REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Succession Cause 399 of 2007

IN THE MATTER OF THE ESTATE OF

MUHORO NJOGU ALIAS MUHORO KOGI – DECEASED

AND

ROSE KARENGO ..... 1ST APPLICANT

JANE GATHONI ..... 2ND APPLICANT

VERSUS

WANJA MUHORO ..... 1ST RESPONDENT

WAMUYU MUHORO ..... 2ND RESPONDENT

WANGIGI MUHORO ..... 3RD RESPONDENT

WANJIRU GICHERU ..... 4TH RESPONDENT

NGIMA MUNYIRI ..... .5TH RESPONDENT

KABUCI WAMAI ..... 6TH RESPONDENT

R U L I N G

Rose Karengo and **Jane Gathoni** are the applicants in a Summons for Revocation and or annulment of grant dated 21st August 2007 and filed in this court on the 23rd August 2007. The Respondents in the application are said to be **Wanja Muhoro**, **Wamuyu Muhoro**, **Wangigi Muhoro**, **Wanjiru Gicheru**, **Ngima Munyiri** and **Kabuci Wamai**. The application is expressed to be brought under Section 76 of the Law of Succession Act and rule 44 of the Probate and Administration Rules.

The application seeks for an order that the grant of letters of Administration intestate issued to the 1st respondent, **Wanja Muhoro,** on 1st December 2004 be annulled on the grounds that the same was made by a court lacking in jurisdiction to grant the same, as the estate involved

was in excess of Kshs.100,000/=.

The affidavit in support of the application sworn by the 1st applicant gives the history of the dispute. Apparently the deceased, **Muhoro Njogu** alias **Muhoro Kogi** died on 20th September 1966. He was a father to the respondents save for 3rd respondent to whom he was the husband. Consequent upon his passing on a grant of letters of administration intestate was issued to the 1st respondent on 1st December 2006 by the Senior Resident Magistrate's Court at Karatina in succession cause number 68 of 2004. However to the applicants, the said grant was obtained by concealment of material facts in that the 1st respondent did not declare the value of the entire estate of the deceased although at the time he passed on his estate comprised of the following assets; **Iriaini/Karia/74** – **2.9 acres** and **Iriaini/Karia/198** – **2 acres**. That by the time the deceased died he also owned plot No. **Karatina Block 1/240** which under mysterious circumstances after his death was transferred to third parties. It is the applicants contention that the total value of these assets was in excess of Kshs.100,000/= hence beyond the pecuniary jurisdiction of the SRM's court, Karatina. It is for this reason that the applicants moved this court to annul and or revoke the grant aforesaid.

The application as expected was opposed. In a replying affidavit dated 4th June 2008 and filed in court the following day, the 1st respondent deponed that although the value of the estate was inadvertently not declared, no prejudice had been caused to the applicants since their names featured in form P & A 5 as well as being provided for in the proposed distribution of the estate. That plot No. **Karatina Block 1/240** did not form part of the estate of the deceased. Accordingly the grant was not obtained by concealment of any material facts and that the SRM's Court, Karatina had the requisite jurisdiction to entertain the succession cause. The application was thus a delaying tactic bent on frustrating the finalisation of the cause.

The 1st respondent's position aforesaid received further boost from the remaining respondents who all swore an affidavit dated 27th March 2009 and filed in court on the same day. To them the estate of the deceased comprised the two parcels of land aforesaid which ought to be distributed among the beneficiaries in 3 equal portions in accordance with the 3 houses of the deceased. The applicants were not only included in the proposed distribution of the estate but were also specifically mentioned in form P & A 5 as well as the chief's letter filed in Karatina SRM's court on 13th December 2008. Finally they deponed that the summons for revocation of grant were only meant to delay the distribution of the estate.

When the application came up for hearing on 17th September 2009, the applicants represented by **Mr. Muchiri wa Gathoni**, learned counsel and respondents' by **Mr. Karingithi**, learned counsel, agreed to canvass the application by way of written submissions. Those written Submissions were subsequently filed and exchanged. I have carefully read and considered them.

Under section 76 of the Law of Succession Act this court has wide and unfettered discretion to annul or revoke a grant whether or not confirmed at any stage on the following grounds:-

"**(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;

(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 he 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 particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances."

In the matter at hand, the applicants seek to have the grant made on 1st December 2004 to the 1st respondent in Karatina SRM's court succession cause number 68 of 2004 annulled on the ground that it was made by the court lacking in jurisdiction. They allege that the value of the entire estate of the deceased was in excess of Kshs.100,000/=. Secondly, they also allege that the 1st respondent deliberately failed to disclose the worth or value of the estate in form P & A 5 and the applicants therefore believe that this was done to deny the court the opportunity to know the exact value of the estate. Finally they also claim that the 1st respondent failed to include plot number Karatina Block 1/240 in the list of the assets of the deceased.

Section 48 of the Law of Succession Act grants jurisdiction to a magistrate's courts to hear and determine certain aspects of succession causes so long as the net value of such estate involved does not exceed Kshs.100,000/=. That section is in these terms:-

"**Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a resident magistrate shall have jurisdiction to entertain any application other than an application under section 76 and to determine any dispute under this act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings".**

It is trite law that whoever alleges must prove. The applicants have alleged that the value of the estate of the deceased was in excess of Kshs.100,000/=. Other than that blunt statement, there is no other evidence tendered to support thereof. One would have expected that in support of that contention the applicant would have tendered some documentary evidence such as a valuation report. They have not done so and yet they expect this court to act on unsupported statement. No explanation has been given as to why they could not enlist the services of a land valuer who would have come up with a report to back their claim. In the absence of such evidence, this court is not inclined to take the word of the applicants based on speculation as gospel truth, more so, in the light of the response by the respondents that the Karatina SRM's court had the necessary jurisdiction to issue the grant. In fact the applicants have themselves not demonstrated what the value is nor have they pleaded the same. They are merely engaging this court in a speculative exercise.

The applicants too would wish this court to take judicial Notice of the fact that the area where deceased's suit premises are situate an acre goes for over Kshs.200,000/= and that since the two parcels of land measure 2.9 and 2 acres respectively, their value must be well over Kshs.100,000/=. Judicial Notice can only be taken on matters of common notoriety. The value of land is not one such matter. It varies from area to area. Accordingly this court cannot rightly take judicial notice of the fact that the value of land in the area where those parcels of land are situate go for in excess Kshs.200,000/= per acre as claimed by the applicants. There was need for evidence to be tendered in this regard. I therefore decline the invitation to take judicial Notice on matters of value of land in the said neighbourhood. Further the applicants claimed that plot No. **Karatina Block 1/240** belonged to the estate of the deceased. However they advanced no evidence at all to back up this claim. It would have been easy for them to do so by availing title documents in respect thereof. They did not and accordingly their allegation remains that, a mere allegation.

I have perused through the proceedings in the Senior Resident Magistrate's court. What strikes me as being mischievous on the part of the applicants is that they consented to the 1st respondent filing the succession cause in Karatina SRM's court. Their consent was filed in that court on 13th July 2004 together with the petition. They were also named in form P & A 5 as those surviving the deceased and therefore beneficiaries of the estate. The temporary grant was subsequently issued on 1st December 2004 without as much as the applicants raising a finger as to want of jurisdiction by the issuing court. Subsequent thereto, the 1st respondent made an application for confirmation of grant and made a provision for the applicants. Initially they had consented to the application going by the documents filed in court with the application. It would appear that later the applicants were not happy with the share given to them and therefore made an about turn. On 14th September 2005 they jointly filed an affidavit of protest. In that protest, the applicants again did not raise the issue of jurisdiction. Rather their protest was hinged on the fact that the deceased before he passed on had demarcated the parcels of land to his children who included their husbands and wished the grant to be confirmed according to the wishes of the deceased.

The protest from the record was heard as from 20th September 2006 by **P. C. Tororey – SRM**. The 1st applicant testified. However nowhere in her testimony did she question the jurisdiction of the court to determine the matter. Her testimony was limited to the fact that the deceased had subdivided his land in four portions and gave it out to his 3 sons and a daughter. It was her contention that the deceased wishes be respected therefor. The application for confirmation of grant had gone contrary to the wishes of the deceased. In the cause of the testimony, it appeared to the court that the 1st applicant was not properly prepared for the hearing of the case. Accordingly the cause was adjourned to enable her prepare. To date that cause has not been concluded. A month later after the said adjournment the applicants moved to this court. To my mind this is the height of abuse of court process. Litigants cannot be

allowed to hope from one court to another whenever they sense that their case in another court is not perhaps going as per their expectation. In the circumstances of this case, the applicants have throughout the succession proceedings in the Karatina SRM's court been active participants. They have never raised the issue of jurisdiction therein. They cannot now be heard to question the jurisdiction based on mere speculation as to the value of the estate of the deceased.

It is the applicant's contention that the 1st respondent failed to disclose the true worth of the estate of the deceased in form P & A 5. True as it may be, however I am unable to hold that, that omission was deliberate. It might have been inadvertent as stated by the 1st respondent. After all the form was not prepared by a lawyer. Rather it was prepared by the 1st respondent in person. That omission in my view cannot amount to concealment. After all the applicants must have seen the form before it was filed in court. They ought to have raised the issue then if they felt so strongly about it. In any event what prejudice has been suffered by the applicants by that omission? I cannot think of any. Afterall all the surviving beneficiaries were named in the said form, the applicants included. The applicants have been catered for in the application for confirmation of grant though unhappy with the same. However their unhappiness should not be the cause for the revocation of the temporary grant properly and legally issued. They can ventilate their concerns regarding distribution during the hearing of the protest which has been stalled following their filing of the instant application. In any event I do not think that it is a mandatory requirement that the exact value of the assets of the deceased must be disclosed in form P & A 5. In fact the form talks of "**Total estimated valued.....**" So that even if one does not put the value of the estate in that form, it cannot be said that such failure whether deliberate or not amounts to concealment of material facts.

In conclusion, I find that this application is unmerited. Accordingly it is dismissed with costs to the respondent. I direct that the original record from Karatina SRM's court be returned forthwith for the hearing and final determination of the pending application for confirmation of grant as well as the protest.

Dated and delivered at Nyeri this 30th day of November 2009

M. S. A. MAKHANDIA

JUDGE