



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO.453 OF 2002

**IN THE MATTER OF THE ESTATE OF THE LATE DORCAS KADENYI ZEDEKIAH –
DECEASED**

AND

IN THE MATTER OF SUMMONS FOR REVOCATION OF GRANT

BETWEEN

SAMUEL MAJANI APPLICANT

VERSUS

DAVID AGGREY ZIMBIRU.....RESPONDENT

RULING

1. The applicant, **Samuel Majani**, has filed an application dated 22nd April 2016 being summons for revocation of grant seeking for orders that:-

(1) The grant of letters of administration intestate made to **David Aggrey Zimbiru** on 19th December 2002 and subsequently confirmed on 26th July 2011 be revoked.

(2) The respondent David Aggrey Zimbiru do account for all proceeds of any monies and assets in respect of the estate of the late **Dorcias Kadenyi Zedekiah**.

2. The application was supported by the affidavit of the applicant sworn on 22nd April 2016 in which he depones that the proceedings leading to the issuance of the grant were fraudulent, had material non-disclosure and omissions for the reasons that:-

(a) His signature on the consent dated 3rd October 2002 annexed and marked 'C' was forged.

(b) The respondent omitted to include all the assets of the deceased such as:-

(i) Cash deposit at National Bank of Kenya Ltd **Eldoret Branch – Account No.404-129-234** as evidenced by an annexed statement marked 'D'

(ii) Barclays Bank of Kenya Branch A/C No.4081492 as evidenced by annexed deposit slip marked 'E'

(iii) Land Parcel known as Lugari/Lukuyani/Block (Vihiga)191 measuring 1.241 Hactares as evidenced by certificate of official search marked 'F'.

3. The application was opposed by the respondent David Aggrey Zimbiru who is a brother to the applicant vide his replying affidavit deponed on 8th November 2016 in which he depones that before their mother passed on she had given out land to both the applicant and himself. That everything that formed the estate of the deceased estate was meant for their late sister Pricilla Kanaiza Kadenyi and Joyce Kakai Lundu who had purchased from their mother. That their deceased sister was survived by Jimmy Kelson Kaharangwa and Daniel Boitiva Luvembe. That he distributed the estate to the children of their late sister and the purchaser. That he and the applicant were not entitled to any share from the estate. Further that the money at National Bank was deposited with the Public Trustee which he and the applicant withdrew and used towards filing of this succession cause and taking care of the deceased sister's children. That he is not privy to any information of money at Barclays Bank held on the deceased's account.

4. The confirmed grant was issued by the court on 26th July 2011 indicates that the estate of the deceased comprised of L.R.No.Lugari/Lukuyani/Block 1(Vihiga)191 that was distributed as follows:-

- (1) Jimmy Kelson Kiharangwa - 0.5 acres
- (2) David Aggrey Zimbiru -
(To hold in trust for
Daniel Boitiva Luvembe - 1.25 acres
- (3) Joyce Kakai Lundu - 1.25 acres

5. The application is made under rule 44 of the Probate and Administration rules and **section 76** of the Law of succession Act, Cap 160. **Section 76** of the Law of Succession act states as follows:-

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)
- (e)....

6. The applicant says in his application that the proceedings to obtain the grant were defective and that the grant was obtained fraudulently by the making of a false statement. That the grant was obtained and confirmed by the concealment from the court of something material to the case. 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 inadvertently. That the person to whom the grant was made has failed to produce in court an account of the administration of the estate.

7. The advocates for the applicant Wambua Kigamwa & Co. Advocates submitted that the respondent has not challenged the allegations of forgery of the consent to apply for grant. That in the petition originating the cause and the affidavit the respondent/petitioner never mentioned the names of Joyce Kakai Kundu,

Jimmy Kelson Kiharangwa and Daniel Bativa Luvembe. That however in the application for confirmation of grant the said names were introduced. That the original petition was not amended to incorporate additional defendants. That the affidavit in support of the summons for confirmation indicates that Priscilla Kanaiza Kadenyi is deceased yet no evidence exists to demonstrate that her personal representative was substituted in her place. That this was clear violation of **section 82** of the Law of succession Act as it was the said representative who ought to have appeared before the judge during confirmation hearing pursuant to **rule 41(1)** of the Probate and Administration Rules.

Further that the respondent/petitioner omitted to include 3 assets of the deceased stated above.

Further that there is no evidence that the deceased had given inter-vivos gifts to the applicant and the respondent/petitioner.

8. That no evidence has been led of the Public Trustee Succession Cause that was lodged to entitle the administration of the deceased's money that was at the National bank of Kenya.

The advocates for the respondent, Rauto & Co. Advocates submitted that the applicant has sought for an order that the grant issued to the respondent be nullified and or cancelled but then, he does not tell the court what should happen to the administration of the estate. That though the applicant has alleged forgery on the consent used to file the succession cause, he has not proved forgery on the part of the respondent. That the deposit slip from Barclays Bank is for the year 1993 way back before the deceased died. There was no evidence that the deceased held an account with the said bank before she died. That **L.R. No. Lugari/Likuyani Block 1/Vihiga/191** is the basis of the confirmed grant. That the applicant has not sought for a share in the estate and has not complained of how the estate was shared out.

DETERMINATION:

9. The applicant is alleging forgery on the consent that was used to file the succession cause. Forgery is a criminal offence. There is no evidence that the applicant has reported to the police that the respondent has forged his signature on the said document. The grant in this matter was confirmed in 2011. The applicant has not explained why he waited for nearly 5 years for him to come up with such serious allegations. The allegation about the forgery has not been proved.

10. The applicant is not contesting that his sister Priscilla Kanaiza Kadenyi is not dead. Neither is he contesting that Jimmy Kelson Kiharangwa and Daniel Boitiva Luvembe are not her children. He is not contesting that Joyce Kakai Lundu never bought any land from his mother. He is not claiming any land from the estate of the deceased. He has not responded to the evidence that he and the respondent were given land by their mother before she died. The applicant has not thereby shown that the estate was wrongly distributed to the aforementioned beneficiaries.

11. As to the money alleged to be at National Bank, there is no evidence that there is such money still with the said bank. The respondent has explained that the money was withdrawn and used. The applicant has not produced anything from the bank to show that the money is still lying there. If the respondent fraudulently withdrew the money or wrongly used it, then the applicant should file criminal proceedings against him. The court cannot revoke the grant when there is no evidence that there is any part of the estate that is undistributed. This ground must fail.

12. Similarly there is no statement from Barclays Bank to indicate that the deceased has any money lying there. The deposit slip produced in court was for the year 1993 which was 3 years before the deceased died. The applicant cannot rely on such an old document to say that the deceased has money with the said bank. The applicant has not proved this ground.

The applicant is further seeking that the respondent do account for all the proceeds of any monies and assets in respect of the estate of the late Dorcas Kadenyi Zedekiah. The grant was confirmed in the year 2011. The appellant has not explained why he has waited for nearly 5 years to seek that the respondent account for monies from the estate. I find that there has been inordinate delay in bringing up the

application. The prayer to account for the money is unwarranted.

13. The confirmed grant clearly indicates that the land that was distributed was L.R.No. Lugari/Likuyani/Block 1(Vihiga)191. The land measured 1.214 Hectares which is equivalent to 3.00 acres. A total of 3.00 acres was distributed thereby leaving no land undistributed.

14. Though the applicant has sought for revocation of the grant he is not seeking for fresh grant of letters of administration. He is not alleging that he was left out in the distribution of the estate. The applicant has not shown that there was any impropriety in the manner the grant was obtained and confirmed. There are no sufficient reasons given for the court to revoke the grant.

The application dated 22nd April 2016 is thereby dismissed with costs to the respondent.

Delivered, signed and dated at Kakamega this 29th say of June, 2017.

J. NJAGI

JUDGE

In the presence of:

N/A..... for applicant

N/A..... for respondent

Paul..... court Assistant

Applicant Absent

Respondent Present