the grounds are:-

a) *Defect in proceedings to obtain the grant*

b) *Fraud and concealment by a petitioner*

c) *False allegations*

d) *Failure to diligently carry out the administration*

e) *When a grant becomes inoperative or useless through subsequent circumstances.*

15. In Jesse Karaya Gatimu v Mary Wanjiku Githinji [2014] eKLR, the court was of the view that: -

“The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of grant to demonstrate the existence of any, some or all of these grounds, whatever the case may be.”

16. The applicant in my considered view has failed to demonstrate any of the statutory provisions required to revoke a grant. That notwithstanding, prior to any grant being confirmed, there is a restriction on distribution of the deceased's estate's capital or immovable properties under section 55 and 82(b) (ii) of the Law of Succession Act. Accordingly, as there is nobody yet with authority to sell the estate property to any person including the 1st respondent, the sale to or acquisition of the immovable property of the estate of a deceased is completely in violation of the law, and therefore null and void.

17. Regarding land parcel no. Kagaari/Gikuuri/T.217 claimed by the 2nd respondent and cautioned, i do note that there is a pending case before Embu ELC Case No. 48 of 2018 on its ownership.

18. **Rule 41 (3) of the Probate Administration Rules** (under the law of succession Act) provides that: -

“Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant”.

19. In the case of Pricilla Ndubi and Zipporah Mutiga vs. Gerishon Gatobu Mbui, Meru Succession Cause No. 720 of 2013, the court was facing a more or less similar question for determination. It was held that: -

“The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41(3) of the Probate and Administration Rules was enacted so that claims which are prima facie valid should be determined before confirmation”.

20. It is noted that the deceased died on 10/04/2001 and that the originating summons were filed on 1/11/2018 which is seventeen (17) years after the death of the deceased and about five (5) years after the grant was confirmed. The delayed claim by the 1st applicant does not demonstrate seriousness on his part.

21. In my view the 1st applicant has not shown any legal interest in the land of the deceased LR. No.Kagaari/Gikuuri/T.217 which he has cautioned. After all, the 1st applicant may apply for orders of restriction before the ELC court pending determination of the originating summons. I am of the considered view that his application for revocation of grant is not supported by the law for the grant was issued to the rightful beneficiaries of the deceased whereas the applicants are not beneficiaries.

22. As for the 2nd applicant, the administratrix/respondents admits his claim of agreement to purchase land and promises to give him the portion after the grant has been executed. He is a grandson of the deceased and does not rank in priority to the administratrix/ respondents who are widows of the deceased under Section 66 of the Law of Succession Act as to issue of letters of administration.

23. I find that the respondents have failed to establish any of the grounds under Section 76 of the Act for grant of orders for revocation of grant. Their application dated 25/09/2018 must therefore fail.

24. The two respondents in the application dated 11/09/2018 have failed to establish any legal interest on the deceased's parcel of land LR. Kagaari/Gikuuri/T.217 and Kagaari/Kigaa/867 which they have filed restrictions. The applicants have not demonstrated any tangible interest on the land parcel and as such there is no justification of the restrictions remaining in force.

25. It is my finding that the applications dated 25/09/2018 has no merit and are hereby dismissed with costs.

26. As for the application dated 11/09/2018, I find it merited and it is hereby allowed in the following terms: -

a) That the restrictions placed on LR. Kagaari/Gikuuri/T.217 and Kagaari/Kigaa/867 be and are hereby removed.

b) That each party to meet their own costs of the application dated 11/09/2018.

27. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF NOVEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muthama for Ms. Muthoni Ndeke for 1st Respondent