



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

The Applicant herein filed an application by way of summons for revocation of grant dated 5th November 2015 wherein he is seeking the following orders:

1. That pending interparte hearing and determination of this application, interim restraining orders of issue restraining the Respondent from selling, transferring, charging, or in any other way disposing off the deceased's land parcel No. NDALANI/NDALANI 1/313.
2. That pending hearing and determination of this application, an injunction order do issue against the Respondent, her agents, servants and /or representative from transferring, entering surveying, taking possession and /or interfering with the applicants parcel of land measuring 5 hectares and 2 meters in plot No. NDALANI/NDALANI 1/331.
3. That the Grant of Letters of Administration Intestate made to Petronilla Kalondu Wambua on 23rd January 2014 and confirmed on 18th September 2015 by the Principal Magistrate's Court at Kithimani in Succession Cause No. 23 of 2013 be revoked.

The grounds for the application are that the Respondent has fraudulently and by concealment of material facts obtained a grant of letters of administration intestate of the estate of Jackson Wambua Nzusyo ("the deceased") which is now confirmed, and that one of the assets of the deceased assets that has been wholly given to the Respondent is land parcel No. NDALANI/NDALANI 1/313, of which a portion measuring 5 hectares and 2 meters has been in the Applicant's occupation and use since 1998 after he purchased it from the deceased. The Applicant avers that the Respondent has sought to evict him from the portion of land, and that the Magistrate's Court did not have jurisdiction to entertain the Respondent's petition.

The Applicant attached a copy of a sale agreement he entered with the deceased to purchase a parcel of land measuring 5 meters and 2 meters from his parcel of land No. NDALANI/NDALANI 1/313 to his supporting affidavit sworn on 5th November 2015, and also attached the copies of the of the Grant of Letters of Administration Intestate and the Certificate of confirmation of grant issued to the Respondent by the Principal Magistrate's court at Kithimani in succession cause No. 23 of 2009 on 23rd January 2014

and 18th September 2015 respectively. The Applicant also averred that the Respondent was one of the witnesses to the sale agreement and participated in collecting the installments of payments from the Applicant's advocate.

The Applicant's counsel, Andrew Makundi & Co. Advocates, filed submissions dated 14th December 2015, wherein it was urged that under section 48(1) and 49 of the then Law of Succession Act, subordinate courts could only adjudicate succession causes in which the value of the estate did not exceed Kshs 100,00/=, and that the Respondent while petitioning the Principal Magistrate's Court in Kithimani for letters of administration for the deceased estate stated that the said estate was worth Kshs 500,000/=.

Therefore, that the grant of letters of administration intestate to the Respondent by the said Court was an illegality and null and void. Reliance was placed on various judicial authorities by the Applicant's Advocate, including the decision of the Court of Appeal in **Stanley Maina Mwangi vs Sabina Wanjiru Mwangi (2014) e KLR**. The counsel also submitted that the Respondent while knowing that the Applicant had purchased a portion of NDALANI/NDALANI 1/313 from the deceased, petitioned for letters of administration fraudulently by indicating that the deceased's estate had no liabilities and by leaving out the Applicant as a creditor, and therefore section 76 of the Law of Succession Act was applicable.

The Response

The Respondent filed a replying affidavit sworn on 2nd December 2015 in opposition to the Applicant's application. She admitted therein that the Applicant bought a piece of land from her late husband Jackson Wambua Nzusyo but disputed the acreage he bought. The Respondent denied that the Applicant purchased 5 hectares and 2 metres as alleged and stated that he bought 3 acres out of the plot No. 313 for a consideration of Kshs. 45,000/=, and that she was ready and willing to transfer to him the same upon acquisition of the title deed. The Respondent also alleged that the agreements annexed in the Applicant's application are forgeries.

The Respondent further denied that she has threatened to evict the Applicant whom she alleged is peacefully utilizing the portion he bought from the deceased. She also averred that the grant was properly issued to her and that she should be allowed to proceed to administer the estate of the deceased as required by law. Lastly, the Respondent contended that the grant the Applicant is seeking to revoke is different from the one issued to her and as such his application is fatally defective. The Respondent reiterated these arguments in submissions she filed in Court on 21st January 2016.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made herein. The issue to be decided is whether the orders for revocation of grant issued to the Respondent should be revoked, and secondly whether the Applicant has established reasonable grounds for the issue of the temporary injunction orders he seeks against the Petitioner should be granted.

On the first issue I note that the orders sought are revocation of the grant of letters of administration intestate issued to a Petronilla Kalondu Wambua on 23rd January 2014 in Succession Cause No. 23 of 2013 by the Principal Magistrate's Court at Kithimani. The copies of grant of letters of administration attached in support by the Applicant are of a grant of letters of administration intestate issued to Kalondu Jackson Wambua, the Respondent herein. The Respondent has argued that the Applicant's application is defective to the extent that she is not Petronilla Kalondu Wambua.

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 Kitihimani Principal Magistrate's Court.

On the second issue as to whether the injunctions sought against the Respondent can issue, I am also faced with the legal difficulty of granting a temporary injunction in this instance as there is no pending substantive suit involving the estate of the deceased and/or the parties herein in this Court. This suit was commenced by way of a summons for revocation, and this Court's jurisdiction at the time was given by the then section 48 of the Law of Succession Act to revoke grants of representation given by magistrate's courts. However, to the extent that the Applicant has not succeeded in revoking the grant of letters of administration given to the Respondent in the Kithimani Principal Magistrate's Court, the substantive petition for the administration of the deceased's estate is thus still pending in the Principal Magistrate's Court in Kithimani, and unless and/or until that suit is transferred to this Court or a new substantive suit filed by the parties herein, there will be no basis on which the temporary injunctions can be anchored.

In the premises the Applicant's summons for revocation of grant dated 5th November 2015 fails. There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 23rd day of March 2016.

P. NYAMWEYA

JUDGE