



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO. 29 OF 2010

In the Matter of the Estate of Zakaria Nkumbuku (Deceased)

SAMSON KILEMI.....1ST OBJECTOR
MUSA GITONGA.....2ND OBJECTOR
DOUGLAS MITHIKA.....3RD OBJECTOR
ZAKAYO MPEKETHU.....4TH OBJECTOR
JACOB MWITHALI.....5TH OBJECTOR
SAMUEL MUROKI.....6TH OBJECTOR
JOSEPH THURANIRA.....7TH OBJECTOR

Versus

GEOFFERY M' MUGAMBI ZAKARIA.....PETITIONER

RULING

[1] Before me is a Summons dated 10.1.2015 for Revocation and/or Annulment of Grant. The application is expressed to be brought pursuant to Section 47 and 76 of the Law of Succession Act and is supported by the Affidavit of Samson Kilemi Nkumbuku. The significant order sought by the Objectors is the Revocation and/or Annulment of Grant issued to the Petitioner on 23rd November 2011.

[2] The gist of the application is that the deceased had 17 children including the Objectors. But, the Petitioner made false claims and failed to disclose the full list of the deceased's wife and children. According to the Objectors, the introductory letter dated 21st January 2010 was obtained through deceit and the Certificate of Death used to file these proceedings was a forgery. For these reasons, the Objectors opine that the Grant of Letters of Administration and subsequent confirmation was obtained illegally, un-procedurally and criminally.

[3] In addition to the foregoing the Objectors contended that they recently learnt that that the Petitioner/Respondent had filed this Cause, obtained a Grant and caused their late father's Land Parcel NO. NJIA CIA MWENDWA/187 to be transferred into his name. They claimed further that the Petitioner did not disclose to court that their mother Zipporah Atuuma Zakaria was still alive. Their major point of argument was that none of them consented to the filling of this Succession Cause. They sought revocation

of the grant herein.

[4] The Petitioner opposed the application and filed two Replying Affidavits to that effect in which he deposed inter alia that he did not file this cause secretly as all the beneficiaries were aware and the chief's letter dated 10th September 2015 testifies to that fact. He also denied that he had transferred the whole land to himself. He argued that the grant should not be revoked.

Directions

[5] Following direction given by the court on 26th April 2016, parties filed submissions in support of and essentially reiterated their above avowed positions.

DETERMINATION

Legal threshold

[6] Section 76 of the Law of Succession Act sets out circumstances in which a grant of representation could be revoked. The section provides 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

iv. that the grant has become useless and inoperative through subsequent circumstances.

[7] And from the arguments in this case, the relevant questions I should ask and resolve are whether:-

(a) The proceedings to obtain the grant were defective in substance; or

(b) 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

Lack of consent

[8] I have carefully considered this Application and the rival submissions by the parties. Applying the test of the law, the following facts are important. The Objectors herein have contended that they are brothers of the Petitioner and among the 17 children of the deceased. This averment was not controverted or denied by the Petitioner. The Objectors also claimed that they did not give their consent prior to filling of this Succession Cause. But, the Petitioner stated that the Objectors were aware of the filing of these proceedings as they were present in a clan meeting held on 11.9.2006 in which the way forward on this succession cause was explained. He also stated that they had also given their consent. On the basis of those statements, the Petitioner termed this application as an afterthought which should be rejected by the court. He gave other details in his replying affidavit but I will not say much about them for now. What does the record show?

[9] A careful perusal of the Petition and application for Summons for Confirmation of Grant filed in court by the Petitioner on 11th May 2011; the Petitioner, (1) lists himself, Jennifer Gitura and Ruth Mukiri as the only children of deceased; and (2) proposes that Land Parcel No. NJIA CIA MWENDWA/187 to be registered in his name. See the affidavits in support of the Petition and Summons for Confirmation of Grant. Similarly only Jennifer Gitura and Ruth Mukiri signed the consent form to the making of a grant (Form 38) and to Confirmation of Grant. See Consent to the making of a Grant of Administration Intestate to Person of Equal or Lesser Priority filed in court on 2nd February 2010 and Consent to Confirmation of Grant (General Form) filed dated 9.3.2010. As it has not been denied that the Objector's are the Petitioner's brothers, it follows that they are entitled to apply for Letters of Administration as persons with equal or lesser priority with the Petitioner. It is, therefore, clear from the record that the Objectors did not give their consent to the filling of this succession. There is also no record to show that they renounced their rights to so apply. I will place that revelation to the scale of the law. Needless to state that, in intestacy, the consent required in law from persons with equal right or priority to the Petitioner is not a matter of mere form. It is a core and substantial legal requirement, for; (1) it gives legitimacy to the authority of the Petitioner to apply for a grant of representation of the estate; and (2) ensures all parties concerned are involved in the proceedings. I say so because a succession cause is not really a personal claim of the Petitioner but for all the beneficiaries of the estate of the deceased. Case law reflects on the serious view taken by courts where there is lack of the requisite consent from persons who are entitled to give consent or to be notified of the proceedings. For instance, see the case of **SAMUEL WAFULA WASIKE -vs- HUDSON SIMIYU WAFULA CA NO.161 OF 1993** (Kwach, Omolo and Tunoi JJA) where it was held:-

“A grant obtained on the strength of false claims, without obtaining the consent of persons who had prior right to the grant and on the basis of facts concealed from the court, is liable to revocation.”

See also what Koome J (as she then was) stated in **THE MATTER OF THE ESTATE OF NGARI GATUMBI ALIAS JAMES NGARI GATUMBI (DECEASED NAIROBI HIGH COURT SUCCESSION CAUSE NO.783 of 1993** (persuasively) that:

“A grant will be revoked where a person who is entitled to apply is not notified by the petitioner of their intention to apply and that person's consent to the petitioner's application is not sought.

Consequently, I am satisfied that the Objectors did not give consent to the Petitioner to apply for a grant of representation. Making them aware does not remove the necessity of obtaining their consent in the form stipulated in law. However, if such consent is unreasonably withheld, the law never intended that an estate of the deceased should be left at the mercy of un-willing beneficiaries. It has provided the redemption route; the Petitioner is at liberty to apply for citation to issue upon such defaulting parties and appropriate orders shall accordingly be issued on the filing of a cause in respect of the estate of the deceased. Thus, I find that this grant is a perfect candidate for revocation.

[10] But, before I close, I should also state that, contrary to the assertion by the Petitioner, it is true that he indicated in the confirmation application that the entire estate property should go to him, and in the Certificate of Confirmation of Grant issued to the Petitioner on 23rd November 2011, he gets the whole of L.R NO. NJIA CIA MWENDA/187. The assertion by the Petitioner that the deceased had shared his other parcels of land amongst all his children at a clan meeting held on 10th April 1990 at his home only renders credence the argument by the Objectors that the deceased had other properties which were not disclosed in the petition for grant of representation. This again is equally a potent ground on which a grant of representation could be revoked.

In the end result and having come to the above conclusions, I find the Objectors' Application dated 10th October 2015 to be merited, and I accordingly allow it. In light thereof, I revoke the grant issued to the Petitioner on 23rd November 2011. I also order that the estate property herein shall revert back into the name of the deceased forthwith after which an inhibition shall accordingly be registered on the suit property until further orders of this court. With that order the other application also dated 10.10.2015 for inhibition is also determined. This being a succession matter, I order each party to bear own costs of the applications. It is so ordered.

Dated, signed and delivered in open court at Meru this 24th day of April 2017

F. GIKONYO

JUDGE

Ruling delivered in open Court in the presence of:-

Gitonga for B G Kariuki for petitioner.

Mbogo for objector- absent

C.C Mwenda

F. GIKONYO

JUDGE