



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 363 OF 2009

IN THE MATTER OF THE ESTATE OF ISAAC WAMBUGU S/O WAWERU-DECEASED

RULING

Esau Waweru Wambugu, a beneficiary to the deceased's estate in an application dated 2nd August 2010 seeks orders to set aside the orders made on 14.5.2010 confirming the grant issued in these proceedings and prays that the grant be recalled and cancelled.

There is a second application dated 23rd August 2010 by **Dishon Kiiru Wambugu**, the administrator to estate seeking orders to authorize the Deputy Registrar of this court to execute the necessary transmission documents on behalf of **Esau Waweru Wambugu** to give effect to the grant issued in these proceedings.

I am not able to comprehend why both applications have been pending in court for almost six years and no explanation has been offered for the delay but it's clear there has been evident lack of action by both sides. I find such a long and unexplained delay to be unacceptable especially so when it can evidently be attributed to both parties.

On 24th February 2016, **Mr. Kariuki**, counsel for the applicant in the application dated 2nd August 2010 asked that his application be determined first, a position I agreed with, but after studying the record, I formed the opinion that both applications can conveniently be determined together without causing prejudice to either party and my opinion in this regard is reinforced by the following reasons, namely, **(a) both parties addressed both applications in their written submissions, (b) this court has powers under Rule 73[1] to make such orders as may be appropriate for the interests of justice, (c) the two applications have been pending in court for an unreasonably long period, hence the need to determine both now, and (d) determining the two applications together will not prejudice either party.**

The applicant in the application dated 2nd August 2010 seeks to have the orders made on 14th May 2010 confirming the grant set aside and that the said grant be recalled or cancelled. The reasons offered are *inter alia* that he was not served with the application. But I note in the court file an affidavit of service dated 12th May 2010 which states that he was served. This affidavit has also been annexed to the Replying Affidavit of **Dishon Kiiru Wambugu** and no leave was sought to file a further affidavit to dispute the contents of the said affidavit. In absence of convincing evidence to the contrary, I have no reason to doubt that the said application was served.

The said **Esau Waweru Wambugu** also disputes the mode of distribution stated in the grant. As per the grant, the three beneficiaries are to get equal shares of the deceased land. The applicant has been aware of these proceedings and he never filed a protest or objection and his belated application can only be construed as an afterthought.

It is important for me to point out that a grant of representation, whether or not confirmed, may be

revoked or annulled at any time by the court on its own motion or on application by an interested party by virtue of the provisions of Section 76 of the Law of Succession Act.[2] Revocation pursuant to the said section can only be on any of the following grounds, namely, that the proceedings to obtain the grant were defective in substance, that the grant was obtained by reliance on false statements, non-disclosure or concealment of important matter or information or the person to whom the grant was made has failed to apply for confirmation within the prescribed time or has failed to diligently administer the estate or has failed to produce to the court within the prescribed time any inventory or account of administration in law or produces any inventory or account which is false, and that the grant has become inoperative through subsequent circumstances. In short, an application for revocation ought to be premised on the grounds set out in Section 76 cited above otherwise it fails.[3]

I am aware that the application before me is expressed under Rules 49 & 73[4]. In my view, such an application as the one before me can only touch on issues relating to the confirmation process, that is, the integrity of the grant making process. In other words, the applicant must demonstrate that the confirmation process was not in conformity with the law. I have carefully examined the court record, and I find nothing to show that the confirmation process was not in conformity with the law nor do I find any grounds to warrant the cancellation of the grant. As mentioned above, I am satisfied that the application was properly served, that the applicant was fully aware of these proceedings from inception, and that he never filed any objection or a protest and further, there is no material before me to persuade the court to re-distribute the property.

I find that the application dated 2rd August 2010 lacks merits, hence I hereby dismiss it.

As, mentioned earlier, the two applications can conveniently be determined together, and since both advocates submitted on the second application, and upon considering the entire record and the application dated 23rd August 2010, I find that it would be in the interests of justice to allow the prayers sought in the said application.

Accordingly, I hereby order as follows:-

*a. **That** the application dated 2nd August 2010 be and is hereby dismissed. with costs to the Respondent.*

*b. **That** the **Esau Waweru Wambugu** be and is hereby ordered to sign all the necessary documents/forms to facilitate the sub-division of title number **Thegenge/Kihora/91** into three equal portions to be shared among **Dishon Kiiru Wambugu, Esau Waweru Wambugu and Jacob Kiige Wambugu** as per the confirmed grant issued in this cause on 14th May 2010 and to transfer the respective portions to each of the aforesaid persons.*

*c. **That** in the event of the said **Esau Waweru Wambugu** failing to sign the said documents within **14 days** from the date of being so requested, then the Deputy Registrar of this Honourable be and is hereby authorized to sign such documents as may be necessary to facilitate the sub-division of title number **Thegenge/Kihora/91** into three equal portions to be shared among **Dishon Kiiru Wambugu, Esau Waweru Wambugu and Jacob Kiige Wambugu** as per the confirmed grant issued in this cause on 14th May 2010 and to transfer the respective portions to each of the aforesaid persons.*

*d. That the said **Esau Waweru Wambugu** shall bear the costs of both applications.*

Right of appeal 30 days

Signed, Delivered and Dated at Nyeri this 19th day July of 2016

John M. Mativo

Judge

[1] Probate and Administration Rules

[2] Cap 160, Laws of Kenya

[3] See *In the Matter of the Estate of Patrick Mbugua Njoroge- deceased*, Succession Cause No. 659 of 1989, Nairobi, Waweru J.

[4] Probate and Succession Rules