



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 3 OF 2006

*(IN THE MATTER OF THE ESTATE OF MBUTHIA RWENGO ALIAS JOSEPH MBUTHIA RWENGO
(DECEASED))*

JOSEPH WANGAI MBUTHIA..... APPLICANT

VERSUS

JOHNSON WAGURA MAINA.....RESPONDENT

JUDGMENT

By a summons for revocation or annulment of grant filed in this court on 7th October, 2009, the applicant sought to revoke or annul the grant of letters of administration made to the respondent in respect of the estate of Mbuthia Rwengo alias Joseph Mbuthia Rwengo (deceased) who died intestate on 19th April, 1987.

In the affidavit sworn in support of the summons, the applicant swore that the grant was 'fraudulently confirmed' because the respondent, who is the administrator of the deceased's estate, concealed the fact that half of the land parcel referred to as **Title No. Tetu/Thatha/457** allocated to their house was to be shared between the applicant and the respondent.

The applicant acknowledged that he consented to the confirmation of grant but that that he was not aware of how the applicant had proposed to distribute the estate. He swore that the grant issued to the respondent should be revoked to enable him file an affidavit of protest against confirmation of the grant.

In reply to the applicant's application, the respondent filed a replying affidavit in which he denied having misled the applicant into signing the consent form for confirmation of the grant of letters of administration. He also swore that the applicant is not entitled to any share of the deceased's estate since he had been given his own land by the deceased in his lifetime.

My study of the court record reveals that the respondent petitioned for letters of administration intestate of the deceased's estate on 6th February, 2006. According to the affidavit sworn by the respondent in support of the petition, the deceased was survived by eleven survivors whom he listed and named as follows:

1. Grace Wanjiku Mbuthia (wife)
2. Johnson Wagura Maina(son)
3. Mugo Mbuthia(son)

4. Joseph Wangai Mbuthia(son)
5. Samuel Kaigwa Mbuthia(son)
6. Cyrus Wangombe Mbuthia(son)
7. Francis Muthui Mbuthia(son)
8. Stephen Mathenge Mbuthia(son)
9. James Ngatia Mbuthia(son)
10. Rahab Wangechi (daughter)
11. Johana Ndiritu Mbuthia (son)

The assets comprising his estate were listed as land parcels known as **Title No. Tetu/Thatha/457** (measuring 0.73 ha) and **Title No. Euaso/ Nyiro/Suguroi/Block V/443** (measuring 6.38 ha).

The schedule to the certificate of confirmation of grant shows that **Title No. Euaso/ Nyiro/Suguroi/Block V/443** devolved upon Samuel Kaigwa Mbuthia while **Title No. Tetu/Thatha/457** devolved upon Johnson Wagura Maina and James Ngatia Maina as proprietors in common in equal shares.

The record also shows that prior to the confirmation of grant all the beneficiaries executed a consent in a prescribed form showing that they were all in agreement that the grant be confirmed. Based on this consent, the grant was confirmed on 7th November, 2008.

At the hearing of his summons, the applicant testified that his deceased father had two houses. He named his mother as Ann Wanjru Wathigio who, apparently, is now deceased. Apart from himself, the other members in his house were the respondent, Johana Nderitu and Mugo Mbuthia.

According to the applicant, he was all along aware of the succession cause in respect of his father's estate except that it was agreed that the parcel of land comprising **Title No. Tetu/Thatha/457** should be shared equally between the two houses. The share due to their house was to be divided equally between him and his brother, the respondent herein, as the rest of the deceased's children were said not to be interested in the estate. It was also his evidence that he lives on this parcel of land and that he has no alternative land to go to.

The applicant produced some receipts to show that he had previously purchased land of his own in 1975 from a land buying company called Mweiga General Farming Company but he sold the land in order to pay school fees for his children.

As far as **Title No. Euaso/ Nyiro/Suguroi/Block V/443** is concerned, he was not aware whether it belonged to his father; however, he testified that he was aware that his step-brother, Samuel Kaigwa Mbuthia, had been given this particular parcel of land by his late father before he died.

Samuel Kaigwa Mbuthia (PW2) himself testified and clarified that indeed the applicant and the respondent shared the same mother, Ann Wathigio Mbuthia, who was the deceased's first wife. The other children in that house were Johana Nderitu Mbuthia and Mugo Mbuthia.

This witness testified that he was from the second house and he named his mother as Grace Wanjugu Mbuthia; apart from himself, the other children in that house were Bilha Wangechi Mugo, Cyrus Wangombe Mbuthia, Francis Muthui Mbuthia, Nderitu Mbuthia and James Ngatia Mbuthia.

He testified further that his father made inter vivos transfers to some of his children; for instance, Johana

Nderitu Mbuthia was given land in Tetu, Mugo Mbuthia was given land in Murugi Estate while the applicant and the respondent were given a portion of **Title No. Tetu/Thatha/457**. The deceased's two houses, according to him, were given an equal share of this parcel of land and the children in each house were to share equally the share allocated to their respective houses. Samuel Kaigwa Mbuthia himself was given land in Gatanga; Stephen Mathenge was given land in Muruatetu.

It was also his evidence that when they signed the consent, they were not aware what they were signing for, and in particular, they were not aware how the respondent proposed to distribute the estate. He confirmed that both the applicant and the respondent live on their house's portion of **Title No. Tetu/Thatha/457**. James Ngatia Mbuthia also lives on the same parcel but on the portion allocated to the second house; according to him, James Ngatia should inherit the second house's portion.

He also confirmed that the applicant had his own land in Mweiga but that he sold it. He testified that both the applicant and the respondent together with James Ngatia were not given any land by their deceased father and it is for this reason that they are living on **Title No. Tetu/Thatha/457**.

The respondent died during the pendency of this cause and therefore he was substituted in the proceedings by his daughter Jane Wambui Wagura who testified that it is only the applicant who lives on **Title No. Tetu/Thatha/457**. She testified also that the applicant had chased everybody else away from the land although this land was to be shared equally between James Ngatia and Johnson Wagura Mbuthia as representatives of their respective houses. It was her evidence that the applicant has his land in Mweiga where he is supposed to move.

What I understand all this evidence to reveal is that, as much as the applicant has sought to impugn the grant of letters of administration made to the respondent, his primary concern is about the confirmation of the grant made to the respondent and the subsequent distribution of the deceased's estate. This is apparent from the testimony of both the applicant and the respondent but it is also clear from the affidavit which he swore in support of the summons for revocation or annulment of grant. This is what he said in one of the paragraphs in that affidavit:

11. That the grant issued to the respondent should be revoked so that I may be able to file affidavit of protest to the confirmation of grant.

Again, it is also apparent that counsel for the applicant was very clear in his mind from the very beginning what his client's intentions were when he appeared before Makhandia, J (as he then was) on 28th September, 2009, to prosecute a certain application; he submitted as follows:

I seek now prayers 2 & 3 on the face of the application dated 25th February, 2009. It is brought under rules 49 & 79 of P & A Rules. We have no quarrel with the grant as issued. However, we are challenging the distribution of the estate. We are also not challenging the entire distribution. The consent was taken to the applicant in a meeting at home and was told to sign. He signed the same without seeing the application and the supporting affidavit. On reflection, I would wish to withdraw the application. I will have to file an application for revocation and or annulment of grant.

The application was accordingly withdrawn but it largely represented what has turned out the applicant's case in the present summons for revocation or annulment of grant which the applicant filed after the withdrawal of the application of 25th February, 2009. The withdrawn application sought, among other things, the setting aside of the certificate of confirmation of grant issued on 7th day of November, 2008.

I must hasten to state that if the applicant has no issue to pick with the grant, as he has clearly stated in such clear and unambiguous terms, it follows that he has absolutely no ground upon which he can fault the same grant on any of the grounds stipulated in **section 76** of the **Law of Succession Act, cap 160**.

As far as I understand his application, it was based on the grounds prescribed in **section 76(b)** and **(c)**

which 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) ...

(d) ...

(e) ...

If the grant is admittedly regular, then the issue of whether the proceedings to obtain it were defective in substance or 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 does not even arise. In any event, having admitted that the grant was valid, there was no evidence, and there couldn't have been any, to show that it was tainted in any of the ways prescribed by the Act. To put it straight, the applicant's summons is not only misconceived but it also falls short of the threshold set by **section 76** of the Act in any event.

If I have to add anything, all I can say is that once it is generally acknowledged that a grant has been validly obtained, the question whether or not a party's consent to confirm it was obtained appropriately or by fraud cannot be a subject for determination in the context of a summons filed under **section 76** of the Law of Section Act. In my humble view, where an applicant has a valid case to the effect that there was some misrepresentation, or undue pressure or inducement, or any form of fraud employed in obtaining the consent of any person for confirmation of a grant, the appropriate application would be to set aside the confirmation order. The grounds for such an application to set aside what in effect is a consent order would, in my humble view, be the same grounds that apply in an ordinary civil application to set aside a consent order. I reckon that it is such an application that the court will properly interrogate the circumstances under which the consent in issue was obtained or generally the kind of issues that have emerged in the applicant's summons.

I have already noted that to the extent that the applicant's application was filed under **section 76** of the **Law of Succession Act** when no ground upon which the grant was made to the respondent can be revoked or annulled has been demonstrated to exist, it is misconceived; it is also an abuse of the process of this court. In conclusion, therefore, I would dismiss the applicant's summons for revocation or annulment of grant dated 5th October, 2009 but with no orders as to costs. It is so ordered.

Signed, dated and delivered in open court this 22nd September, 2017

Ngaah Jairus

JUDGE