



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 246 OF 2003

(IN THE MATTER OF THE ESTATE OF MANG'URU MANG'ONG'I (DECEASED))

JEDIDAH MUTHONI KAMONJI.....APPLICANT

VERSUS

NAHASHON KIHARA KAMONI.....RESPONDENT

RULING

Munguru Mungongi died in 1960. He was domiciled in Kenya and his last known place of residence was Munyange village, Mahiga location, Nyeri County. One Kamoni Ruhara filed a petition for letters of administration of his estate in the Resident Magistrates Court at Nyeri in 1982, being succession cause No. 229 of 1982.

Marimau Watetu Karuri objected to the grant of the letters to Kamoni Ruhara on the grounds that he was not closely related to the deceased and that she was the rightful heir of the deceased's estate. In any event, she had been living on the deceased's estate all along and at the very least, she was a dependant. The objection dated 19th August, 1983 was filed in court on the same date.

Besides filing the objection, Mariamu Watetu also filed a petition by way of cross-application for grant of letters of administration of the same estate to herself; the petition was dated 23rd January, 1984 and was filed in court on the even date. In the cross-petition she described herself as the deceased's daughter-in-law, in the sense that she was married to the deceased's son.

She, however, died on 19th December, 1990 before her objection and the petition had been disposed of. Consequently, by an application dated 20th February, 1992 the applicant applied for extension of time to enable her seek orders to be substituted in place of Mariamu Watetu. In the same application, she sought leave to file an objection to an elders' award which apparently had been read to in court and adopted on 10th February, 1992.

It is not clear from the record if any orders were made in respect of this application because the only other application on record is by Kamoni Ruhara, a chamber summons dated 25th July, 2002 made in Miscellaneous Application No. 217 of 2002. The application sought to have the succession cause in the magistrates' court transferred to the High Court. There is an extract of the record showing that parties consented to have the cause transferred to this Court on 5th November, 2002.

Sometime after the cause was transferred to this court and in particular by an application date 31st May, 2004 and filed in court on 2nd June, 2004 Kamoni Ruhara sought the order of this court for the grant of letters of administration to be made in his name.

On 12th July, 2005 this Court (Okwengu, J., as she then was), ordered that the grant be made in the joint names of the petitioner and the objector. The court, however, directed further that the objection be heard by way of oral evidence.

On 26th June, 2003 the original petitioner Kamoni Ruhara filed a summons for confirmation of grant dated 26th June, 2007 the primary prayer being that:

“That the grant of Probate/or letters of administration intestate made to the said KAMONI RUHARA and JEDIDAH MUTHONI KAMONJI in this matter on 12th July, 2005 be confirmed.”

He sought to have the deceased's estate identified as **Title Number Mahiga/Munyange/432** devolve upon him exclusively and absolutely.

On 30th October, 2007, the Court (Kasango, J.) rejected this application on the ground that the objection had not been heard as earlier directed.

Later, by a summons general dated 3rd November, 2011, Nahashon Kihara Kamoni, the present respondent, applied to be substituted in place of Kamoni Ruhara who is said to have died on 1st June, 2011; Nahashon sought to take his place in the cause in his capacity as one of Ruhara's sons. The application was allowed on 9th December, 2011.

Soon after he obtained these orders Nahashon Kihara Kamoni filed a summons for confirmation of grant dated 14th December, 2011 which he filed in court on the following day.

The pertinent part of the application was couched in the following terms:

LET ALL PARTIES CONCERNED attend the Honourable Judge in chambers on the.....day of.....2012 at 9.00 o'clock in the fore/afternoon on the hearing of an application on the part of the applicant NAHASHON KIHARA KAMONI being one of the administrator(sic) of the estate of the above named MANG'URU MUNG'ONGI who died in the year 1960 for orders: -

1. THAT the grant of Letters of Administration intestate be issued to me and at the same time be confirmed to the applicant herein.

This application was allowed on 10th February, 2012. In effect, the grant was made to the respondent and confirmed in the same breath. For avoidance of doubt, the certificate of confirmation of grant issued on the 10th February, 2012 shows that the grant was made and confirmed on the same day. The schedule to that certificate shows the deceased's estate devolved upon the respondent absolutely.

By a summons dated 27th July, 2013 made under **section 76** of the **Law of Succession Act, cap 160**, the applicant sought to revoke the grant on the ground that the grant was fraudulently made to the respondent by means of untrue allegations of fact essential on a point of law to justify the grant.

In the affidavit sworn in support of the summons, the applicant swore that the proceedings to obtain the grant were defective in substance because the respondent did not disclose to court the existence of the previous grant made to the applicant and the respondent's father, in their joint names.

Again, the respondent is alleged not to have served the applicant with any of the applications in which he sought to be substituted in place of his father and subsequently the summons for confirmation of grant.

It was the applicant's deposition that the respondent is only a distant cousin of the deceased while the applicant and her sisters have a prior right to the estate mainly because the estate initially belonged to their father who happens to have predeceased their grandfather, whom I understand to be the deceased in this cause.

In his response to the summons, the respondent denied having obtained the grant fraudulently. In any event, so he swore, the estate has now been transferred into his name and therefore the applicant's application has been overtaken by events. With this transfer of ownership, so he urged, it does not matter that the estate initially belonged to her father. He appears to admit that he may not have served the applicant with any of his two applications because he has alleged that the applicant was nowhere to be found.

I directed the summons for revocation be disposed of by way of written submissions since the primary issue upon which the summons turns is, in my humble view, more or less, legal.

I say so because **section 81** of the **Law of Succession Act** is fairly clear on administration of a deceased's person estate whenever a co-administrator or administratrix dies; it states as follows:

81. Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them:

Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of the trust until the court has made a further grant to one or more persons jointly with him.

The proviso thereto is not of much significance since the issue of a continuing trust does not arise in the present application. Of worth noting from this section is that the demise of any of a joint administrator or administratrix does not necessitate appointment of a new administrator or administratrix in order to complete administration of an intestate estate; as long as there is a surviving joint administrator or administratrix, the powers and duties of the administrators or administratrixes are vested in the surviving administrator or administratrix, whichever the case.

It follows that the respondent's summons dated 3rd November, 2011 for substitution and the one dated 14th December, 2011 appointing him as an administrator were superfluous.

But even if, for whatever reason, the respondent felt inclined to step into his father shoes and take his place in the succession cause, he could not obtain a new grant and purport to have it confirmed without any reference whatsoever to the a previous grant made in the same cause to his late father and the applicant as joint administrators of the deceased's estate; the reason is simple-no two grants can be made to two different people for administration of the same intestate estate.

A fresh grant of letters of administration can only be made when, for one reason or another, a previous grant for administration of the same

estate has been annulled or revoked.

I also found it curious that the respondent managed to have the grant made to him and confirmed on the same day. I say so because according to section 71(1) of the Act, a grant can only be confirmed upon expiry of six months from the date it is made. That section says:

71. (1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

Of course, there are special circumstances when the grant can be confirmed before the expiry of the six-month period; those circumstances are expressly prescribed in **section 71(3) (a) and (b)**. According to this provision, the grant may be confirmed earlier if there is no dependant as defined by section 29 and that it would be expedient in all the circumstances of the case so to direct. Neither of these circumstances were shown to exist.

It must also be remembered that the deceased's father had himself filed a summons for confirmation of grant and which was on record pending for determination when his successor, the respondent filed his own. The earlier summons dated 26th June, 2007, had at one stage been slated for hearing but as noted, it was directed the grant could not be confirmed until such a time that the objection filed by the applicant's predecessor had been heard. It is apparent from the record that this objection has not been disposed of.

In the final analysis, the grant made to the respondent was vitiated from several perspectives; the application out of which it was made was an abuse of the court process to the extent it was filed and urged without reference to a prior similar summons filed by the same party and which is still pending for determination and also because it was contrary to an earlier court directive that put on hold the confirmation proceedings until the objection by the applicant had been heard.

Narrowing down to the grounds upon which a grant may be revoked or annulled under **section 76** of the **Law of Succession Act**, I agree with the applicants that considering the background of the summons out of which the grant was obtained it is obvious that:

(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

Looking at the material before me, all these three grounds have been demonstrated to exist although only one of them is sufficient to have the grant revoked.

In a nutshell, I am satisfied that the applicant's summons for revocation of grant dated 27th July, 2013 is merited; it is allowed with costs. For completeness of record I direct the land registrar, Nyeri Lands office to cancel the subdivision and subsequent transfer of the parcels of land excised from Title No. Mahiga/ Muniyange/432 and restore the registration of the original title into the deceased's name.

It is so ordered.

Signed, dated and delivered in open court this 23rd November, 2018

Ngaah Jairus

JUDGE