



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 82 OF 2013

**IN THE MATTER OF THE ESTATE OF ROSHAN HASSANALI KASSAM
SHIVJI(DECEASED)**

RULING

1. The summons dated 27th November 2014 seeks revocation of the grant made herein on 5th April 2013 to Nizar Hassanali Kassam and Nazira Ismail Mawji. The application is brought at the instance of Ashif Abdul Aziz Mohamed on the grounds set out on the face of the application, as well as on the facts deposed in his affidavit sworn on 27th November 2014.

2. The applicant brings the application in his capacity as the attorney of the executor of the will of his father, Abdul Aziz Mohamed Alibhai Gulam, who died in 2000, and who co-owned LR No. 209/665 Tom Mboya Street with the deceased herein, Roshan Hassanali Kassam Shivji.

3. His case is that the estate of the deceased herein owned 23% only of the property known as LR No. 209/665 Tom Mboya Street. At the confirmation of the grant made in this cause, the administrators of the estate did not disclose that fact to the court and caused the entire property, instead of the 23% thereof, to be distributed as if the estate owned the whole of it. He accuses the administrators of harbouring an intention of taking over the entire property. He argues that owing to the concealment of that fact, the grant herein ought to be revoked.

4. To his affidavit in support of the application, the applicant has attached several documents. There is a copy of the certificate of confirmation of grant issued in the cause in respect of the estate of Abdul Aziz Mohamed Alibhai Gulam, being HCSC No. 1078 of 2000, on 29th November 2004, which indicates that the deceased person in that cause had a share of 16% in LR No. 209/665 Tom Mboya Street which devolved upon Noorbanu Abdul Aziz Gulam, the mother of the applicant and the executrix of the will of the deceased in that cause. The other document is a copy of the grant of probate made in respect of the estate of Abdul Aziz Mohamed Alibhai Gulam, being HCSC No. 1078 of 2000. Next is copy of the indenture in respect of LR No. 209/665 Tom Mboya Street, attached to which is a flow chart showing the history of the property from the first transaction on 18th November 1915 to last on 12th March 2007. The chart indicates the ownership structure of the property as at 12th March 2007 – Ravinder Singh Sembhi and Nirmaljit Singh Sembhi 25%, Jaswant Singh Sembhi 25%, Roshan Hassanali Kassam Shivji 29%, Noorbanu Abdul Aziz Gulam 23% and Mohamed Nanji Lallany 19%. There is a power of attorney dated 4th April 2012 by Noorbanu Abdul Aziz Gulam to the applicant. There are also copies of pleadings filed in Milimani ELCC No. 501 of 2012 between the applicant and the estate the subject of these proceedings and others. The last document is the certificate of confirmation grant made in this cause on 24th January 2014, where LR No. 209/665 Tom Mboya Street is distributed to the survivors without indication that only part of the property was available for distribution.

5. In reply to the application, one of the administrators of the estate herein swore an affidavit on 10th July

2015. He avers that at the time of petitioning for representation it had been disclosed that the deceased only owned part of LR No. 209/665 Tom Mboya Street. He asserts that the process of applying for the grant complied with the law and the grant was properly made. He states that the fears by the applicant that the administrators of the estate of the deceased intended to dispose of the property were unfounded. He disputes the claim by the applicant that her mother was entitled to 23% of the property. There are also averments on tenants, collection of rents and rendering of accounts on the income. He also refers to the case pending before the Environment and Land Court between the estate and the applicant.

6. The respondent has attached several documents to his affidavit to support his case. There is a bundle of documents that were herein when the respondents petitioned for the grant. The said documents are incomplete and do not mention the property in dispute, LR No. 209/665 Tom Mboya Street. There are several other documents relating to the income generated by the subject property and the pleadings in Milimani ELCC No. 501 of 2012.

7. Directions were given on 4th February 2015 that the revocation be disposed of by way of written submissions. Both parties have placed their respective written submissions on record. The applicant's written submissions are dated 27th April 2015 and were filed herein on 28th April 2015. The respondents' submissions are dated 16th July 2015 and were lodged at the registry in this cause on 20th July 2015. The applicant filed further submissions on 30th September 2015, dated 29th September 2015.

8. The application is founded on section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. It seeks revocation of the grant herein confirmed on 24th January 2014. The matters that give rise to the application have nothing to do with the process of the making of the grant, but everything to do with its confirmation.

9. Section 76 gives the court the discretion to revoke grounds for the reasons that are set out in the provisions. That would be where there were problems with the process of obtaining the grant, or with the administration of the estate where there has been omission to apply for confirmation of grant within the stipulated period or lack of diligence in administration or failure to render an account when required to, or where the grant has been rendered useless and inoperative by circumstances subsequent to its making.

10. For avoidance of doubt, the said provision states 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 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. That the grant was obtained by means of an untrue allegation of a fact essential in point to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

d. That the person to whom the grant was 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; or

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

particulars; or

e. That the grant has become useless and inoperative through subsequent circumstances.'

11. It is plain from the language of section 76 that what is envisioned is the revocation of the grant of representation. The section does not provide for revocation of a certificate of confirmation of grant, nor for review or setting aside of orders made on the confirmation of the grant. It is important to separate the grant of representation, whether of probate or of letters of administration, from a certificate of confirmation of grant. There is only one grant of representation in each case. The confirmation thereof does not produce a second grant to be known as a confirmed grant.

12. Therefore the process of the confirmation of grant cannot be the subject of the revocation of the grant by a party unhappy with the outcome of the confirmation proceedings.. Indeed, under section 76(d)(i) of the Act, the only time a party may move the court for revocation of grant with connection to confirmation of the grant is where the grant holder has failed to apply for confirmation of their grant within the time provided by the law.

13. The remedy of revocation should not be available where a party interested in the estate is aggrieved one way or the other with the confirmation process. The available remedy should be an application for review of the confirmation orders, for the review provisions in the Civil Procedure Rules have been adopted into probate and administration practice by Rule 63 of the Probate and Administration Rules. The orders can also be set aside on an application founded on Rule 73 which saves the inherent powers of the probate court. The discretion given to the court under section 76 of the Act, to revoke grants, is clearly not for exercise in the circumstances.

14. The applicant in the instant application is not aggrieved about the manner in or process by which the grant in this cause was obtained. Nor is he complaining about the manner the administration is being done in terms of failure to apply for confirmation of the grant within the time allowed or lack of diligence in administration or failure to render accounts. Neither is he claiming that the grant made to the respondents has become useless and inoperative. The grounds, therefore, upon which he is basing his application for revocation of grant, are tenable under section 76 of the Act. In short, the grant made herein is not available for revocation for the reasons given in the application.

15. I have looked at the petition that was lodged herein on 18th January 2013, for grant of letters of administration intestate to the estate of the deceased. The affidavit in support of the petition was sworn on 5th December 2012. It listed LR No. 209/665 Tom Mboya Street among the assets that made up the estate of the deceased, and described the deceased as part owner thereof. To the extent of the process of obtaining the grant, therefore, it cannot be said that the court was misled.

16. The application to have the grant confirmed is dated 19th September 2013 and was lodged herein on 20th September 2013. The assets listed as available for distribution include LR No. 209/665 Tom Mboya Street, but it is not indicated that only a part of the said asset was to be distributed. The further affidavit sworn on 6th December 2013 and filed herein on 9th December 2013 was in similar terms. The grant was confirmed in those terms, hence the certificate of confirmation of grant dated 24th January 2014, which gives the impression that the entire asset, LR No. 209/665 Tom Mboya Street, was being distributed equally between the two beneficiaries. To the extent of the confirmation process the court was misled with regard to the property in question. However, that is not a ground for revocation of the grant.

17. It is common ground that LR No. 209/665 Tom Mboya Street was partly owned by several individuals in various proportions. The said proportions are not clear to me, and the parties affected do not themselves appear to be in agreement as to what each of them was entitled to in the property. Who owns what proportion in the subject matter of the application is not a matter that should be dealt with by the probate. That falls within the jurisdiction of the Environment and Land Court. I shall not venture to address it any further.

18. The respondents concede that they are entitled to just a portion of LR No. 209/665 Tom Mboya Street. That should be treated as an admission that there is an error in the manner that they obtained confirmation of the grant. The error is curable by a review of the confirmation orders to reflect that only a portion of LR No. 209/665 Tom Mboya Street was available for distribution in the estate of the deceased herein.

19. In view of everything that I have said so far, I shall determine the application dated 27th November 2014 in the following terms:

a. That the application dated 27th November 2014 is hereby dismissed;

b. That administrators herein shall, in the next thirty (30) days, apply for a review of the confirmation orders made on 24th January 2014 or rectification of the certificate of confirmation of grant dated 24th January 2014 in terms of paragraph 17 here above; and

c. That there shall be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 15TH DAY OF AUGUST, 2016.

W. MUSYOKA

JUDGE