REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2948 OF 2013

IN THE MATTER OF THE ESTATE OF TABITHA NYAMBURA KINUTHIA (DECEASED)

JUDGMENT

1. The deceased person the subject of this cause died on 11th October 2001. She had six daughters. Representation to her estate was committed to one of them, Lucy Njoki Gichuru, on 9th June 2014. The said grant was confirmed on 1st July 2015, and a certificate to that effect was duly issued on even date.

2. On 21st February 2017, the administrator moved the court by a summons dated 20th February 2017, for revocation of the certificate of confirmation of grant issued on 1st July 2017. Her case is that she had sold a portion of the estate land, Dagoretti/Ruthimitu/589, to Hannah Wanjiku, who is named in the application as a respondent, in 2014 before the grant had been confirmed. She says that the buyer has declined to complete payment of the purchase price and had also made the subdivision of the property difficult and thereby frustrating distribution. She further says that the respondent had been named as a beneficiary of the estate yet she was not a beneficiary. She states that the survivors of the deceased had decided not to have her as their neighbour.

3. The respondent has replied to the application through here affidavit sworn on 13th March 2017. She concedes the sale, and says that she thought the administrator was the sole beneficial owner and that the rest of the survivors had no interest in the land. The land was surveyed and beacons were placed on the land with the concurrence of the administrator after the sale. The sale was subsequently sanctioned by the court at confirmation of the grant for she was listed as one of the beneficiaries. .

4. Directions on the disposal of the application were given on 14th March 2017. It was to be disposed of by way of *viva voce* evidence. The oral hearing commenced on 7th June 2017. The parties testified and were cross-examined. The administrator called witnesses. Both sides breathed life to the averments made in their respective affidavits. The oral evidence is on record and I need not recite it here. At the close of the oral hearing I directed the parties to file written submissions. There has been compliance; both sides have filed their respective written submissions, complete with the authorities that they rely on. I have read through the material and noted the arguments made therein.

5. The contention is on the sale of an estate asset before the grant herein was confirmed. The person who sold that property is the administrator of the estate who is the applicant in this case. She seeks to rescind the agreement on the basis that at the time that she disposed of the property it was still in the name of the deceased. She also says that she has fallen out with the buyer.

6. The deceased died after the Law of Succession Act, Cap 160, Laws of Kenya had come into force. The estate is therefore subject to the provisions of the said Act. Section 82(a) of the said Act is relevant here, it says –

> *'Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers – to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:*
>
> *Provided that –*
>
> *(i)* …
>
> *(ii) No immovable property shall be sold before confirmation of the grant …* '

7. The effect of the above provision is that, although the immovable assets of the estate do vest in administrators by virtue of section 79 of the Act, such property is not to be sold before the grant is confirmed. It is at confirmation of the grant that distribution is proposed by the administrators and approved by the court. It follows logically that sale of immovable property should follow only after confirmation, for it is here that the beneficiaries are identified, the assets ascertained and the proposed distribution approved by the court. Any sales done prior may have the effect of frustrating distribution and disadvantaging survivors who do not benefitting from the said sales. The provision no doubt outlaws any such sales. The same can only hold if sanctioned by the court.

8. It is clear beyond peradventure that the sale the subject of these proceedings was caught up by section 82(a) of the Act. It happened before the grant had been confirmed, and it is common ground that it had not been okayed by the court. To that point it was an unlawful transaction that ought to have been struck down should anyone have moved the court in that behalf. Indeed, the transaction happened sometime in April 2014 before grant was made in June 2014. This would mean that the property was sold before the same had vested in the purported seller. She had no right as at that date to sell it. She had no authority to sell it, and therefore she intermeddled with it contrary to section 45 of the Act. She committed the offence created by that provision. The transaction was indeed as dead as a dodo.

9. The applicant herein, in her capacity as administrator, moved the court by an application filed herein on 10th February 2015, dated 9th February 2015, for confirmation of the grant. In the supporting affidavit sworn on unknown date in 2015, she deposed that the deceased had sold 1/8 of the subject property to the respondent herein, and averred that she desired to honour that alleged transaction between the respondent and the deceased. The said application was placed before Ougo J on 4th March 2015, nine of the persons interested in the estate, including the parties hereto, were in attendance. The court was not satisfied that all the survivors had consented to the distribution and put off the matter to another date. The grant was eventually confirmed on 1st July 2015.

10. One thing that is striking about the confirmation application is that in it the applicant swore an affidavit in which she placed facts before the court that are totally inconsistent with the facts that she has deposed in the affidavit drawn in support of the instant application. In the said affidavit she said that the respondent had bought the property from the deceased, while in the latter affidavit she avers that the transaction was in fact between her and the respondent. That would mean that she lied to the court in 2015 to obtain confirmation. The confirmation was obtained on the lie that the transaction was between the deceased and the respondent, which no doubt, would have passed the said transaction as valid. Now that the administrator has fallen out with the respondent she has come back to court to tell the court the truth, that the said transaction was actually not valid, it was entered into by a person who had no capacity to sell the property, and even if she had capacity the same was still caught up in section 82(a) of the Act.

11. I am surprised that such an application can be mounted by a party who is represented by counsel. The administrator, no doubt, comes out as a double-mouthed individual who has no qualms swearing affidavits where she deposes to facts that are contradictory so long as they suit her case. She speaks from both sides of her mouth. She is the one who went to court for confirmation of grant with a proposal that the respondent be allocated a portion of the estate. She is now coming to court to say that that should be undone as the transaction she was relying on to make that proposal was a nullity. She is the administrator of the estate. It was her duty to ascertain the assets, the liabilities, the survivors of the deceased, the beneficiaries and creditors. She must have had known of the said faulty sale before she came to court for the confirmation. She was actually the one who sold that property to the respondent. She knew that. Yet she chose to lie to court that it was the deceased who had contracted with the respondent. She now has the temerity to come back to court with another tale. She has no shame.

12. From the material before me, it is plain that the respondent herein was sold a portion of the estate by the administrator. The administrator concedes to that fact. The other survivors of the deceased also conceded to the same. They said so at the trial. When it was proposed at distribution that the portion she had bought be carved out, there was no protest, and the court approved the same. I have gone through the record and noted that the respondent was not complicit in anyway in the lies that the administrator spinned for the purpose of having her grant confirmed. What is clear to me is that the administrator has decided to shortchange the respondent, and she is now using her own follies as excuses to have the court rule in her favour. I shall do no such thing. The sale in question was questionable, but all the survivors of the deceased acceded to it at confirmation. I shall therefore not interfere with the order that was made on confirmation at all.

13. I also wish to point out that although the application dated 20th February 2017 is presented as an application for revocation of grant and is brought under section 76 of the Law of Succession Act, the orders it seeks cannot possibly be available. It seeks revocation of the certificate of confirmation of grant dated 1st July 2015 and not the grant itself, which was made on 9th June 2014. The provision in section 76 is about revocation of grants of representation, and not certificates confirming such grants. A grant of representation can be revoked by the court on account of three general grounds. The first ground has something to do with the manner that the grant was obtained. If the process was defective, or the petitioner used fraud or misrepresentation or concealed facts in order to obtain the grant, the court can exercise discretion to revoke it. The second aground has something to do with the process of administration. This applies in circumstances where the grant had been made procedurally, but the grant holder in one way or another falls short in the discharge of their duties. The provision identifies three shortcomings on the part of grant holders for which the court may revoke a grant. One is where the grant holders fail to move court for confirmation of their grants within one year or such other period that the court had allowed. The second is where the grant holder has failed to proceed diligently with administration of the estate. The third one is where the grant holder fails to render accounts as and when required to by the court. The third general ground for revocation is where the grant has become useless and inoperative as a result of circumstances that emerge after the making of the grant, such as the death of the sole administrator. The applicant is not asking me to revoke the grant that she obtained on 9th June, 2014. Her application does not raise any of the matters that are listed in section 76 of the Act. That then means that the same is misconceived.

14. The administrator is raising questions about the orders that the court made at the hearing of the confirmation application. Certain things need to be made clear. A certificate of confirmation of grant is not a grant of representation. It is merely a certificate that the grant of representation has been confirmed. A certificate of confirmation of grant and a confirmed grant are not synonymous; they do not refer to the same thing. A certificate of confirmation of grant is a document that is generated from the orders that the court makes on the confirmation of the grant. It is a mere formal expression of orders that a court has made on the confirmation of the grant. It is akin to a formal order or decree of the court. It has no existence of its own outside the order of confirmation of the grant. A nullification or cancellation or revocation of the certificate of confirmation of grant does not affect the orders made by the court on confirmation since it is a mere extract from those orders. A party unhappy with the confirmation orders, which find expression in the certificate, must seek to have the said orders reviewed or set aside, otherwise prosecuting an application for cancellation or revocation of the certificate without asking for the review or setting aside of the orders behind the certificate is a total waste of judicial time.

15. In the end the orders that I shall make in the circumstances are -

(a) That the application dated 20th February 2017 is misconceived, incompetent, bad in law and devoid of merit, and it is hereby dismissed ;

(b) That the respondent, Hannah Wanjiku, shall have the costs thereof; and

(c) That any party aggrieved by the orders made herein shall be at liberty to move the Court of Appeal appropriately within the next twenty-eight (28) days of date hereof.

DELIVERED, DATED AND SIGNED at NAIROBI THIS 27TH DAY OF JULY, 2018.

W. MUSYOKA

JUDGE