



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
SUCCESSION CAUSE NO. 872 OF 2011
IN THE MATTER OF ESTATE OF
MBANDI NJAMWEA (DECEASED)

BETWEEN

KIRINGA MBANDI PETITIONER

AND

NEBERT NJERU BENEFICIARY/RESPONDENT

R U L I N G

Introduction

1. The deceased, Mbandi Njamwea, died sometime in July 1967. His son, Kiringa Mbandi, applied for letters of administration which were issued in his favour on 25th February 2003. The grant of confirmation was issued on 30th March 2004. The only property of the deceased, Land Parcel No. Kyeni/Kigumo/440 measuring 20 acres, was distributed as follows; Kiringa Mbandi – 3 acres, Anthony Njiru – 3 acres, Augustino Kariuki – 3 acres, Kiringa Mbandi and Cicely Wanjiru Kiringa holding 3 acres in trust for Albert Mugendi, Kiringa Mbandi and Cicely Wanjiru Kiringa holding 3 acres in trust for Julius Mugambi and Nebert Njiru Njeru – 5 acres.

Application

2. The application before the court is dated 30th October 2014 and is a summons for annulment of grant made under **section 76** of the *Law of Succession Act (Chapter 160 of the Laws of Kenya)*. The applicant seeks the following orders;

(1) The Certificate of Confirmation issued to the applicant on 30th March 2004 be annulled and/or revoked and new certification issued to reflect the proper sharing of property LR Kyeni/Kigumo/440 by deleting the name of Nebert Njiru Njeru and replacing it with the applicants name.

(2) The costs of the application be provided for.

Applicant's Case

3. The application is supported by the applicant's affidavit sworn on 30th October 2013. The

- applicant (“Kiringa”) depones that Nebert Njagi Njiru (“Nebert”) took advantage of their close relationship and friendship, his inability to read and write and his hearing difficulties to inherit 5 acres of his father’s land. He avers that the grant was issued fraudulently by means of untrue allegations of fact as Nebert is not related to the deceased and is not a beneficiary of the estate of the deceased. He refers to the chief’s letter showing that he is the only heir of his father’s land. He further avers that Nebert was not a purchaser of the land for value.
4. The applicant avers that Nebert’s name appeared on the final certificate of grant fraudulently. The applicant depones that he could not have signed the application for confirmation of the grant as he could not sign the application but could only affix his thumbprint. The applicant states that he only discovered the fraud when he attended the Land Control Board on 9th March 2012 when he was informed by the Land Registrar that he could not subdivide the land into eight portions for his children. As a result the applicant seeks that the grant be annulled to exclude Nerbert from the list of beneficiaries to the estate.
 5. The petitioner called the chief of Kasafari Sub-location to testify on his behalf. Mr Thomas Njeru testified the Nerbert resided on part of the land originally owned by Kiringa’s father. He testified that both Kiringa and Nebert had lodged complaints with him regarding the land and he advised them to seek the solution in court.
 6. The applicant also called a friend, Nicasio Njiru M’Njiru to testify on his behalf. He testified that he knew Kiriga and he assisted him from time to time to communicate via phone and assist him in understanding what was being said as Kiringa has difficulties hearing. He confirmed that the when Kiringa went to the Land Control Board to subdivide the land, he was informed that this could not be done as the court has distributed the land.
 7. Mr Ireri, counsel for Kiringa, submitted that in form P & A 5, Nerbert was not listed as a beneficiary and in form P & A 80 he was a witness. In form P & A 11 and 12, he appeared as a surety. Counsel wondered why Nebert appeared in all these capacities and he also claimed to be a purchaser of the land. He submitted that the entire process was tainted by fraud and that the grant of the certificate of confirmation should be revoked entirely.

Respondent’s Case

8. The application is opposed by Nebert who filed a replying affidavit sworn on 20th March 2014. He depones that he resides on the land having purchased the same from Kiringa after they agreed that Nebert would finance the filing of the petition. He produced a document dated 11th November 2002 which he stated was the agreement between the parties for the purchase of the land. Nebert testified that the agreed price for the five acres was Kshs 100,000.00 at Kshs 20,000.00 per acre. He avers that he over a period of time he paid Kiringa the sum of Kshs. 205,747.00 including giving him in kind contributions like maize. He states that he resides on the land and has made improvements on it. He denies all the allegations of fraud against him. In order to protect his interest in the property, Nebert lodged a caution.
9. The respondent called Defather Njiru, his friend, who testified that he was part of the discussions between the Nebert and Kiringa when the property was being purchased and he assisted the parties’ record the agreement in writing in document dated 11th November 2002. He also stated that he paid money to Kiringa on behalf of Nebert.
10. Ms Njeri, counsel for Nebert, submitted that Kiringa approached Nebert and offered to sell the land so that he could get funds to file succession proceedings and distribute the land to his children. She submitted that money was duly given to the applicant and the proceedings were filed successfully. She submitted that Kiringa participated in all the proceedings and in fact attended court when the grant was confirmed. He also gave Nebert vacant possession of the property. She submitted that there has been inordinate delay in presenting the application and as such it should be dismissed.

Determination

11. The matter before the court is an application for revocation of the grant which is governed by **section 76** of the **Law of Succession Act** and which provides 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 interested party or its own motion:-

- a. *That the proceedings to obtain the grant were defective in substance;*
- b. *That the grant was obtained by the making of a false statement or by concealment of from the court of something material to the case.*
- c. *That the grant was made by an untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.*
- d. *The person to whom the grant was made has failed, after die notice and without reasonable cause either:-*
 - i. *To apply for confirmation of the grant within a 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 paragraph (e) and (g) of section 83 or has produced such investigation or account which is false in any material particular; or*
- e. *That the grant has become useless and inoperative through subsequent circumstances*

12. The issue for determination is whether the applicant's case falls within the provisions of **section 76** of the **Law of Succession Act**. Interestingly, this application has not been instituted by "an interested party" as contemplated by **section 76** but by the petitioner himself. If indeed the applicant relies of grounds (a), (b) and (c) he can only have himself to blame as he is the administrator and the one who commenced the process of application of grant of letters of administration. The main ground he raises is that being illiterate, he did not affix his name and signature on the application for summons for rectification of the grant and that Nebert fraudulently appeared on the application for confirmation of grant.

13. Having considered the evidence, I do not think the Kiringa has made out a case Nebert took advantage of him as alleged or at all. First, it is not disputed that there was an agreement where Nebert would assist Kiringa to file the application for grant of letters of administration. Such an agreement is not disputed and perhaps it is the terms thereof that are a bit hazy. It is inconceivable that Karinga did not know what the process of application for grant entailed since it is him who sought assistance from Nebert to apply for administration of his father's estate. I am also not convinced that Karinga cannot sign his name. He complains that he could not have signed the summons for confirmation yet the petition originating the matter, form P & A 80 is signed by the petitioner. I have also seen the affidavit sworn on 6th August 2002 which depones to the fact that he is the only son of the deceased and that he should be allowed to file the petition as registration of births and deaths was not compulsory by the time his father passed away. The affidavit is signed by Kiringa himself.

14. Likewise the summons for confirmation of grant dated 11th December 2003 and the affidavit in support thereof is signed by Kiringa. In the application filed for confirmation of the grant Nebert is listed as one of the beneficiaries. The application for confirmation of the grant of letters of administration was heard and granted on 30th March 2004 by Okwengu J., in presence of all the beneficiaries. No objection was taken by any of the beneficiaries and indeed none of the beneficiaries have appeared before this court to dispute the inclusion of Nebert. In the affidavit in support of the summons, Kiringa proposes that the 5 acres reverts to him.

15. In my view, the fact that Nebert was not listed as beneficiary of estate in form P & A 5 or that he

only appeared as a surety of the Kiringa and was a witness to the petitioner's signature in form P & A 80 is not a ground for annulling the grant in the circumstances of this case. All the beneficiaries were in agreement as to the distribution and what the court did was to confirm the grant in the manner agreed by all the beneficiaries.

16. I find and hold that the said Nebert was included as a beneficiary of the estate of the deceased by the Kiringa and the family knew he was so included. The grant was confirmed in the presence of all the parties which negates any fraud on the respondents' part. The agreement was consummated when Nebert was given possession of part of the property on which he continues to reside. The matters raised by the applicant are outside the scope of the nature of the proceedings contemplated by **section 76** of the **Law of Succession Act** which deal with revocation of the grant. I also note that the grant was confirmed way back in 2004. According to the endorsement on the duplicate copy of the certificate of confirmation of grant in the court file, the original grant was received by Kiringa in person on 13th April 2004. He signed for it personally in his name. It is too late in day to claim that he was misled or that there was fraud on the part of Nebert or that he did not know the import of the grant of confirmation.

Disposition

17. For the reasons I have given, I dismiss the summons for revocation of grant dated 30th October 2013 with costs to the respondent.

DATED AND DELIVERED AT EMBU THIS 29TH DAY OF APRIL 2014.

D.S. MAJANJA

J U D G E

Mr Ileri instructed by Mwaniki Ileri and Company Advocates for the petitioner/applicant.

Mr Njeru, instructed by Rose W. Njeru and Company Advocates for the respondent.