



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 673 OF 2015

IN THE MATTER OF THE ESTATE OF JACKSON WAMBUA NZUSYO (DECEASED)

CALLISTUS MBUI MWENGIAPPLICANT

VERSUS

KALONDU JACKSON WAMBUA RESPONDENT

RULING

The Application

This Court delivered a ruling herein on 23rd March 2016 in which it declined to revoke a grant of representation issued to the Respondent in Kithimani Principal Magistrate's Court Succession Cause No 23 of 2013. This Court in this regard held as follows in the said ruling:

"I agree that the party against whom the order of revocation of grant is sought is not the Respondent. The Applicant did not bring any evidence to show that the person against whom the order of revocation is sought, namely Petronilla Kalondu Wambua, is the same person as the Respondent, and this Court cannot make that assumption without any such evidence. In addition, no evidence of a grant of letters of administration intestate issued to Petronilla Kalondu Wambua was brought by the Applicant, and which may for all purposes and intent be non-existent, and cannot therefore be the subject of an order of revocation. To this extent the Applicant's prayer for revocation of grant is incompetent and fails. The Court will accordingly not address the issue of the jurisdiction as this Court has found that the grant sought to be revoked is not the one issued to the Respondent by the Kithimani Principal Magistrate's Court."

The Applicant has now applied by way of a Notice of Motion dated 29th April 2016 for orders that that this Court reviews and sets aside the said ruling, and reinstates the application dated 5th November 2015 for hearing. The application is supported by an affidavit sworn on 29th April 2016 and submissions dated 11th October 2016 filed by Andrew Makundi & Co. Advocates, the Applicant's Advocates.

The Applicant contends that the Respondent herein in her submissions dated 20/11/2016 stated that she was a witness to the sale agreement whereby the Applicant purchased the disputed property. Further, that the sale agreement relied on by the applicant indicated the name of the respondent as Petronila Kalondu a fact which the Respondent does not dispute, and that this Court ignored the admission made on the part of the Respondent as being the holder of the name Petronila Kalondu .

It is also alleged that the applicant did not have an opportunity to address the new issue of the

Respondent's name being different from the one in the grant and hence an apparent error was occasioned as the ruling delivered on 23/3/2016 was primarily hinged on the identity of the respondent which all along was not in dispute only to become the point of focus in the ruling.

The Applicant submitted that the Respondent did not dispute possessing the name Petronila Kalondu Jackson in paragraph 12 of the her replying affidavit dated 2/12/2015 and the grant sought to be revoked is one for the estate of Jackson Wambua Nzuysy, the Respondent's deceased's husband, which is not a different grant from the one the respondent was granted. He urged this Court to consider the names Kalondu Jackson Wambua and Pertonilla Kalondu Jackson as referring to the same person to whom the grant of letters of Administration and confirmation of the grant to the estate of Jackson Wambua Nzyusyo were issued to, and to consequently review the application dated 5/11/2015.

The Response

The Respondent relied on a Replying Affidavit she swore on 25th July 2016 and submissions dated 20th February 2017 she filed in Court. She denied that the issue of her name was a new matter, and stated that paragraph 12 of her replying affidavit filed in court dated 2nd December 2015 and served upon the Applicant's counsel on 4th December 2015 clearly indicated that the grant which the application sought to be revoked being different from the one she had and that the names therein are clearly indicated. Further, that there is no mention of the name Petronila in the said grant.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the Applicant and Respondent. The issue to be decided is whether the ruling delivered by this is amenable to review and /or setting aside. The provisions of Order 45 of the Civil Procedure Rules avail an opportunity to any person who feels aggrieved by a decree or order of the court to apply to have the said decree or order varied or set aside. The said Order is one of the Orders of the Civil Procedure Rules that is listed in Rule 63 of the Probate and Administration Rules as applying to succession causes.

Order 45 rule 1 of the Civil Procedure Rules provides the circumstances under which an order can be reviewed. The said provisions state that:

“ any person considering himself aggrieved by:

a. a decree or order from which an appeal is allowed but from which no appeal has been preferred or

b. a decree or order from no appeal is hereby allowed and from the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason desires to obtain a review of the decree or order my apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

The main ground raised by the Applicant is that there was an error on the face of the record in the ruling delivered herein as the issue of the Respondent's name was new evidence which he was not given a chance to respond to. However as noted by the Respondent, she did specifically deny being the person to whom the grant sought to be revoked was issued in paragraph 12 of her affidavit sworn on 2nd December 2015, which was in response to the Applicants' summons for revocation of grant dated 5th November 2015. She stated therein as follows:

“That the grant the Applicant is different from the one i have and as such his application is fatally defective. (Herein attached are copies of the said grant of letters of administration amd marked KJW 2a&b respectively”

The Applicant did not file any further affidavit to address this denial and bring any evidence to show that the grant that he sought to be revoked issued to one Petronilla Kalondu Wambua, was the one and same one issued to Kalondu Jackson Wambua, the person to whom the impugned grant of representation was issued. It is notable that the grant which the Applicant also attached to his summons for revocation of grant was one issued to a Kalondu Jackson Wambua.

Therefore for purposes of review of this Court's ruling, the fact of the name of the Respondent being different from that in the impugned grant cannot qualify as new evidence, as the material time under Order 45 Rule 1 with regard to the existence of the new evidence is the time when the decree was passed or the order made, and that such evidence was not within a person's knowledge or could not be produced by him. This rule therefore requires that the matter being relied on as new evidence should have been in existence at the time of the ruling. This was clearly not the case in the instant case, has the fact that the Respondent was denying being the holder of the impugned grant was brought to the Applicant's notice before the ruling was delivered.

Therefore, the position still remains that the person named in the prayers in the Applicant's summons for revocation as the one to whom the grant that is sought to be revoked was issued is Petronilla Kalondu Wambua, and these are not the names of the persons in the grant possessed by the Respondent which was the grant issued in Kithimani Principal Magistrate's Court Succession Cause No 23 of 2013. The statement by the Applicant that the two names belong to one and same person is not a fact that the Court can presume without evidence.

In addition without any evidence of proof, every possibility exists that the persons named in the said prayer by the Applicant may be different from the Respondent, and the onus was on the Applicant to show that they were one and the same persons which he has still not discharged. Lastly, it must be also be emphasized that the issue in the ruling by this Court delivered on 23rd March 2016 was that of revocation of grant, and not whether the Applicant entered into a sale agreement with the Respondent, to which the Respondent admitted. The only option available to the Applicant is to seek the correct prayers as against the Respondent, which he is still at liberty to do, or appeal this Court's ruling.

The Applicant's Notice of Motion dated 29th April 2016 is therefore found not to have merit for the foregoing reasons, and is hereby dismissed with costs to the Respondent.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 19th day of June 2017.

P. NYAMWEYA

JUDGE