



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
SUCCESSION CAUSE NO. 26 OF 2013

(IN THE MATTER OF THE ESTATE OF NJII NDORO (DECEASED))

LUCIA WANGECHI.....APPLICANT

-VERSUS-

FRANCIS MBURU NJII.....RESPONDENT

JUDGMENT

The applicant filed a summons for revocation of grant under **section 76 of the Law of Succession Act (Cap. 160)** and **rule 73 of the Probate and Administration Rules**. The summons is dated 10th January, 2013 and the grant sought to be revoked is in respect of the estate of one Njii Ndoro who died domiciled in Kenya on 17th July, 2002.

In the affidavit in support of the summons sworn on 10th January, 2013, the applicant has stated that she is one of the daughters of the deceased and the respondent to whom the grant of the letters of administration intestate was made is her brother.

The original record from the magistrate’s court where the petition was filed shows that the grant was made on 29th June, 2011 and confirmed on 3rd October, 2012. According to the certificate of confirmation the only asset comprising the deceased’s estate is a parcel of land known as **L.R. Ndarugu/Gacharage/547**; when the grant came up for confirmation this estate was distributed amongst the deceased’s survivors as follows:-

- i. Francis Mburu.....Three decimal four (3.4) acres
- ii. Zachary Kamamo Mburu.....One(1) acre
- iii. Lucy Wangechi.....One(1) acre
- iv. Salome Wairimu.....One(1) acre

The beneficiaries of the deceased’s estate were described in the petition for the grant of the letters of administration and in the certificate of confirmation of grant respectively as sons and daughters of the deceased.

The applicant has taken issue with the grant made to the respondent and the subsequent distribution of the estate on the ground that, first, the grant was made and the estate distributed without her knowledge or consent. Secondly, she claims, as far as I understand her application, 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 court or that it was obtained by means of untrue allegation of a fact essential in point of law to justify the grant.

As far as the applicant's consent and knowledge of the proceedings is concerned, the original record of the petition for the grant shows that on 29th June, 2011, the petitioner appeared before the learned magistrate and told the court that though the applicant had been served with the requisite notice to attend court, she had failed to attend. The court, on its part, noted that indeed the applicant had been duly served and there was on record an affidavit of service to this effect. The learned magistrate also noted that the applicant had been served with a citation, apparently under **rule 22(1)** of the **Probate and Administration Rules**, to which she had also not responded. In the absence of the applicant, the Court proceeded to make an order that the grant of the letters of administration be made in the name of the respondent.

When the grant came up for confirmation, the record indicates that the petitioner appeared alone before the learned magistrate on 3rd October, 2012; neither the applicant nor any other beneficiary of the deceased's estate was in court on the material day. The absence of the applicant and the rest of the beneficiaries notwithstanding, the respondent prosecuted his application for confirmation of grant dated 9th August, 2012; he is recorded to have told the court that parties, whom I understand to mean the beneficiaries, had agreed on the distribution of the estate.

The Court allowed the summons and confirmed the grant.

In the affidavit sworn by the respondent in support of the summons for the confirmation of grant, the respondent attached a consent indicating that the deceased's dependants had consented to the proposed distribution of the deceased's estate. Of the deceased's four survivors, only the applicant, who was listed as one of the persons who had agreed to the distribution as proposed by the respondent had not signed the alleged consent.

There is nothing on record to suggest that the court enquired why the applicant had not signed the consent if at all she was agreeable to the distribution of the estate of the deceased's estate in the manner proposed by the petitioner. The record does not also show whether she was aware of when the summons for confirmation of grant was scheduled for hearing.

On the question of concealment from the court of a fact that may be considered material to the grant or the issue of respondent's untrue allegation of a fact essential in point of law to justify the grant, the applicant says that one Zachary Kamano Mburu who was listed both in the petition and in the summons of confirmation of grant as the son of the deceased yet he is in fact the son of the respondent. It is the applicant's case that the respondent misrepresented the relationship between the said Zachary Kamano Mburu and the deceased and thereby misled the court for the sole purpose of allocating his son a share of the deceased's estate to which he was not legally entitled.

It is for the foregoing reasons that the applicant wants the grant revoked and/or annulled.

The respondent did not file an appearance or any sort of response to the applicant's summons; there is an affidavit of service on record showing that he was served with the pleadings. In the absence of the respondent's answer, the summons can properly be considered as unopposed.

Section 76 of the **Law of Succession Act (Cap 160)** under which the applicant's summons was brought 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 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 something material to the case;*
- c. *That the grant was obtained by means of 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 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. *Failed 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.*

Considering the facts alluded to in the applicant's affidavit, part **(b)** and **(c)** of **section 76** would appear to be more relevant to his application. If the respondent misrepresented his own son as the deceased's son in the petition with the result that the court allocated him a share of the deceased's estate on the basis of a false allegation of fact material to the case, it appears to me that the applicant has satisfied those conditions set out in those provisions of the law justifying nullification of the grant irrespective of whether it had been confirmed or not.

By deliberately stating that Zachary Kamano Mburu was the deceased's son when he knew that such statement was untrue, the deduction that the respondent obtained the grant fraudulently by the making of a false statement of fact is a plausible conclusion; alternatively, the respondent obtained the grant by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation may have been made in ignorance or inadvertently. Either way, I am persuaded by the applicant that in this particular case, the conditions for nullification or revocation of a grant as contemplated in **section 76 (b)** and **(c)** of the Act have been satisfied.

Besides proof of the statutory grounds for nullification or annulment of the grant, there is the question of the confirmation proceedings which were taken before the learned magistrate in the absence of any the beneficiaries of the deceased's estate and in particular the applicant.

My understanding of **section 71** of the Act on the confirmation of grants is that a beneficiary or a survivor eligible for a share in an intestate estate must have the opportunity to participate not only in the petition for grant of letters generally but also in the proceedings for confirmation of that grant in particular. The relevant part of that section provides:-

71.(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.

(2) The court to which application is made, or to which any dispute in respect thereof is referred, may-

(a) if it is satisfied that the grant was rightly made to the applicant, and that he is administering, and will administer, according to law, confirm the grant; or

(b)...

(c)...

(d)...

Provided that, in all cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to respective identities and shares of all persons beneficially entitled; and when confirmed the grant shall specify all such persons and their respective shares.

It is clear under the proviso to **section 71 (2)** of the Act, that before the grant is confirmed, the court must satisfy itself as to the identities of the beneficiaries and the shares of the estate to which they are beneficially entitled. The record from the subordinate and the depositions in the applicant's affidavit suggest that this particular condition was not complied with before the grant in question was confirmed.

The applicant was not aware of the confirmation proceedings and none of the beneficiaries of the deceased's estate was in court when the summons for confirmation of grant was heard. More importantly, one of the alleged beneficiaries was deliberately misrepresented as the deceased's sons. There is no way the court can be said to have been satisfied, in these circumstances, on the identities of the beneficiaries and their respective shares. The court was, on one hand, simply misled while on the other hand, it misdirected itself when it failed to make any enquiries on the identities and the respective shares of the beneficiaries particularly the applicant who had not signed the purported consent to the proposed distribution of the estate; in these premises, the grant was confirmed in breach of **section 71 (2)** of the Act.

In view of the foregoing reasons, the conclusion I am bound to make in respect of the applicant's summons dated 10th January, 2013 is that the grant of letters of administration intestate made to Francis Mburu Njii on 22nd August, 2011 and subsequently confirmed on 3rd October, 2012 in the Thika Chief Magistrate's Court Succession Cause No. 582 of 2010 is tainted. It is hereby revoked or annulled. Costs shall be in the cause.

Dated, signed and delivered in open court this 24TH day of October 2014

Ngaah Jairus

JUDGE