



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
MISC. APPLICATION NO. 3 OF 2003

In the matter of the Estate of COSMAS NYAGA (Deceased)

PAULINE NJOKI KARIUKI.....APPLICANT

VERSUS

ANN PHIDES WAMBUI NJOKI.....1ST RESPONDENT

KENNETH NDAMBIRI NJOKI.....2ND RESPONDENT

R U L I N G

1. This is a ruling on the respondent's preliminary objection dated 16/11/2015 seeking that the application for revocation of grant dated 8/7/2015 be dismissed on the grounds that the application offends the provisions of Section 76 of the law of succession Act and Rule 44 of the Probate and Administration Rules. The application is *res judicata* as there are rulings and judgments made in respect of the same subject matter and that the application is tantamount to an appeal brought through back door.

2. Parties filed written submissions to dispose of this application.

3. The respondents submitted that revocation of grant is governed by section 76 of the law of succession act and the procedure thereof by rule 44 of the probate and administration rules. Rule 44(1) of the rules require in mandatory terms that the party applying for relief must file the summons in compliance with form 107 of the Act. Under form 107 all summons for revocation under rule 44(1) must be issued by the High Court.

4. The summons for revocation dated 8/7/2015 have been signed by the advocate on record and there is no indication that the same was issued by the High Court through the Deputy Registrar together with the seal of the High Court. This is a fatal defect. The application is *res judicata* as the respondents had successfully applied for revocation of the grant issued to Leah Wagatwe Nyaga on 2/4/02. The grant was revoked and the court ordered the respondents to apply for fresh confirmation of grant within 30 days.

5. The respondent applied for fresh grant and the same was issued redistributing the estate of the deceased. The issues raised by the applicant herein were raised in her replying affidavit sworn on 21/11/2014 in opposition of the application dated 23/1/2014. The issues included the applicant being a joint registered proprietor of L.R Baragwe/Thumaita/2603 and the applicant not having been involved in the proceedings for revocation of grant filed by the respondent. It is argued that all the issues raised now by the applicant were addressed in the ruling delivered on 18/6/2015 which ruling has not been appealed against or set aside.

6. The applicant submitted that stated that Form 107 which is the prescribed form for the summons for

revocation of grant indicates at the lower bottom that the summons is dated and issued (as in Form 104). As per Form 104 the lower bottom indicates it is dated, signed by the applicant or advocates, place of issue, signed by the Deputy Registrar of the High Court. In the applicant's application the place of issue has not been indicated. The omission does not go to the root substance of the application.

7. The respondent contends that the application is not *res judicata* as the applicant was not a party to the respondent's proceedings for revocation of grant which had been issued to Leah Wagatwe Nyaga. The applicant was only listed in the respondent's application dated 13/7/2012. The estate of the deceased has been distributed in a manner that is not acceptable to the applicant who is a daughter of the deceased and was left out in the distribution. The issues raised in the present application have never been raised before.

8. The interested party submitted that Rule 44 (1) of the Probate and Administration Rules does not require summons to be issued by the deputy registrar but that the summons be filed through the registry which was done in this case. Article 159(1) (d) of the Constitution empowers the court to look at substantive justice and not mere technicalities. The application is not *res judicata* as the herein never participated in the application for revocation of grant filed by the respondents. The law on distribution is clear that all children of the deceased should be beneficiaries.

9. The guiding principles in determining a preliminary objection have been discussed in the case of **MUKISA BISCUITS MANUFACTURING CO LTD VS WEST END DISTRIBUTORS [1969] EA 696**. At page 700 cited by the court of appeal in the case of **SULEIMAN SAID SHABHAL VS INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 3 OTHERS [2014] eKLR** where it was stated that:

...a 'preliminary objection' consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

Sir Charles Newbold P. added as follows at page 701:

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

10. I proceed to determine whether the issues raised by the applicant in the application dated 8/7/2015 are *res judicata*.

11. *Res judicata* was explained in the court of appeal decision of **NJUE NGAI VS EPHANTUS NJIRU NGAI & ANOTHER [2016] eKLR** where it was held that;

To summarize, as stated in the UHURU HIGHWAY CASE (supra), in order to rely on the defence of res judicata there must be:

- (i.) a previous suit in which the matter was in issue;*
- (ii.) the parties were the same or litigating under the same title*
- (iii.) a competent court heard the matter in issue;*
- (iv.) the issue has been raised once again in a fresh suit.*

12. In the instant case, the respondents have alleged that the issues raised by the applicant in the application dated 8/7/2015 were dealt with by the court in the ruling delivered on 18/6/2015.

13. In the application for revocation of grant dated 8/7/2015 the applicant seeks for annulment of the certificate of confirmation of grant issued of 11/5/2006 on grounds that she is the daughter of the deceased and that the respondents who are her nieces and nephews secretly filed an application for revocation of the grant which had been issued to her mother.

14. The respondents did not make provision for the applicant who is a daughter of the deceased. She only learnt that the grant had been revoked after she was served with the application dated 13/7/2012 seeking to revoke the grant. It is argued that if the grant is not revoked she will be rendered destitute.

15. One of the grounds of the PO is that the application offends the provisions of section 76 of the law of succession Act and Rule 44 of the Probate and Administration Rules as Rule 44(1) of the rules require in mandatory terms that the party applying for relief must file the summons in compliance with form 107 of the Act.

16. Under form 107 all summons for revocation under rule 44(1) must be issued by the High Court. The summons for revocation dated 8/7/15 has been signed by the advocate on record and there is no indication that the same was issued by the High Court through the Deputy Registrar together with the seal of the High Court.

17. A look at form 107 indicates that summons for revocation or annulment of grant **MUST** be issued in the High Court. Rule 44 of the Probate and Administration Rules provides that;

(1) Where any person interested in the estate of the deceased seeks pursuant to the provisions of section 76 of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that resident magistrate's registry.

18. In the instant case, the summons dated 8/7/15 have not complied with section 44(1) of the Probate and Administration Rules and form 107 showing the format for summons for revocation and annulment of grant.

19. However, I am of the opinion that the issue of form is curable under Article 159 2(d) of the Constitution which provides that;

'justice shall be administered without undue regard to procedural technicalities'

and the court should focus on the substance of the application rather than the form.

20. In the application dated 13/7/2012 that yielded the ruling dated 18/6/2015, the respondent sought to have the register rectified in respect of Baragwe/Thumaita/2603 and that the same be registered in the name of Ann Phides Wambui Njoki and Kenneth Ndambiri Njoki jointly and Baragwe/Thumaita/ 1060 be registered in the names of Joseph Nyaga, Alexander Murage Njoki and Dennis Mwangi.

21. The applicant in the present application was the 4th respondent in the application dated 13/7/2012 and filed a replying affidavit jointly with the 1st respondent therein sworn on 21/11/2014. In paragraph 8 of the said replying affidavit, they stated that they were never informed that the grant which had been issued by court earlier had been revoked.

22. The applicant admits that she participated in the application dated 13/7/2012 seeking for rectification of the registers for several parcels of land so as to be in tandem with the grant issued in favour of the respondents by Lenaola J. after revoking the original one issued in Kerugoya Succession Cause No. 47 of 2002.

23. The applicant was not included in the original grant but did not raise a voice. It included her sister

Florence Wanjiku who was registered to hold a share jointly with the administrator. The applicant was aware of this grant and has not explained why she did not object to knowing very well that she had not been given share by her mother who was the administrator.

24. The applicant was served with the application dated 13/7/2012 on 10/7/2014 personally together with the other respondents. This application sought to implement the orders issued on 20/5/2005. Upon Lenaola J. revoking the grant, the formality of issuing a fresh grant in favour of the respondents took time until the 11th May 2006 when the necessary document was issued. This explains why the grant was confirmed on the same date.

25. I find no irregularity in the action of the registry of issuing issue the letters because the orders had been given about one year earlier. The grant was also confirmed and the estate distributed afresh without any protest from any of the heirs.

26. The grant confirmed on 11/05/2006 did not give the applicant a share and neither had she ever claimed any since her mother Leah filed the case in 2002. She was not named as a beneficiary by the original administrator. This appears like it was an agreement in the family since since her sister Florence Wanjiku was given a share together with her mother.

27. In her response to the application dated 31/7/2012, the applicant was not claiming any share in the estate but was supporting her mother Leah in that she was justified to sell part of the estate to a 3rd party in order to get money to cater for medical bills. Secondly, she was opposed to the issue that her mother only getting the benefit of life interest in the estate.

28. Having participated in this application as a party, the applicant ought to have filed an application for revocation of the confirmed on 11/5/2006 at that juncture. This demonstrates that the applicant was aware of the grant she is challenging since she was served with the application dated 13/7/2012 which was seeking to implement the grant that she now seeks to revoke.

29. After the grant was revoked, Leah unlawfully sold part of the land which did not belong to her. The court had given her only life interest. The court gave orders to cancel the titles issued without authority contrary to the grant. In its ruling it dealt with the issues at hand which involved the applicant as a party in that application. It was observed:-

It cannot be true that the respondents were not aware of the proceedings for revocation for grant. There is evidence that the respondents were served with summons and some of them attended court and cross examined the applicants.....During confirmation of grant which came up on 6/3/06 the court noted that the beneficiaries had been served for there was a return of service filed by the advocate for the applicant. If they wanted to object to the summons for revocation, the respondents should have filed a protest which would have been given due consideration by the court.

30. The issues of the respondents claim that they were not aware of the grant issued by Lenaola, J. in 2005 were dealt with in the ruling. The applicant was the 4th respondent in the application. The application dated 8/7/2015 raises issues which have already been determined by a court of competent jurisdiction. These are the grounds upon which form the basis of the applicant's summons for revocation.

31. The issues are therefore *res judicata*. The application dated 8/7/2015 is an afterthought and should not be entertained.

32. The preliminary objection is hereby upheld and summons dismissed accordingly with no order as to orders.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF SEPTEMBER, 2016.

F. MUCHEMI

J U D G E

In the presence of:-

Ms. Muriuki for Muthoni for Applicant

Applicant present