



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
SUCCESSION CAUSE NO. 52 OF 2006

IN THE MATTER OF THE ESTATE OF M'ARICHA(DECEASED)

KENNEDY MBURUGU1ST PETITIONER

SALOME NDAMBU M'MUKETHA.....2ND PETITIONER

R U L I N G

The petitioner through an application brought pursuant to Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules sought that certificate of confirmed grant dated 22nd May, 2013 be rectified and that the 1st administrator Kennedy Murugu M'Mbui be empowered to sign all the necessary documents on his own behalf and that of the 2nd administrator Salome Ndambu Muketha to facilitate distribution of the deceased's estate. The application is based on the grounds on the face of the application that there is an error in the names of some of the beneficiaries and that the 2nd administrator has been un-cooperative and has refused to sign necessary documents to facilitate distribution of the deceased estate.

The application is further supported by 1st administrator's affidavit dated 28th February, 2014. The 2nd administratrix opposed the application averring that the 1st administrator intends to disinherit some of the beneficiaries. The 2nd administratrix deponed that it was only fair and just the distribution of the estate of the deceased be done after that beneficiaries all have been heard and their interest considered.

The issue for consideration in this cause is whether there is proper confirmed grant that can be rectified? That if not so what orders can issue?

The petition for grant of letters of administration in this cause were presented to this court on 16th February, 2006 and the same was gazetted on 6th March, 2009. The 1st petitioner filed summons dated 17th September, 2010 seeking to be enjoined in this cause in place of the deceased petitioner. On 18th November, 2010 Hon. Lady Justice Lesiit allowed the application dated 17th September, 2010 with an amendment that in addition to the applicant one Salome M'Muketha the 2nd administratrix be a joint administratrix of the estate. That on 18th November 2010 temporary grant together with confirmed grant were drawn and executed by the Hon. Judge without there having being an application for confirmation of the grant. On 22nd May, 2013 the court was moved to rectify the grant issued on 18th November, 2010. The application for rectification of the grant was consequently granted.

In the instant application the 1st petitioner moves the court to rectify the rectified grant issued on 22nd

May, 2013 as per his application.

In a succession causes before any grant can be confirmed the petitioner is required to file a formal application seeking that the grant to be confirmed, to which application the petitioner should indicate the mode of distribution and have consent attached to the application, duly executed by all beneficiaries consenting to mode of distribution and confirmation of the grant.

Further Rule 40(1) of the Probate and Administration Rules provides:-

40. (1) Where the holder of a grant which has not been confirmed seeks confirmation of the grant he shall apply for such confirmation by summons in Form 108 in the cause in which the grant was issued, supported by an affidavit in Form 8 or 9 exhibiting the grant together with an estate duty compliance certificate or other satisfactory evidence that no estate duty is payable and setting out the full names of the deceased person to whose estate the grant relates, and he shall satisfy the court that no application under Part III of the Act is pending.

Further to the said Rule, Rule 40(8) of the Probate and Administration Rules requires consent of all the beneficiaries in writing for confirmation to be allowed without their attendances. Rule 40(8) of Probate and Administration rules provides:-

40 (8) Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been

filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit.

I have very carefully perused the court record and all proceedings in this cause and it reveals that no application was drawn and filed by any of the petitioners seeking confirmation of the grant and further no order was made by court for confirmation of the grant. The alleged confirmed grant dated 18th November, 2010 was not granted by court and it is mysterious how the confirmed grant came to in the court record.

Section 76 of the Law of Succession Act gives court powers to revoke or annul any grant on its own motion if the court decides so. The said section 76 provides 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 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 of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.”

As earlier on stated in this ruling the confirmed grant was not based on any order of this court. It is unexplainable how it came to be on record and as such I find and hold the confirmed grant and all subsequent orders based on the purported confirmed grant to be a nullity.

In view of the confirmed grant being a nullity this court has no alternative but to annul the confirmed grant and all subsequent orders on its own motion as provided for under Section 76 of the Law of Succession Act.

The upshot is that the 1st petitioner's application for rectification of the grant dated 28th February, 2014 is struck out. The parties are at liberty to apply for confirmation of the grant issued on 18th November, 2010.

No order as to costs.

DATED, SIGNED AND DELIVERED AT MERU THIS 22ND MAY, 2014

J. A. MAKAU

JUDGE

Delivered in open court in the presence of:

1. Mr. M. Kariuki for the 1st petitioner
2. 2nd petitioner in person – present

J. A. MAKAU

JUDGE