



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 1044 OF 2010

**IN THE MATTER OF THE ESTATE OF THE LATE NJAU KANYORA alias NJAU S/O
KANYORA-DECEASED**

Samuel Kanyora Njau.....Applicant

Versus

Paul Githumbi Njau.....Respondent

RULING

Njau Kanyora alias **Njau S/O Kanyora** (herein after referred to as the deceased) died intestate on 29th June 2001 at the age of 75 years. On 17th November 2010, **Paul Githumbi Njau** (hereinafter referred to as the petitioner) a son to the deceased petitioned for letters of administration intestate to the deceased's estate in this cause. In the affidavit in support of the said petition, the following persons were listed as persons surviving the deceased:-

- i. Samuel Kanyoria Njau -----Son*
- ii. Paul Githumbi Njau-----Son*
- iii. James Ndiritu Njau-----Son*
- iv. Joseph Maina Njau-----Son*
- v. Ann Wambui Maina-----Son*
- vi. Beatrice Waruguru Njau-----Son*

The grant of letters of administration was confirmed on 27th July 2012. On 11th February 2015, **Samuel Kanyora Njau** (hereinafter referred to as the applicant) filed a summons general seeking orders that he be substituted in this matter in place of **Paul Githumbi Njau** (hereinafter referred to as the Respondent) who has refused to execute the said grant by distributing the deceased's estate as required by law. The application is supported by the annexed affidavit of the applicant annexed thereto the crux of which can be summarized as follows:-

- i. That he is a beneficiary to the estate of the deceased and that one of the beneficiaries has given him consent to be substituted in this matter.*
- ii. That the administrator has failed to execute certificate of confirmation of grant as required causing other beneficiaries to suffer a lot as they cannot have their shares from parcels of land which are*

still in the deceased's name.
iii. *That the said grant has become useless and inoperative.*

The application is opposed. The Respondent in this application filed a replying affidavit on 7th September 2015 in which he *inter alia* states as follows:-

- i. *That it's not true that he has refused to execute the certificate of confirmation of grant but rather there are some beneficiaries whose shares out of L. R. No. Mahiga/Munyage/263 were wrongfully indicated on the grant namely James Ndiritu Njau & Joseph Maina Njau.*
- ii. *That prior to his death the deceased had given part of his estate to his sons and that the said James Ndiritu Njau & Joseph Maina Njau had been allocated 2.06 acres each out of the above parcel of land and Duncan Njau Gitumbu had been given 0.15 acres.*
- iii. *That he has tried to discuss with the beneficiaries to agree to amend the grant to reflect the wishes of the deceased's and all have agreed except the applicant herein.*
- iv. *That the application is incompetent since the applicant has not sought and obtained the consent of all the beneficiaries.*
- v. *Further, there were shares for Gathuthi Tea Factory Company Ltd which were not included in the grant, hence the need to rectify and the applicant has refused to consent to the rectification to include the said shares.*

The applicant filed a reply to the replying affidavit dated 14th July 2015 in which he essentially disputed the averments in the Respondents affidavit.

At the hearing the applicant who is acting in person adopted the affidavits and stated that he did not wish to make submissions while counsel for the Respondent filed written submissions. Counsel submitted that no compelling reasons have been offered to warrant the substitution.

I have carefully considered the affidavit evidence in this cause, and the submissions filed by the Respondent and in my view, the following is the only issue for determination, namely:-

Whether the applicant demonstrated sufficient grounds for the court to grant the orders sought.

The applicant has not stated the provisions of the law under which the application is expressed. However, under Article **159 (2) (d)** of the Constitution of Kenya 2010, the court is enjoined to administer justice without undue regard to procedural technicalities.

Section **47** of the Law of Succession Act^[1] enjoins the High Court to entertain any application and determine any dispute under the Law of Succession Act and pronounce such decrees and make such orders therein as may be expedient. Rule **73** of the Probate and Administration Rules provides as follows:-

"73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

Rule **49** provides the 'a person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these rules shall file a summons supported if necessary by an affidavit.'

I have carefully considered the crux of the applicants application and I take the view that it falls under the provisions of Section **76** of the Law of Succession Act^[2] discussed below.

Discussing a similar issue as in the present case, **Khamoni J** in the matter of the estate of Mwangi Mugwe alias Elieza Ngware^[3] had this to say:-

"I do not think Rule 49 and 73 of the Probate and Administration Rules come in to assist the

applicant beyond enabling the applicant to bring this application by way of summons.In the circumstances therefore, it is my considered view that the proper provisions of the law to apply is section 76 (e) of the Law of Succession Act and Rule 44 of the Probate and Administration Rules whereby the applicant would apply for revocation or annulment of a grant on the ground that the grant has become useless and inoperative through subsequent circumstances. The applicant would proceed to put a prayer in the same application that a new grant be made to him and could as well add a further prayer , if need be for the confirmation of a new grant. The application should, of course, be supported by consent from adult beneficiaries in the estate of the deceased person..."

As stated above, I am persuaded that the applicants applications falls under Section **76 (d) , (ii) & (e)** of the Law of Succession Act[4] which provides 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 an interested party or of its own motion-

(d) the person to whom the grant was made has failed, after due notice and without reasonable cause either

(ii) to proceed diligently with the administration of the estate;

(e) that the grant has become useless or inoperative through subsequent circumstances

The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of grant to demonstrate the existence of any, some or all the grounds stated under the said section. A close look at Section **76** shows that the grounds can be divided into two categories:- **(a) the first three deal mainly with the propriety of the grant making process; (b) the other grounds deal mainly with mal-administration i.e personal representatives have not been effective in administration. In the present case the administrator is alleged to have failed to act.**

A grant can also be revoked for lack of diligence in administering the estate or for becoming in operative or useless. (See *In the matter of the estate of Mohamed Mussa*[5]and *in the matter of the estate of Elizabeth Wamaitha Ngaruiya-deceased*.[6]

In the matter of the Estate of Murathe Mwaria-deceased[7]**Koome J** summarised the grounds for revocation of a grant under Section **76** as follows:-

- i. when the procedure followed in obtaining the grant is defective in substance.*
- ii. when the grant is obtained fraudulently by making a false statement.*
- iii. making an untrue allegation of fact essential in point of law to justify the grant.*
- iv. or when the person who has the grant has failed to proceed diligently with the administration of the estate.*

In the above list we can add where the grant has become useless and inoperative through subsequent circumstances. Under Section **76**, the court has discretionary power when faced with application for revocation. It can make such orders as it considers fit in the circumstances. The court is not bound to issue revocation even where the case has been set out under Section **76**.

Turning to the facts of this case, the applicant alleges that the respondent has failed to finalize the distribution of the estate. It's important to mention that the applicant has not obtained the consent of the other beneficiaries, hence on this ground, the application does not meet the requirements.

Secondly, the respondent has given a detailed response in his replying affidavit as explained above giving reasons as to why the distribution has not been finalized and even blaming the applicant for not co-operating. I am persuaded by the explanation offered by the Respondent in his replying affidavit which I find to be more candid, logical and probable.

I find nothing in this application to demonstrate that the applicant has established any of the grounds stated in Section 76 of the Act. I therefore answer the issue framed earlier in the negative. Accordingly, I find that the application dated 30th January 2015 has no merits and I hereby dismiss it with costs to the Respondent.

Right of appeal 30 days

Dated at Nyeri this 18th day of February 2016

John M. Mativo

Judge