



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
SUCCESSION CAUSE NO. 161 OF 2016
IN THE MATTER OF THE ESTATE OF SCIACOVELLI DONATO - DECEASED
SUSANNA SCIACOVELLI.....1ST APPLICANT/OBJECTOR
SVETLANA IKOROSTINKAYA...2ND APPLICANT/INTERESTED PARTY
VERSUS
GLADYS NASERIAN KAIYONI.....RESPONDENT/PETITIONER
RULING
[Summons dated 23rd February, 2017 and Summons dated 27th March, 2017]

1. The Petitioner, Gladys Naserian Kaiyoni is the Respondent in respect to the two applications which are the subject of this ruling. The first application belongs to Susanna Sciacovelli. I will henceforth refer to her interchangeably as Objector or 1st Applicant. Her application which is dated 23rd February, 2017 and filed in Court on 27th February, 2017 will be referred to as the 1st Application. The application dated 27th March, 2017 and filed on 10th April, 2017 belongs to Svetlana Ikorostinkaya. I will henceforth interchangeably refer to her as Interested Party or 2nd Applicant. Her summons for revocation of grant will be referred to as the 2nd Application.

2. The 1st Applicant through her application seeks orders as follows: -

“a) THAT pending the hearing and determination of this Application, this Honourable Court be pleased to stay the Confirmation of the Grant of Probate granted on 15th November, 2016 and issued on 7th December, 2016.

b) THAT the Grant of Probate issued to GLADYS NASERIAN KAIYONI on 7th December, 2016, be revoked.

c) THAT in the alternative to prayer (b) above this Honourable Court be pleased to vary and/or review the Grant of Probate issued to Gladys Naserian Kaiyoni on 7th December, 2016.”

3. The application is supported by the grounds on its face and the supporting affidavit of the 1st Applicant’s advocate Makaya Oweya.

4. On her part, the 2nd Applicant through her application seeks orders as follows:-

“1. Pending hearing and determination of this application this Honourable Court be pleased to stay the confirmation of the Grant of Probate granted on 15th November, 2016 and issued on 7th December, 2016.

2. The Grant of Probate issued to the Petitioner on 7th December, 2016 be revoked.

3. SVETLANA IKOROSTINKAYA be enjoined as an Interested Party in these proceedings.

4. The costs of this application be costs in the cause.”

5. The application is supported by the grounds on its face and a supporting affidavit sworn by the Interested Party on the date of the application.

6. The Petitioner/Respondent opposed the 1st Application through the affidavit dated 12th July, 2017. She opposed the 2nd Application through an affidavit sworn on 27th April, 2017.

7. The 1st Application for revocation of grant of probate is based on the sole ground that the application for the grant of probate was made in contravention of a consent order dated 21st September, 2016 between the 1st Applicant and the Petitioner in which they agreed that the petition for the grant of probate was to be made by both of them as the administratrices of the estate of the deceased Sciacovelli Donato.

8. The Petitioner’s response is that she applied for a grant of probate to the estate of the deceased after the 1st Applicant failed to communicate to her and did not show willingness to cooperate with her in administering the estate of the deceased.

9. As for the 2nd Application, the 2nd Applicant avers that she only learned of these proceedings on 15th March, 2017 after the 1st Applicant who is a step-daughter informed her of the same. She avers that she is interested in the estate as the wife of the deceased.

10. It is her case that the Petition was advertised in the Kenya Gazette on 11th November, 2016 and the grant of probate made on 15th November, 2016 before the same was issued on 7th December, 2016. She contends that this contradicted Section 67 of the Law of Succession Act, Cap. 160.

11. The 2nd Applicant avers that the Petitioner concealed her existence and that of her son Maksim Svetlov from the court despite having known of their existence through the Will left behind by the deceased.

12. She further avers that the deceased had left a valid Will in Torino, Italy and that she will at the opportune moment file proceedings seeking to challenge the Will which has been annexed to the Petitioner’s petition for grant of probate.

13. In response to this particular application, the Petitioner’s position is that the deceased left a valid Will appointing her executrix of his estate. Further, that the deceased has in said Will named the persons who are to benefit from the estate. She therefore denies concealing any material information from the court.

14. In summary therefore, the Petitioner’s view is that the grant of probate to the estate of the deceased issued on 7th December, 2016 complied with the law.

15. The advocates for the parties also filed and highlighted submissions in respect to the two applications. I will, in reaching my decision, take those submissions into consideration.

16. It is important to lay out in brief the history of this cause before making any determination. At this point in time, the history shows that the deceased Donato Sciacovelli died testate on 17th May, 2016 at Malindi. On 4th August, 2016 the Petitioner who identified herself as the wife of the deceased petitioned for grant of letters of administration ad colligenda bona in Malindi High Court Succession Cause No. 48 of 2016. A grant was issued to her on 5th August, 2016 limited to withdrawal of funds in certain bank accounts identified in the grant. This grant was later used by the Petitioner to withdraw Kshs. 15,800,000.

17. When the 1st Applicant got wind of the developments she moved to court challenging the Petitioner's appointment as an administratrix of the estate of the deceased. On 21st September, 2016 a consent was reached between the Petitioner and 1st Applicant confirming the order allowing the Petitioner to withdraw Kshs. 15,800,000 from the deceased's bank accounts. It was also agreed that the sum of Kshs.7,000,000 be withdrawn from the same accounts by the 1st Applicant. There were other orders but important to this application was an order that the substantive petition be filed by the Petitioner and the 1st Applicant as co-executors and co-administratrices of the estate of the deceased.

18. On 11th November, 2016 a notice appeared in the Kenya Gazette in respect to Malindi High Court Succession Cause No. 161 of 2016 in which the Petitioner sought a grant of probate to the estate of the deceased. The grant was issued on 7th December, 2017.

19. The question is whether grounds for revocation of the grant issued to the Petitioner have been established.

20. Starting with the 1st Application, I note that the Petitioner does not dispute the existence and the contents of the consent reached on 21st September, 2016 between herself and the 1st Applicant. In that consent they agreed that they would seek to administer the estate of the deceased together. The Petitioner went against that consent. She claims that the 1st Applicant was not cooperative. There is no evidence that she reached out to the 1st Applicant before taking action. It is her case that the 1st Applicant was in Europe. This excuse is not good enough for the 1st Applicant had an advocate on record. In any case she ought to have brought the uncooperativeness of the 1st Applicant to court's attention before seeking the grant of probate. Her actions ran afoul of Section 76(a) of the Law of Succession Act as the proceedings to obtain the grant were defective in substance. The proceedings were in clear contravention of a court order.

21. Secondly, the grant was obtained through concealment of something material to the cause. Although the order was part of the court record, she had a duty to disclose that there was a court order directing her to apply for the grant together with the 1st Applicant. The grant she obtained is therefore susceptible to revocation on the ground found in Section 76(b) of the Law of Succession Act. She concealed something material to the case. For those two reasons, the 1st Application succeeds.

22. As for the 2nd Application, I find that there is no dispute that the notice of the petition for grant of probate appeared in the Kenya Gazette on 11th November, 2016. The grant was issued on 7th December, 2016. In the notice, the Deputy Registrar warned that:-

“The court will proceed to issue the same (here read grant) unless cause be shown to the contrary and appearance in this respect entered within thirty (30) days from the date of publication of this notice in the Kenya Gazette.”

23. That warning is consistent with Section 67(1) of the Law of Succession Act which provides that:-

“No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for the grant, inviting objections thereto to be made known to the court within a specified period of not less

than thirty days from the date of publication, and the period so specified has expired.”

24. The grant herein was issued before the expiry of thirty days. Similar action was frowned upon by the Court of Appeal in **Sally Njambi Mahihu & another v Mwanguza Kai Deche & another [2017] eKLR** where it held that:-

“The gazette notice specified that the grant would be issued within 30 days if no objection was raised. The grant was gazetted on 18th March, 2015 and issued on 24th March, 2015, one week later.

The only mischief intended by the requirement that the notice of the application for a grant be for a period of not less than 30 days from the date of publication, is to avail any objector the time and opportunity to participate in the probate proceedings.

With respect, it was therefore in grave error for the learned Judge, even after noting that there was an anomaly in the manner the grant was issued and that it ought to have been issued on 19th April, 2015, nevertheless hold that the grant was properly issued.”

25. One of the grounds of appeal in the decision cited above was that the grant had been issued before the expiry of the 30 days period envisaged by Section 67 (1) of the Law of Succession Act.

26. In the case at hand, the grant was issued prior to the expiry of thirty days from the date of the notice in the Kenya Gazette. The grant was therefore rendered defective and the 2nd Application should succeed on this ground.

27. I will avoid making any determination as to whether the Petitioner concealed the existence of the 2nd Applicant and her son. In doing so, I am avoiding a situation why I may make comments prejudicial to any of the parties because it appears that a battle may be looming in regard to the administration and distribution of the estate of the deceased. On the 2nd Applicant’s prayer to be allowed to join these proceedings, I only need to point out that a person who objects to the issuance or confirmation of a grant does not need the permission of the court to file the objection. The Interested Party is therefore before this court as a matter of right.

28. I only wish to note that succession proceedings should be prosecuted with utmost good faith and attended by full disclosure. That is the only way that dependants of a deceased can have a good environment for amicably sharing the property left behind by the deceased.

29. In conclusion, I find that the two applications for revocation of the grant issued to the Petitioner on 7th December, 2016 are merited. Each application is allowed as prayed. Costs in respect of each application shall be in the cause.

Dated, signed and delivered at Malindi this 28th day of Sept., 2017.

W. KORIR,

JUDGE OF THE HIGH COURT