



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO 720 OF 2013
IN THE MATTER OF THE ESTATE OF JULIUS NDUBI JAVAN (DECEASED)

PRISCILLA NDUBI.....1ST PETITIONER

ZIPPORAH MUTIGA.....2ND PETITIONER

VERSUS

GERISHON GATOBU MBUI.....APPLICANT

RULING

Deceased as trustee and creditor

[1] I have been called upon to determine the application dated 8th October 2013. The application is expressed to be brought under sections 45, 47 and 76 of the Law of Succession Act, and rules 27, 44, 49 and 73 of the Probate and Administration Rules and all enabling provision of the law. The significant orders sought in the application are:-

- a. An inhibition to be registered on LR NO NYAKI/MULANTHANKARI/2244;**
- b. Revocation or annulment of the grant of letters of administration issued and confirmed to the petitioners on 18th September 2013 and 24th September 2013 respectively;**
- c. Leave of court for the applicant to file protest; and**
- d. Costs be provided for.**

[2] The application is premised upon two affidavits of GERISHON GATOBU MBUI, the grounds set out in the application, oral evidence adduced and the submissions filed on behalf of the applicant. Briefly, the applicant has argued that:-

- i. The grant herein was confirmed without his knowledge;
- ii. He bought LR NO. NYAKI/MULATHANKARI/2244 (hereafter the suit land) from the deceased vide agreement dated 12th September 2006;
- iii. *The 1st petitioner has committed fraud and is now seeking to sell the suit land;*

iv. The 1st petitioner has refused to distribute the estate in accordance with the wishes of the deceased.

v. The chief has been unable to settle the dispute herein; He will, therefore, suffer irreparable harm unless orders sought are issued.

[3] The Applicant provided further details:

(1) That the area chief as well as neighbours were aware of this sale of land transaction between him and the deceased

(2) That the consideration in the agreement dated 12th September 2006 was Kshs. 365,000 and he has paid over Kshs. 322,800 which was duly acknowledged.

(3) That he took possession of the suit land as per the agreement and have since then lived on the suit land with his family live. Unfortunately, the deceased died on 26th January, 2009 before he could officially transfer the suit land to him.

(4) That the 1st petitioner, the widow of the deceased was aware of the sale of the suit land and agreed to transfer the suit land to him immediately upon completion of these proceedings. The area chief wrote to court on this subject vide letter dated 22nd February, 2011.

(5) That, surprisingly, she applied through an application dated 23rd September, 2013 for confirmation of the grant before expiry of six months without including his interest in the suit land. He is a creditor to the estate and his claim should be determined under section 66 of the Law of Succession Act. This court therefore has jurisdiction over this matter.

(6) That by failing to disclose his interest in the suit land, to wit, that it belongs to him, he and his family lives on it, he has constructed permanent residence, keeps livestock, has connected piped water and installed electricity, grows bananas, has planted blue gums and gravellia trees; the petitioners committed fundamental omission for which the grant should be revoked. In fact, he was surprised that the petitioners applied for confirmation in a haste in order to commit fraud upon him. He applied for the grant to be revoked.

(7) That he has no interest whatsoever of disinherit the beneficiaries of the estate.

[4] The petitioners opposed the application and filed affidavit and submission to that effect. The averments by the 1st Petitioner in her replying affidavit sums up their stand point on this application. These averments include:

i. That this application is an afterthought, lacks merit and is tainted by concealment of material facts;

ii. That the court lacks jurisdiction to hear this matter;

iii. That the sale agreement herein is unenforceable for lack of consent from the relevant land control board;

iv. That the applicant is intermeddling with the estate; and

v. That the grounds by the applicant are only fit for an action under Order 37 of the Civil Procedure Rules.

DETERMINATION

[5] Quite valid legal arguments have been presented in this application. The Applicant argued that, having sold the suit land to him, the deceased became a trustee of the suit land for the Applicant. And, therefore, the petitioners should be estopped from denying him his land. The petitioners posit that the Applicant has no locus standi to bring this application for revocation. They stated further that, the agreement relied upon by the Applicant relate to agricultural land, hence, it is unenforceable for the transaction lacks the necessary consent from the relevant land control board as required under section 6(1) (a) of the Land Control Act. And that the applicant will only be entitled to refund of the purchase price as an ordinary debt under section 7 of the Land Control Act. They did not stop there. They stated that any continued possession or occupation by the Applicant of the suit land in furtherance of the avoided transaction or agreement opens him to criminal liability under section 22 of the Land Control Board Act.

[8] All the foregoing arguments are legally sound. But, their full effect can only be evaluated by the proper court as it will be borne out in the rendition of court below. I will, therefore, say only enough for purposes of determining the application dated 8th October, 2013. The application has three major prayers; revocation of grant, leave to file protest and inhibition on the suit land.

Locus standi of applicant

[9] A kind of objection has been taken out by the petitioners; that the applicant lacks locus standi to file an application for revocation or annulment of grant. Section 76 of the Law of Succession Act is very clear 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... [Underlining mine]

Details have emerged that there was an agreement between the Applicant and the deceased for the sale of the suit land. Although, challenges to the said agreement and objection to the jurisdiction of this court to try such claims have been raised, one thing is clear- and this is alluded to by the petitioners- that money may have passed to the deceased which is recoverable as debt. Accordingly, at the very least, the Applicant could be treated as a creditor, thus, an interested party for purposes of section 76 of the Law of Succession Act. Therefore, he is within his right to apply for revocation of grant as he has done.

Revocation or annulment of grant

[11] I now turn to the substantive issues before me. I wish not to re-invent the wheel. The circumstances in which a grant may be revoked or annulled are set out in section 76 of the Law of Succession Act as follows:

76 Revocation or annulment of grant 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 order or allow; 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.

[12] After hearing the arguments of the parties, I should determine, whether:-

(a) 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; or

(c) 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

[13] Applying the test of law in section 76 of the Law of Succession Act, the fact that there was an agreement between the deceased and the Applicant for sale of the suit land is important to these proceedings. It seems also that consideration may have passed between the two parties. I am aware that this court does not have jurisdiction to determine the validity or enforceability of the said agreement. Environment and Land Court does; it is the court which is constitutionally mandated to determine such matters. But of relevance in these proceedings is that such material facts were never disclosed to this court during confirmation of the grant so as to enable the court make an informed decision on distribution of the estate. Needless to state that, in any judicial proceeding, parties must make full disclosures to the court of all material facts to the case including succession cases. This general rule of law emphasizes utmost good faith (*uberima fidei*) from parties who take out or are subject of the court proceedings. The said responsibility is part of justice itself. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice; such must, immediately be subjected to serious reverse osmosis to purify the streams of justice, if society is to be accordingly regulated by law. I will give ample justification for taking this position.

[14] 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 *prima facie* valid should be determined before confirmation. See rule 41 below:-

41. Hearing of application for confirmation

(1) At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative.

(2) The court may either confirm the grant or refer it back for further consideration by the applicant or adjourn the hearing for further evidence to be adduced or make any other order necessary for satisfying itself as to the expediency of confirming the applicant as the holder of the grant or concerning the identities, shares and interests of the persons beneficially entitled and any other issue which has arisen including the interpretation of any will.

(3) 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.[Underlining mine for emphasis]

(4) In proceedings under subrule (3), unless the court otherwise directs, the personal representative of the deceased shall be the applicant seeking determination of the question, and the person claiming so to be beneficially interested together with the residuary legatee or other person to be appointed by the court to represent the residuary estate shall be the respondents; and the court in such proceedings shall give all necessary directions relative to the prosecution thereof including the safeguarding of the share or estate so appropriated and set aside and the provision of costs.

(5) Where the court in exercise of its power under section 71 (2) (a) of the Act directs that a grant be confirmed it shall cause a certificate of such confirmation in Form 54 to be affixed to the grant together with the seal of the court and shall appoint a date not more than six months ahead, by which time the accounts of the completed administration shall be produced to the court for its approval.

(6) Where the court, in exercise of its power under section 71 (2) (b) of the Act, instead of confirming a grant already issued directs the issue of a confirmed grant, this grant may be in Form 55.

(7) On production of the accounts in court any person beneficially entitled and any creditor may appear and be heard before the court's approval is given. (8) The approval of the accounts in court may be dispensed with if all persons beneficially entitled have signed as consenting to the accounts as produced. (9) On the date for approval of the accounts and on any adjourned date application may be made for an adjournment to a fixed date not longer than three months away.

[15] Whereas I agree with the advocates for the Petitioners that the Applicant's claim should be dealt with under Order 37 of the Civil Procedure Rules (previously Order XXXVI, rule 1 of the Civil Procedure Rules), but the decision to pack or appropriate and set aside the property or portion thereof in dispute for determination under order 37 of the Civil Procedure Rules is made by the Probate Court under rule 41(3) of the Probate and Administration Rules. For emphasis I reproduce the said sub rule below:-

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.

[16] For better appreciation of the effect of the determination of ownership under Order 37 of the Civil Procedure Rules on a succession cause and the relationship between the two proceedings, see Musyoka J in re Estate of Stone Kathuli Muinde (Deceased) [2016] eKLR that:

“...If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.”

Accordingly, by virtue of the law, and I stated this earlier, the Applicant is an interested party and he has locus standi to apply for revocation of grant. I have considered the facts of this case, and I find that the Applicant has satisfied the court that:

(a) 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; or

(c) 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

[17] But before I close, the facts of this case bring me to the point where I feel I should state, albeit in passing, that, where the deceased had entered into some binding transactions, or where liability had attached against him or a right had accrued upon him, the death of the deceased does not discharge him from the obligations or liability, or obliterate his right under those transactions. The personal representative comes in to fulfil those obligation or liabilities, or to realize any right or benefit thereof for the estate of the deceased. That is why the law requires the personal representative to bring in all the estate property, to pay out all liabilities and discharge all obligations of the deceased. In my experience as a judge, I have seen dishonest parties seeking to defraud *bona fide* claimants especially in land transactions which the deceased did not complete due to his death, in the pretext of preserving the estate- and what they mostly cite is section 45 of the Law of Succession Act even where it is inapplicable. Circumstances of this case should be distinguished from a situation where the sale of land is done after the death of the deceased and before confirmation of grant.

Findings and Orders

[18] The analysis above leads me to this. The Applicant has satisfied section 76 of the Law of Succession Act. He has also made a case for the success of his application dated 8th October, 2013. In the upshot, the said application is granted in the following terms;-

- 1. The grant of letters of administration issued and confirmed to the petitioners on 18th September 2013 and 24th September 2013 respectively is hereby revoked.**
- 2. As corollary and necessary order, an inhibition shall be registered on LR NO NYAKI/MULANTHANKARI/2244 until ownership thereof is determined as per the order (3);**
- 3. As the petitioners rightly submitted, and in exercise of my powers under the law of Succession Act and specifically under rule 41(3) of the Probate and Administration Rules, I hereby make a finding that the dispute on the ownership in respect of LR NO NYAKI/MULANTHANKARI/2244 cannot be conveniently determined in these proceedings. And I accordingly, subject to the provisions of section 82 of the Act, by order appropriate and set aside LR NO NYAKI/MULANTHANKARI/2244 to abide the determination of the question in proceedings under Order 37 rule 1 of the Civil Procedure Rules. Subject to the proviso to section 71 (2) of the Act and consent of the beneficiaries herein, the court may proceed with the distribution of rest of the estate.**
- 4. In light thereof, there is no need for the applicant to file protest; and**
- 5. Costs of the application shall be paid by the petitioners.**

Dated, signed and delivered in open court at Meru this 12th day of February 2018

F. GIKONYO

JUDGE