



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA

SUCCESSION CAUSE NO. 126 OF 2008

IN THE MATTER OF THE ESTATE OF NATOLIO NAGWEBONIA MBOLU.....
DECEASED

AND

JAMES OUMA NATOLIOAPPLICANT/2ND ADMINISTRATOR

VERSUS

JOHN MAUBE NATOLIORESPONDENT/1ST ADMINISTRATOR

AND

EDWARD OCHIENG MAUBE.....INTERESTED PARTY

RULING

(Chamber Summons dated 30th January, 2015)

1. According to the Petition for Letters of Administration Intestate (Form P&A 80) filed in Court on 5th August, 2008 John Maube Natolio and James Ouma Natolio jointly petitioned for grant of letters of administration for the estate of Natolio Nagwebonia Mbolu who passed away on 26th November, 1976. Natolio Nagwebonia Mbolu will henceforth be referred to as the deceased.
2. In the affidavit (Form P&A 5) sworn on 5th August, 2008, the petitioners disclosed at paragraph 4 that they were the sons of the deceased and they were the only dependants who had survived him. The assets of the deceased were listed at paragraph 6 of the same affidavit as Bunyala/Bulemia/1324, Bunyala/Bulemia/133, Bunyala/Bulemia/2242 and Bunyala North/533. No liabilities were disclosed.
3. On 3rd November 2008 letters of administration intestate of the estate of the deceased were granted to the two Petitioners. The grant was confirmed on 5th May, 2009 with the schedule showing that all the assets of the deceased were to be transmitted to John Maube Natolio. It is important to note that the Certificate of Confirmation of Grant was issued in the names of the two petitioners.
4. A perusal of the file shows various attempts to have the assets of the deceased transmitted to John Maube Natolio but it is apparent that those attempts have hit a brick wall in the offices of the Land Registrar and the Surveyor, Busia County. Through an application dated 14th October, 2014 an order was sought to compel the Land Registrar and Surveyor, Busia County to immediately transfer L.R. No. Bunyala/Bulemia/2242 to John Maube Natolio.

5. On 30th January, 2015 James Ouma Natolio, the 2nd Petitioner/Administrator filed summons seeking to annul the grant confirmed on 5th May, 2009. Let the application speak for itself:-

“1. THAT the confirmed grant issued to JAMES OUMA NATOLIO and JOHN MAUBE NATOLIO both of Post Office Box 64 Port Victoria by Honourable Judge of this court in this Succession Cause Number 126 of 2008 on the 5th day of May 2009 be annulled on the following grounds:-

(a) The confirmed grant was obtained fraudulently by making of false statements to the court.

(b) The grant was obtained fraudulently by concealment from the court that:-

(i) The applicant was not the only true beneficiary of the estate.

(ii) Due process of obtaining the confirmed grant was not followed as the applicant and all the other beneficiaries were not heard.

(iii) The co-administrator the applicant herein and the beneficiaries did not give their consent to the confirmation of the grant.

(iv) Untrue allegations to facilitate the obtaining of the confirmed grant were made to the court, the co-administrator and applicant herein was not a party to the process and or present in court, and the process of obtaining the confirmed grant was both illegal and irregular.

2. THAT the petitioner has now made an application before this court for orders to have the entire estate of the deceased devolve upon him through fraud and concealment of material facts.

3. THAT the particulars of the fraud are that:

(i) The petitioner has made a false representation that the applicant has filed the application for the transfer of land parcel number in his name.

(ii) The petitioner had misled the court that the application for confirmation of grant was made together with the co-administrator the applicant herein.

(iii) The proceedings reveal that the applicant herein was in court for the confirmation of grant yet he did not even know about it and someone else must have impersonated him and lied to the court with the help of the petitioner.

(iv) The petitioner has forged the signature of the applicant herein in the transfer forms annexed to the affidavit in support of the notice of motion dated 14th October 2014.

(v) The petitioner has given false information to the court that all the beneficiaries of the estate have consented that he is the sole, and absolute beneficiary to the estate of the deceased.

4. THAT any portion of the estate of the deceased that has been sold and or disposed off by the petitioner herein to third parties be deemed to be his share and such portions to be deducted from his rightful shares without affecting the shares of the other beneficiaries and the applicant herein.

5. THAT the cost of the application be borne by the petitioner.”

6. The application is supported by an affidavit sworn by the Applicant/2nd Administrator on 30th January, 2015. In his affidavit, the Applicant avers that the grant of letters of administration to the estate of the deceased appointing him and the Respondent/1st Administrator John Maube Natolio as the administrators of the estate of the deceased was done with his consent.

7. The Applicant's problem is with the confirmation of grant which was done on 5th May, 2009. He avers that the application for confirmation of grant was made by the Respondent without his consent. It is also the Applicant's case that he never consented to the devolution of the entire estate of the deceased to the Respondent as stated in the Certificate of Confirmation of Grant. The Applicant avers that the confirmation of grant was based on the false statement that the Respondent was the sole beneficiary of the estate of the deceased.

8. The Applicant alleges that the Respondent concealed material facts from the Court including the fact that there were other children and grandchildren of the deceased who did not participate in the process and whose consents were not sought before distribution of the estate. It is also the Applicant's case that the Respondent did not disclose that the deceased was holding L.R. No. Bunyala/Bulemia/2242 for himself and in trust for his late brother Mudambo Mbolu. Further, that the beneficiaries of the estate of the late Mudambo Mbolu have not been involved in these succession proceedings.

9. The Applicant accused the Respondent of forging his signature so as to have all the assets of the deceased transferred to him. It is the Applicant's case that the Respondent even lied to the Court at the hearing of the summons for confirmation of grant that he (the Applicant) was present in Court and did not object to the confirmation of grant.

10. It is the Applicant's case that from the time the grant was confirmed the Respondent had gone ahead and tried to transfer all the assets of the estate of the deceased to his name. The Applicant discloses that some of the beneficiaries have sold their interests in the estate to third parties and the Respondent's intention of taking the entire estate will result in the beneficiaries being indebted to third party purchasers.

11. It is the Applicant's case that after learning of the fraudulent confirmation of the grant he approached the Respondent with a view to having each beneficiary receive his rightful share to the estate but his attempts at an out of court settlement was not successful. It is the Applicant's case that after spurning his request for an amicable settlement the Respondent had gone ahead and filed the application dated 14th October, 2014 asking the Court to compel the Land Registrar and Surveyor, Busia County to transfer L.R. No. Bunyala/Bulemia/2242 to him.

12. It is the Applicant's averment that he does not know the firm of Mandala and Company Advocates and has never instructed the said firm of advocates to act for him. His position is that any instructions given to the said firm must have come from the Respondent. The Applicant asserts that he has never and would never consent to the devolution of the entire estate of his deceased father to the Respondent.

13. The Applicant discloses that L.R. No. Bunyala/Bulemia/2242 had been sold to third parties by the beneficiaries. It is the Applicant's case that the confirmed grant should be annulled and a fresh grant be issued containing the shares of all the beneficiaries of the estate of the deceased. He proposes that the shares of the purchasers be deducted from the shares of the beneficiaries who sold the land to them. The Applicant exhibited several documents in support of his application.

14. On the date the Applicant filed the summons for revocation of the grant, he also filed a notice of motion application dated 29th January, 2015 seeking to stay the hearing of the Respondent's application dated 14th October, 2014 pending the hearing of the summons for revocation of grant. On 9th March, 2015 Tuiyott, J allowed the said application.

15. The Respondent opposed the Applicant's summons for revocation of grant through a replying affidavit sworn on 30th June, 2015. On the Applicant's allegation of forgery, impersonation and fraud on his part, the Respondent avers that they are made in bad faith and as an afterthought as no evidence has

been adduced and neither have the allegations, which disclose crimes, been referred to the investigating authorities.

16. It is the Respondent's case that the Applicant attended Court during confirmation and the Judge verified the fact before confirming the grant. The Respondent avers that the Applicant was all along aware and participated in the confirmation proceedings. Further, that on 3rd February, 2014 he together with the Applicant and Edward Ochieng Maube (the Interested Party) wrote to the Land Registrar, Busia County asking for transfer of L.R. No. Bunyala/Bulemia/2242 to him but there being no response he filed the application dated 14th October, 2014.

17. The Respondent claims that the Applicant is known to have different signatures which he disowns whenever circumstances change. The Respondent avers that he is not intent on disinherit the Applicant or other beneficiaries but his attempts to agree with the Applicant on the shares of the beneficiaries have been unsuccessful.

18. According to the Respondent, the issue in this matter is distribution of the estate of the deceased and not a revocation of the grant. He urges the Court to mediate the matter so that the beneficiaries and the purchasers can receive their rightful shares of the estate.

19. Through an application dated 29th July, 2016 Edward Ochieng Maube sought to join the proceedings as an Interested Party. Although there is no particular order in the file allowing the said application, the Interested Party has participated in the proceedings since making his application. It is therefore deemed that he joined these proceedings and in particular the summons for revocation of grant by the consent of the parties.

20. Through the affidavit sworn in support of his application to join these proceedings, the Interested Party averred that he is the son of Felix Maube Mudambo who was the son of the deceased. He also averred that he is the administrator of the estate of his father having obtained letters of administration and confirmation thereof in Busia P&A No. 155 of 2004 In the Matter of the Estate of Felix Maube Mudambo – deceased.

21. It is his case that as per the certificate of the confirmation of grant issued on 7th October, 2005 he has already transferred part of the estate of the deceased herein to himself and one Marcel Igondi.

22. The Interested Party denied that he gave consent to the Respondent to become the sole beneficiary of the estate of the deceased. He averred that the Respondent has been a stumbling block in reaching an amicable settlement in this matter.

23. The Applicant and the Interested Party who were represented by the same advocate took the position that the confirmation of the grant was attended by forgery, misinformation and deliberate concealment of information from the Court and the solution lies in revoking the grant. The Respondent held the view that distribution of the estate is the solution to the suffering of the family of the deceased.

24. The advocates for the parties filed detailed submissions and provided authorities in support of the positions taken by their clients. I have read the submissions and the authorities.

25. In my view the question to be answered is whether the Applicant has met the conditions for revocation of the confirmed grant. I will proceed straight to my findings on the evidence and submissions tendered by the parties.

26. This matter is unique in that the person who seeks to revoke the grant is a co-administrator. He alleges that the confirmation was done by his co-administrator behind his back. He claims forgery of the application for confirmation of grant. Even though the record shows that he was in Court on the date the grant was confirmed, he vehemently denied being in Court and even being aware of the application for confirmation of grant.

27. The Respondent lambasts the Applicant claiming that he is a man of many signatures who will deny documents he has signed when it is convenient to do so.

28. The allegations made by the Applicant against the Respondent are indeed grave. Were the allegations true, the Respondent must surely be subjected to investigations by the police for he will have committed serious crimes.

29. The Respondent however contends that the allegations against him need better evidence than the utterances of the Applicant. I agree. In **Re The Estate of Thomas Mutua Mukumbu – (Deceased) [2014] eKLR** Musyoka, J considered the kind of evidence that is expected to prove allegations like those made by the Applicant herein and concluded that:-

“9. The applicant alleges that the respondent forged her signatures in the affidavits which supported his application for confirmation. She also asserts that the respondent acted fraudulently. These are very serious allegations. Forgery and fraud amount to criminality. The applicant is literally accusing the respondent of acting criminally. The standard of proof required to establish forgery and fraud is very high. Even in civil cases it is higher than balance of probability. The Court of Appeal had occasion to address its mind on this in *Elizabeth Kamene Ndolo -vs- George Matata Ndolo* (1995) LLR 390, albeit in a matter on forgery with respect to wills, when it stated that the charge of forgery or fraud is a serious one, and that the standard of proof required of the allegor is higher than that in ordinary civil cases, although not beyond reasonable doubt. The applicant in this case ought to have subjected her alleged signature in the two impugned affidavits to testing by a handwriting expert or a document examiner. It is not enough for her to deny the signature, she should have sought to demonstrate that the signatures in those two documents could not possibly be hers. I am not an expert in such matters, for I do not have a trained eye in that regard, and I cannot possibly pass judgment as to whether the signatures on the two affidavits were genuine or not.”

30. The Applicant before me ought to have done more than just make averments in order to demonstrate that the Respondent acted without his mandate.

31. I also note, as I will shortly demonstrate, that the Applicant is not a man upon which trust should be reposed. Evidence from such a character ought to be taken with a pinch of salt.

32. On the other hand, the Respondent’s allegation that the Applicant has several signatures was also not supported by any evidence. He was also making serious allegations bordering on criminality and the standard that has been applied to the Applicant will also apply to him.

33. Nevertheless, there is more to the confirmation of the grant than meets the eye. It appears from the affidavit of the Interested Party that he has a genuine claim to the estate of the deceased. The Respondent does not seem opposed to the Interested Part’s claim. If this be the case, then the Respondent failed to reveal the Interested Party’s claim when he moved the Court for confirmation of the grant. He concealed from the Court information material to the case. That is a ground for revocation of a grant.

34. There is also an observation that should tilt the case in favour of the Applicant. In a case where the Applicant and the Respondent had indicated that they were the only beneficiaries of the estate of the deceased, it beats logic that the Applicant would surrender his inheritance without any explanation. There is no explanation in the affidavit in support of the application for confirmation of grant as to why all the assets of the estate of the deceased were to be registered in the name of the Respondent. Even with the doubts that have engulfed this Court about the sincerity of the Applicant, the fact that he has denied surrendering his inheritance is enough for this Court to pose and wonder whether he may have signed documents without knowing the repercussions. In such a case, his consent will have been obtained fraudulently and a revocation of the grant would be in order.

35. In the affidavit in support of the application herein, the Applicant indicates that he does not dispute

the proceedings leading up to and including the issuance of grant. His problem is with the confirmation of the grant. That averment leads me to why I doubt the honesty of the Applicant. I will turn to the papers filed when this cause was initiated. Among the documents filed were certificates of official search for all the four parcels of land that formed the estate of the deceased. They were all issued on 5th August, 2008.

36. For L.R. No. Bunyala/Bulemia/2242 the pertinent information is that the parcel of land was registered on 12th November, 1991 in the names of Maube Mudambo, Pius Mbolu, Muhiru Maube, James Ouma and John Maube Natolio Natolio Mbolu. The green card exhibited by the Respondent in his reply to the summons for revocation of grant shows that it is actually on 12th November, 1991 when the Respondent got his name inserted in the title with the remarks that "otherwise known as Natolio Mbolu." The copy of the green card shows that the actual registration was done on 2nd October, 1985 with the five registered owners each being entitled to $\frac{1}{5}$ share. Of importance is the fact that the title was closed on 13th November, 1991 on partition and new numbers being 2676 to 2680 issued.

37. As for L.R. No. Bunyala North/533 the same was registered on 2nd October, 1985 in the names of Natolio Mbolu, Joseph Wasike, James Ouma and Michael Osigo with each owner being entitled to a $\frac{1}{4}$ share of the land. On 27th November, 1992 the title was closed on partition and new numbers being 2743 to 2746 issued.

38. L.R. No. Bunyala/Bulemia/133 was registered on 2nd October, 1985 in the names of Natolio Mbolu and James Ouma. The title was closed on 9th February, 1999 on sub-division and new numbers being 3079 to 3081 issued.

39. The fourth parcel of land being Bunyala/Bulemia/1324 was registered on 2nd October, 1985 in the names of Natolio Mbolu and Martin Wandera with each proprietor being entitled to half share of the land.

40. As the Applicant and the Respondent were approaching the Court on 5th August, 2008 three of the titles which they indicated belonged to the deceased were no longer in existence as they had been closed in 1991 upon sub-division. That is why I said the Applicant is dishonest. The same thing applies to the Respondent for a kettle cannot laugh at the blackness of a pot. They both swore a false affidavit. In respect of the fourth title, they failed to disclose that there was another proprietor who was entitled to half of the land.

41. The Applicant and the Respondent also appear to blame the Land Registrar, Busia County for allowing the sub-division of three of four of the parcels of land after the deceased had passed away and succession had not been done. They fail to ponder the big question: if the deceased passed away in 1976 how could he have been registered as one of the proprietors of the four parcels of land?

42. I have stated two reasons why the confirmation should be revoked. From the facts already disclosed, there is a third reason: that the grant was obtained by means of an untrue allegation of a fact essential in a point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently. One can also say the grant is useless and inoperative. The Petitioners failed to disclose the existence of other beneficiaries of the estate of the deceased.

43. The evidence adduced before this Court has made the confirmation done on 5th May, 2009 a subject of Section 76 of the Law of Succession Act, Cap 160. The application succeeds and the confirmation is revoked.

44. The Applicant and the Respondent are in a quandary. They need to seek out what really belongs to the estate of the deceased so that they can file an application to have the grant reissued and confirmed in their joint names. Otherwise, I fear that these proceedings may not bear fruit for them, the other beneficiaries and the purchasers.

45. During the hearing of the application, there was mention that the Respondent seeks an order nullifying the title deeds issued earlier on. That prayer cannot be granted as no basis has been established for the nullification of any of the title deeds. It is also noted that the owners of those titles were not made parties to the proceedings.

46. Each of the three parties (the Applicant, the Respondent and the Interested Party) who participated in the hearing of the summons for revocation of grant shall bear own costs of these proceedings.

Dated, signed and delivered at Busia this 30th day of March, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT