



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
SUCCESSION CAUSE NO. 381 OF 1994

IN THE MATTER OF THE ESTATE OF DUBA ALI - DECEASED.

GODANA UCHU DUBA APPLICANT

-VERSUS-

MUSHLIM ALI BUDA A.K.A MUSHILIMU ALI RESPONDENT

JUDGEMENT

Godana Uchu Duba , herein after the applicant) moved this court vide Summons for revocation and or annulment of Grant dated 19/2/2013 in which he seeks the following orders,

1. Spent
2. Spent
3. THAT the grant of letters of administration intestate issued to the Respondent herein in this matter on or about the 14th day of May, 1996 and confirmed on or about 5th February, 1997 be revoked and or annulled and consequently the status quo ante to issuance of the said Grant be restored.
4. THAT this honorable court be pleased to issue and or give any other directions and or orders as it may deem fit in the interest of justice taking into consideration the nature and circumstances of this case.
5. THAT the costs of this application be provided.

It is alleged in the grounds in support and the annexed affidavit of the applicant that the Confirmed grant was obtained fraudulently by the making of false statements and concealment from the court of material facts. The grant was obtained by means of untrue allegation of a fact essential in law to justify the Grant.

In brief, the facts as set out in the Affidavit of the applicant are that the Respondent is a sister in law to the applicant being wife to the applicants late brother “ALI DUBA”, the deceased herein.

ALI DUBA was the owner of land known as plot No. 370 Lengenet Scheme. It is the applicant who pursued and even made some necessary payments on behalf of the deceased to secure the land from the settlement scheme when the deceased was imprisoned for 14 years.

The applicant has resided in the land since 1972. The deceased came out of prison in 1985 and married

the Respondent in 1987. Before he died, the deceased agreed to carve out 1.5 acres of land from the parcel to compensate the applicant for the work she had done. An agreement was signed to this effect.

Upon the death of the deceased the Respondent caused the entire land to be registered in her name. In reply the Respondent in

a Replying Affidavit sworn on 13/3/2013 states that the Grant issued to her was regular and legal.

It is denied that the applicant played any role in securing the land.

Directions were given on the 13/2/2014 that the application herein be disposed of by way of viva voce evidence.

The applicant adopted his statement as his testimony and he adopted the bundle of documents dated 2/5/2014 and filed on 5/5/2014 as his exhibits (marked exhibits 1 to 15)

These documents include;

1. Succession forms (SC)
2. Letters of Administration and confirmed grant.
3. Receipts for payments.
4. S.F.T. Charge upon suit land herein
5. Letter/agreement/acknowledgement dated 6/6/1993.
6. Letter dated 8/11/2000
7. Letter/agreement/acknowledgement dated 30/1/2001.
8. Letter dated 27/3/2003 and the map.
9. Proceedings in land dispute to fund held on 21/11/2001.
10. Letter dated on or about 12/2/2005
11. Letter dated 6/5/2003
12. Letter dated 28/3/2003
13. Land Dispute appeal decision
14. Letter dated 12/5/2003
15. Copy of Respondents marriage certificate,

On Cross examination he stated that his claim was for 1½ acres of the land. He has his own land in Eldoret. The 1½ acres had been given to him by the deceased for taking care of the and. It was a reward. He did so in writing (Exhibit 5)

PW2 acknowledged that he wrote the document marked exhibit 5 which is an agreement between Ali Duba and Godana Uchu whereby the former gave the applicant 1 ½ acres of land. PW2 further referred to document No. 7 between the applicant and the respondent herein where the two agreed before a group of elders that, the applicant herein was to get 1 ½ acres of the land. Nobody was forced to sign either of

the agreements. PW3 stated he was present when the agreement was signed. The applicant has been living on the land since 1972.

PW4 told the court that he made an agreement dated 30/1/2001. The said agreement was signed by both the applicant and the Respondent of their own free will. This is document produced as exhibit 7.

In her evidence, the respondent stated that she obtained the grant herein regularly. When cross examined she stated that she is Muslim and her husband too was a Muslim. She admitted that a Muslim ought to file her succession cause at the Kadhi's court. The Applicant herein is also Muslim.

She acknowledged that at some point the deceased had told her that he acquired the land before going to jail.

She also acknowledged that the land dispute herein found its way to the land disputes tribunal and the tribunal ruled that the applicant was entitled to 1½ Acres. She appealed to the Provincial Tribunal which ruled that the land goes to the applicant. She confirmed that PW2 and PW3 testified at the tribunal.

I have had occasion to consider the pleadings herein, the Affidavit evidence and the written statements adopted as evidence.

Section 76 of the **Law of Succession Act** provides for the grounds on which a grant may be revoked as follows:-

“76. 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 something material to the case:

(c) That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

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

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

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

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of Section 83 or has produced any such inventory or account which is false in any material particular; or

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

In our instant case, the applicant raised none of the grounds known in law for revocation of grant.

What he succeeds in doing is a clear demonstration that he lays a claim to part of the estate. A claim he ventilated and actually none at the land disputes tribunal which decision was upheld at the appeal stage.

For inexplicable reasons, he seems not to have pursued the adoption of the finding of the tribunal as

Judgment of court and therefore his claim was not actualized by excision of the portion so granted to him and therefore when the grant was confirmed, the estate of the deceased upon which he had a claim was intact.

In my reading of Section 76 of the Law of Succession Act such a claim does not constitute a ground for revocation of grant. It is *stricto sensu* a claim to land.

In essence there is a challenge to the ownership of the entire estate by the deceased. The applicant has the onus to prove ownership of the part of the estate he lays a claim on. The question that readily arises is whether these Succession proceedings are the appropriate way to ventilate the applicant's claim.

This court (Ibrahim Judge,) as he then was) faced with a claim to land other than through inheritance had this to say of such a claim;

“I have also considered the second question which really is of *locus standi* or interest. The objectors are not claiming any interest as dependants or direct beneficiaries of the deceased. They do not claim that they have any right to inherit any property or asset of the deceased. The correct position in law is that the Estate of their father to which they have obtained letters of administration has a claim against the estate of the deceased herein. The claim is that the deceased held the two properties in question in trust for himself and the objectors father.

In my view this claim cannot in law or fact deny the rights of the true beneficiaries of the deceased estate from obtaining letters of administration and having the same confirmed.

The objectors are able in law to prosecute their claim and secure any rights without interfering with the rights of the Petitioners to exercise control and protection of the estate of the deceased. The objectors also are not entitled to be made joint administrators as they are neither dependants, beneficiaries of the deceased nor have any other capacity to be entitled to be so appointed.

Secondly, I do not think that these Succession proceedings are the appropriate way to challenge the title of the deceased to the said properties. Their claim of a trust is or ought to be the subject matter of a separate suit or proceedings. The objectors have to prove the trust and thereafter seek revocation of the title and/or partition thereof. This requires declaratory orders of the existence of trust. This is not the function of a Succession court where the claimant is neither a beneficiary or dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an Estate by third parties.

In this case, the objectors ought to institute separate proceedings to articulate or vindicate their claims/rights. They are lucky that the claim or trust is not caught by the laws of limitations of actions. However, this court appreciates that they require a reasonable time to institute proceedings before any distribution of the Estate.

I therefore do hereby hold that this court has no jurisdiction to determine the claim of trust or to give any relief in respect thereof. It is unfortunate that the question of jurisdiction was raised at the end of the hearing. It is always appropriate and reasonable for jurisdictional issues to be raised at the beginning of hearing or trials. Preferably, they should be raised in the pleadings at the outset.

Be that as it may, the fact that it is raised at the end does not change anything. If a court has no jurisdiction, then it has none. The conclusion of hearing does not confer any jurisdiction to the court. This will only go to the question of costs.”

And in the very recent decisions (Musyoka, Judge) in the Estate of Richard Karanja Javan (Deceased), the court had this to say;

“It is not in dispute that the deceased was the registered proprietor of the property in question. His registration as such was not disputed until after his death. The registration in question was under the registered Land Act Cap 300, Laws of Kenya (now repealed). It was a first registration. By dint of Section 143 of the registered Land Act, the said registration cannot be faulted. There is judicial authority on this in Obiero -V- Opiyo & others (1972) EA 227, where it was held that a first registration is indefeasible even if fraud is proved. There is therefore no merit in the applicant's case. Even if she had a case that there existed a trust in her mother's favour the same ought to be established in a suit before the Environment and Land Court.”

From the above, and for the reasons stated the applicant's application for revocation and for annulment of Grant must fail. However, the applicant apparently has an arguable claim to land if he approached the right forum provided by our Laws.

For that reason, this court finds itself obliged to invoke the wide Jurisdiction conferred by S.47 and Rule 73 of the Probate and Administration rules to make orders that will aid in meeting substantively Justice for the applicant with the result that orders shall flow as follows;-

1. The summons for revocation and or annulment of grant dated 19/2/2013 is dismissed.
2. To allow the applicant a window to enforce his rights in a right forum, a Stay of execution is hereby issued restraining the respondent from further administration of the Estate for the next 6 months.
3. A prohibition be registered with the relevant registry against the suit land forbidding my dealings in the next 6 months.
4. The administrator be at liberty to wind up the estate in the absence of any further legal orders after six months hereof.
5. Each party to bear its own costs of the dismissed application.

Dated Signed and Delivered this 18th day of August,2016

A.K. NDUNGU.

JUDGE.

18/8/2016