



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 29 OF 2017 (FORMERLY MILIMANI 629 OF 2010)

IN THE MATTER OF THE ESTATE OF PENINA WAITHIRA WILLIAMS (DECEASED)

CARDINAL HOLDINGS LIMITED.....APPLICANT

VERSUS

CHARLES NJOGU MBURU.....RESPONDENT

RULING

1. Before me is an application by Cardinal Holdings Limited (“the Applicant”) dated 14.3.17 by way of Summons for Annulment of the Grant of Probate (“the Application”) in respect of the estate of Penina Waithira Williams (the Deceased). The Grant was issued on 13.8.10 to Charles Njogu Mburu (the Respondent”) and confirmed on 11.7.11. The record shows that the Deceased died on 14.3.05 at Pandya Memorial Hospital in Mombasa. The record contains a will in which the Deceased appointed her brother, the Respondent as the sole executor and beneficiary of the estate. The record further shows that the estate of the Deceased consists of 2 properties known as Kwale/Msambweni “A”, Runda Nairobi 7785/208 and L. R. No. 38739 (Orig. No. 4513/40/17, Mainland South of Mombasa. The Application also contains a prayer for the Applicant to be enjoined in these proceedings as an interested party.

2. The Application is premised on grounds therein and the facts set out in the Affidavit of Roma Lesley Baldwin (“Roma”) a director of the Applicant sworn on 14.3.17. The grounds are that the proceedings to obtain the Grant were defective in substance; the grant was obtained fraudulently by making a false statement and producing a fake death certificate; the Grant was obtained by means of an untrue allegation of fact essential in point of law to justify the Grant.

3. In her Affidavit, Roma avers that the Applicant purchased Kwale/Msambweni “A”, 2675 (“the Suit Property”) from one Margaret Vonlekow and Title Deed registered in the Applicant’s name on 6.3.97. A certificate of official search dated 31.3.06 confirmed that the Applicant was the duly registered proprietor of the suit property. The Applicant caused the suit property to be surveyed in 2007 and new beacons were affixed. Since 2007 to date, the Applicant has paid County Council of Kwale rates in respect of the property. Roma averred that the said Title Deed has been in her possession and control and has at no time been relinquished to any person. On 6.2.13, the Applicant’s advocates applied for a search of the suit property to confirm status but to date, and despite several follow-ups and visits, the Kwale Districty Land Registrar has failed and/or refused to issue a certificate of official search. The reason given is that the green card for the property cannot be traced.

4. It is Roma’s further averment that by an email of 21.6.13, Phillipe Zimmerline, a land surveyor informed her that the suit property had been sold to one Lois Wambui Thuo. On Roma’s instructions, Zimmerlin obtained a certificate of official search and green card showing the said Lois Wambui Thuo as the owner. Upon further investigations, the Applicant’s advocates obtained copies of the title deed in the name of the said Lois Wambui Thuo, her national identity card and PIN certificate. Roma avers that the current green card in respect of the suit property is a fake deliberately generated to commit fraud against the Applicant. The Applicant has since filed Mombasa ELC case No. 217 of 2013 against the said Lois Wambui Thuo, Charles Njogu Mburu, Penina Aithira Williams, the District Land Registrar, Kwale and the Honourable Attorney General. It is through the pleadings of Charles Njogu Mburu that the Applicant became aware that he was the holder of a confirmed Grant in these proceedings.

5. Roma further avers that further investigation revealed that the death certificate number 250982/2005 used by the Respondent in these proceedings is a forgery. The County Coordinator in charge of the Department of Civil Registration by a letter dated 7.2.17 to the Applicant’s advocates stated that the death certificate did not originate from his office and the particulars therein do not match any death record in this registry. All the documents referred to above were exhibited in Roma’s Affidavit This being the case, the entire proceedings herein are a nullity and void *ab initio*. Roma prayed that the Grant be annulled in the interest of justice.

6. On 24.7.17 Nyameta, Mogaka & Magiya Advocates on behalf of the Respondent filed a notice of change of advocates. On the same date the said advocates made a request for 7 days to file a response. The requested was granted and the matter was fixed for hearing on 21.11.17. On that date, there was no appearance for the Respondent nor had any response been filed. The matter proceeded as undefended and by way of viva voce evidence.

7. To begin with the Applicant seeks to be enjoined in these proceedings as an interested party. The Applicant claims ownership of the suit property and has produced copies of the transfer to itself and the title deed in its name. The Applicant falls under the category of “any interested person” expressed in the foregoing provision of the Act. In stating so I am guided by the Court of Appeal in Musa Nyaribari Gekone & 2 Others v Peter Mijienda & another [2015] eKLR where it stated:

“the expression “any interested party” as used in the provision, in its plain and ordinary meaning, is in our view wide enough to accommodate any person with a right or expectancy in the estate.”

The Applicant’s prayer to be enjoined in these proceedings is hereby allowed as prayed.

8. In her evidence, Roma PW1, reiterated the contents of her affidavit. PW2 was Cpl. George Murunga Force No. 70519 from the Directorate of Criminal Investigation, Nairobi, attached to National Registrations of Persons, Mombasa on investigation duties. He testified that on 7.2.17, he received instructions from Mr. P. Mutua, the County Coordinator of Civil Registration, to investigate a death certificate serial number B350169 in the name of Penina Waithira Williams and bearing entry number 2501982/2005 allegedly issued in Mombasa. PW2 conducted investigations and prepared a report which was produced in Court. His findings were that no death occurred at Pandya Memorial Hospital of Penina Waithira Williams on 14.3.05; there was no matching register in the Mombasa registry as indicated in the death certificate with entry number 2501982/2005 serial number B350169; the entry number does not tally with the commencement based system as per Mombasa district since 1999 onwards which follows that system of registration. PW2 further stated that according to the records at the headquarters in Nairobi there was no issue of a leaf by the headquarters with serial number B350169. The records showed that only serial number C350169 was issued to Tranzoia civil registration office on 16.10.12 for the death of one Dina Chenengat Mereng who died on 1.1.011 at Cherengany Nursing Home. PW2’s conclusion was that the offence of making and uttering a false document among other offences had been detected and he recommended that action be taken against the perpetrators.

9. PW3 Henry Muchiri Nyamu the Human resources Manager at Pandya Memorial Hospital told the Court that there was no record at the Hospital wards or mortuary of the death of the Deceased. The Deceased did not die at the hospital nor was her body brought to the Hospital’s mortuary from elsewhere. He confirmed that he wrote a letter (produced in Court) dated 18.5.17 to the Officer in Charge of Investigations National Registration of Persons Bureau, Mombasa confirming the same.

10. The Law of Succession Act at Section 76 makes provision for annulment of grants: as follows:

“76 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) To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

e. That the grant has become useless and inoperative through subsequent circumstances.”

11. In an application for annulment of a grant of representation, the Applicant must satisfy the Court that any one of the above grounds apply in the circumstances. In the present case, the Applicant has based its application on the grounds set out in Section 76(a) (b) and (c) of the Act.

12. The Applicant contends that the proceedings to obtain the grant were defective in substance in that the Respondent relied on a fake death certificate. PW2 stated that upon investigating the death certificate, his findings were that no death occurred at Pandya Memorial Hospital of Penina Waithira Williams on 14.3.05 as alleged. He also found that there was no matching register in the Mombasa registry with entry number 2501982/2005 serial number B350169 as indicated in the death certificate. Further PW2 found that the National Registrations of Persons headquarters in Nairobi had not issued a leaf with serial number B350169. From the uncontroverted evidence adduced in Court it is manifest that the death certificate forming the basis of the proceedings herein is a forgery. Indeed it is doubtful that there ever existed a person by the name of Penina Waithira Williams, the Deceased herein. In the circumstances, the Court finds that the use of a fake death certificate to obtain the grant rendered the proceedings herein defective in substance.

13. Further, the Respondent in his petition for grant stated that the Deceased died on 14.3.09 at Pandya Memorial Hospital. The evidence by PW3 is that the Hospital has no record of a patient by the name of Penina Waithira Williams. He further stated that according to the Hospital

records, the Deceased did not die at the hospital nor was her body brought to the Hospital's mortuary from elsewhere. In his affidavit in support of petition for grant, the Respondent listed the suit property as part of the estate of the Deceased. In her affidavit, PW1 averred that the original title deed to the suit property in the name of the Applicant has been in her possession and control and has at no time been relinquished to any person. It is therefore clear that the Respondent obtained the Grant fraudulently by the making of a false statement *to wit* that the Deceased died at Pandya Memorial Hospital and production of a fake death certificate. The Court is satisfied that the Grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the Grant.

14. It is noteworthy that the record does not contain several requisite documents as is the practice for purposes of scrutiny. Missing from the record include the letter from the chief listing the persons who have survived the Deceased, copies of title deeds of the assets of the estate and copy of national identity card of the Respondent. The Respondent in spite of being given an opportunity and ample time to file a response failed to do so. Having considered the Application, testimony of the witnesses and the documents produced herein, I draw the conclusion that the proceedings herein on the whole appear to be tainted by fraud.

15. In the result and in view of the foregoing this Court finds that Grant herein cannot stand. The Grant of Probate issued to Charles Njogu Mburu on 13.8.10 and confirmed on 11.7.11 is hereby annulled and is of no legal effect.

DATED, SIGNED and DELIVERED in MOMBASA this 19th day of January 2018

M. THANDE

JUDGE

In the presence of: -

.....**for the Applicant**

.....**for the Respondent**

.....**Court Assistant**