



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 664 OF 1997
IN THE MATTER OF THE ESTATE OF C N K (DECEASED)

RULING

BACKGROUND

1. The deceased herein in respect of whose estate this proceedings relate C N K died intestate on 5th June 1996 leaving behind the following as dependants:

(1) E W K – (widow of unsound mind)

(2) S M N – Adult daughter

(3) S N G – Adult daughter

(4) G W K – Adult daughter

(5) C N K– Adult son

(6) S W K– Adult daughter

2. Among the properties left by the deceased as listed in Form P & A 5 are:

(a) Dagoretti/Mutuini/***

(b) Kshs.123,000/= in Standard Chartered Bank Karen Branch Account No. [particulars withheld]

(c) Kshs.67,000 at NSSF

3. On 3rd April 1997, C N K a son to the petitioned this court for a grant of letters of administration intestate after duly securing requisite consent dated 25th February, 1997 from the rest of the beneficiaries. Consequently, a grant was issued on 2nd July 1997 culminating to confirmation of the same on 19th April 2010 pursuant to the filing and determination of the application for confirmation of grant dated 9th November 2009.

4. Based on the consent filed in court on 10th November 2009 signed by all beneficiaries in support of the application for confirmation, land parcel No. Dagoretti/Mutuini/*** was shared out in open court in the presence of all beneficiaries save for the widow as follows:

(a) C N – 2.035 Ha

(b) S M K– 0.10 Ha

(c) S N K– 0.10 Ha

(d) G W K – 0.10 Ha

(e) S W K– 0.10 Ha

5. However, summons for rectification of grant dated 19th August 2010 but filed in court on 20th August 2010, seeking to rectify the confirmed grant by amending the descriptive part of the property was allowed on 9th February 2011 thus referring the property to as Dagoretti/Mutuini/** instead of Dagoretti/Mutuini/**. The individual beneficiaries' shares were not affected by the said rectification.

6. Following the said confirmation and distribution of the estate, each beneficiary was put into possession of his or her share by way of transmission hence completion of the administration of the estate.

Application dated 6th September 2016

7. On 9th September 2016, two beneficiaries to the estate herein S M K and S N K came to court under certificate of urgency vide summons dated 6th September 2016 seeking orders revoking or annulling the grant issued on 9th February 2011, an injunction prohibiting transfer, charging and or subdivision of L.R. No. Dagoretti/** being a subdivision of Dagoretti/Mutuini/** and lastly, redistribution of the estate amongst the spouse (widow) and children after due consideration of the “innocent” purchasers.

8. Application which is brought under Section 47 and 76(b) of the Succession Act and Rule 73 of the Probate and Administration Rules is supported by grounds on the face of it and affidavit in support sworn jointly by the applicants on 6th September 2017.

9. It is the applicants' contention that their father's estate was distributed to the exclusion and absence of their mother who was and still is mentally sick and her estate administrator under the Mental Health Act. That the administrator who is their brother deceitfully and fraudulently intimated during confirmation of the grant that each beneficiary was entitled to equal share but it later emerged that each was given ¼ an acre out of the total 7.5 acres and that a balance of 5 acres was to be shared out equally later an arrangement he has since disowned to their detriment. That as a consequence the respondent has benefited more than the others by getting 5¼ acres of land being the property sought to be redistributed herein.

10. Further, the applicants claimed that the five acre land which was distributed to the respondent (administrator) was to be held in trust for the rest of the beneficiaries including their sick mother and therefore the need for the court to redistribute the same now that the respondent has failed to honor the arrangement of equal share.

11. In response to the application, the respondent filed on 3rd February 2017 an affidavit in reply dated 4th November 2016 denying the averments in regard to fraud and deceit as contained in the applicant's affidavit in support. The respondent admitted that his mother became mentally sick sometime 1985 due to memory lapse and that he is the only person who has been taking care of her while staying together with his unmarried sister G W in his compound.

12. He further claimed that, the applicants who are married sisters are staying in their respective matrimonial homes hence have minimal role to play in looking after their mother.

13. The respondent urged the court to take note of the fact that it has taken the applicants 5 years since confirmation of the grant to bring this application which in his opinion is ill intended as the consent to distribute the estate was signed by all beneficiaries without any conditions attached. He further told the

court that he and his sisters have sold some of their shares to 3rd parties who have fully occupied and developed their respective portions of land and transfer in their favour executed hence to order redistribution will affect several innocent 3rd parties.

14. Before this matter could proceed for hearing, both parties agreed to pursue an outside court settlement which unfortunately failed. On 28/3/2017, directions to have the matter heard and disposed by way of viva voce evidence were made. The matter was subsequently fixed for hearing at the registry albeit exparte after the applicants failed to turn up despite being invited to attend and fix a convenient hearing date.

15. When the file was called out for hearing on 5th February 2018, the applicants and their advocates were absent although having been duly served with the hearing notice. The court proceeded with the hearing exparte after being convinced that the hearing date and confirmation thereof was properly done. During the hearing, Mr. Chege for the applicants merely reiterated the averments contained in the applicants' affidavits in support.

Analysis and Determination

16. I have considered the application herein, affidavit in support and reply plus submissions by counsel for the applicants. Issues for determination are:

(a) Was the grant herein issued fraudulently through deceit;

(b) Was there non-disclosure of material facts;

(c) Are the applicants entitled to equal share of the estate.

17. Grounds upon which a grant can be revoked or annulled are clearly spelt out under Section 76 of the Law of Succession which provides that

“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 proceedings to obtain the grant were defective in substance.

(b) That the grant was obtained fraudulently by the making of false statement or by the concealment from the court of something material to the case.

(c) That the grant was obtained by means of untrue allegation of fact essential in part of law to justify the grant notwithstanding the allegation that the grant was made in ignorance or inadvertently.

(d)

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

18. The applicants claimed that their mother who is mentally sick or her estate administrator/guardian was not involved during distribution of the estate. A perusal of form P & A 5 filed by the petitioner shows that their mother is listed as a widow of unsound mind and one of the survivors to the deceased's estate. Effectively, she did not sign the necessary consent which the rest of the family members (beneficiaries) signed.

19. It is clear from the court proceedings that the widow did not take part in the distribution of the estate.

During confirmation, all beneficiaries except the widow signed consent forms and physically attended court on 19th April 2010 before Judge Nambuye. None of those beneficiaries including the applicants ever raised the issue regarding the absence of their mother or her mental status. In any event, Form P & A 5 was clear on the face of it that the widow was of unsound mind. Even the court was aware of this fact by virtue of this declaration. In the circumstances, there was sufficient disclosure of material facts regarding the mental status of their mother and her exclusion from the list of beneficiaries was mutual amongst her children.

20. For the applicants to hide behind the mental status of their mother who in any event is entitled to life interest of the estate if she were mentally stable is being dishonest. There is no proof that their mother's estate had appointed a guardian, manager or administrator under the Mental Health Act. During distribution of the estate, the respondent was given a bigger share and was to look after their mother an arrangement that all beneficiaries approved.

21. The respondent stated that his sisters are married except G W who is staying with their mother but under his care. There was no proof that their mother who is staying within the land given to the respondent is suffering. It would be unfair to use the sickness of their mother to get the grant revoked so as to secure a bigger share.

22. Was the confirmed grant obtained through deceit or fraud? It is trite law that, before any interested part in an estate petitions for a grant or confirmation thereof, consent of all those interested parties must be obtained. **(See Samson Kilemi and 6 Others vs Geoffrey M. Mugambi Zakaria (2017)eKLR).** Similarly, a grant may be revoked if the person named in the grant failed to apply for confirmation of the grant or to proceed diligently with the administration of the estate **(See Matheka vs Matheka (2005) eKLR Pg 456.** In this case the administrator did properly apply for confirmation and proceeded to administer the estate as required.

23. The applicants and the rest of the siblings signed a consent for petition of a grant of letters of administration intestate and one in support of application for confirmation. They all appeared physically in court and the grant was confirmed without any objection. They each got ¼ an acre of land except their brother (administrator) who got 5¼ acres. How come none of them ever raised the issue of unfair distribution since then? In this case the administrator did administer the estate diligently until completion without any complaint.

24. Subsequent to the distribution of the estate, each beneficiary was put into actual possession by transferring their respective shares into their names. Even at that stage, nobody complained. To claim that their brother showed them a schedule of distribution different from the one they signed is not true. There was no proof that there existed two schedules. Assuming for a moment that their statement is true which is not, how come none of them complained at the transmission stage?

25. For the applicants to allege that they had agreed to subdivide five acres later after confirmation of the grant is to say the least a dishonesty statement. There is no proof that such arrangement ever existed. Ordinarily, when parties appear before court, the list of beneficiaries and their allocated shares as consented by both parties is read out and in case of any objection, the court is duly bound to record and take appropriate action or make necessary orders. In the instant case nobody raised any concern.

26. There is no evidence that the respondent was to hold 5 acres in trust for the other beneficiaries for further distribution. Having signed a consent towards distribution of the estate, the applicants are estopped from changing their mind and now claim equal share in accordance with the Constitution. Even at the time the grant was confirmed, the said Constitution was in operation and nobody stopped them from relying on the same.

27. Whereas it is true that children to a deceased person are entitled to equal share regardless of their gender, a beneficiary who voluntarily renounces his beneficial interest or consents to take a small portion shall not later on turn around and state that he or she was deceived. In this case there is no proof of deceit or fraud established against the respondent in obtaining a bigger share than the sisters. The sisters' claim

is an afterthought based on ill motive.

28. Litigation must come to an end. It is now over 5 years since the grant was confirmed. Nobody has ever raised any question challenging the mode of distribution. Both beneficiaries have taken actual possession of their share and in fact sold to 3rd parties who are not party to this case. To start unwarranted redistribution of the estate will be unfair to both parties and 3rd parties whom both parties admitted are in existence although not named.

29. In a nutshell, the applicants have failed the test of proving that the grant was obtained through deceit, fraud and non-disclosure of material facts. Accordingly, the application herein is dismissed. As regard costs, this is a family dispute to which each party should bear his or her own costs.

Order accordingly.

SIGNED, DATED AND DELIVERED AT NAIROBI ON THIS 14th DAY OF FEBRUARY, 2018.

J.N. ONYIEGO (JUDGE)

In the presence of

Mr.Chege.....Counsel for Applicant

Mrs Kulenywa.....Counsel for Respondent

Mr.Edwin.....Court Assistant