



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Succession Cause 83 of 1992

IN THE MATTER OF EUNICE MUTEMBEI M'RARIA (DECEASED)

PETER KIAMBIAPPLICANT/PETITIONER

VERSUS

KARURU MAGIRI.....RESPONDENT/OBJECTOR

RULING

This is a fairly old application filed on 12th November, 2001. It seeks the reinstatement of a grant which was revoked on 11th November, 1996.

The applicant states that after the revocation the respondent ought to have filed grounds of objection to the petition which has not been done. To these averments the respondent has filed a replying affidavit and a further affidavit.

It is the respondent's contention that this application is *res judicata* that dated 21st January, 1998, which was heard and dismissed by Etyang' J. That the court (Etyang, J) having found that there was no estate and the applicant had no capacity to file this cause, it was not necessary to file objection proceedings. The respondent also complains that the applicant has been using the revoked grant to cause confusion in the estate.

During the argument of this application counsel for the applicant took issue with the two affidavits sworn by the respondent. First he argued that the replying affidavit is incompetent as it does not indicate by whom it was drawn.

The second point is that *jurat* to the further affidavit is contained in a separate page. I propose to dispose of these submissions first. Although counsel raising this issue did not state which law he based his argument, it is clear to me that it is the Supreme Court Practice, 1999 Vol.1 Paragraph 41/1/12 which provides,

“The jurat of every affidavit should contain the full address of the place where the affidavit was sworn, sufficient for identification. Affidavits should never end on one page with the jurat following overleaf. The jurat should follow immediately after the end of the text. The signature of the Commissioner for Oaths should be written immediately below the words “Before Me”. Irregularities in the form of the jurat cannot be waived by the parties”

There is no such provision in our Oaths and Statutory Declaration Act or the Civil Procedure Rules. Section 5 of the former only states;

“5. Every Commissioner of Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made”.

The only provision relevant to the arguments before me in the Civil Procedure Rules is found in Order 18 Rule 7. It provides;

“7. The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription or otherwise in the title or other irregularity in the form thereof:

The English rule requiring that the jurat be on the same page as the text is a good rule, intended, in my view, to address any attempt to change the details on the jurat. A classic example is the present affidavit which is typed in a different colour from the attached jurat, clearly showing that the jurat was imported. But as I have said that rule is not legislated in the Kenyan statutes or rules. Secondly the English rules recognize the fact that such irregularity can be waived by the court and not parties.

In my view the irregularity, if any, in the affidavit is curable under Order 18 rule 7 of the Civil Procedure Rules. The second point relates to the replying affidavit dated 20th December, 2001 which is said not to disclose where and by whom it was drawn.

This is clearly based on the provisions of Section 5 of the Oaths and Statutory Declaration Act, that provides that the Commissioner for Oaths must indicate in the jurat the place and date of the oath.

There has been varied interpretation of this Section with some courts holding that failure to indicate the date and the place the oath is made is merely an irregularity curable by Order 18 rule 17, See Standard Chartered Bank V Lucton, Ltd HCC No.462/97 and Jimoko Enterprises Ltd V DPF Board, HCCC No.514/05_Milimani others have held that the omission is fatal to the affidavit.

I am in this last category. The argument is that the requirement being a substantive provision of a statute cannot be cured by a rule of procedure. The requirement is in mandatory terms and was intended by Parliament to address a mischief. Those with me in this are, Eastern and Southern African Development Bank V African Greenfields Ltd HCCC No.1189/2000 and Stephen Kibunja V Forest Road Flats Ltd, HCCC 371 of 2000. The replying affidavit dated 20th December, 2001 is fatally defective and is struck out. The respondent is lucky to have filed a further affidavit which has been spared.

I turn now to consider the substance of the application. The applicant seeks in the application the reinstatement of the revoked grant because the respondent has not filed an objection after the revocation of the grant. It is clear from the record and it has been argued by the respondent that a similar application was brought on 21st January 1998 and dismissed on 12th November, 1998. The court (Etyang, J) found that no case had been made out to warrant the issuance of orders to reinstate the grant. He further observed that it was doubtful if the court had such powers under Section 71 of the Law of Succession Act.

Although the applicant or his counsel, were absent, the matter was considered and decided on merit. The result is that this application is *res-judicata*. But even that aside, the application which is expressed to be brought under Rule 73 of the Probate and Administration Rules, has no merit, as a court cannot reinstate what has been revoked. As a matter of fact, what is left after the revocation is the petition only.

The respondent has averred that the deceased had no estate capable of being administered as the estate of the deceased's late husband had been distributed among his living heirs. In other words, the respondent argues, that she has no intention of objecting to a cause which is a non-starter. What the applicant ought to have done if he was not satisfied with the revocation of 11th November, 1996, was to prefer an appeal challenging that revocation.

I find no merit in this application for the reasons given and the same is dismissed with costs to the respondent.

DATED AND DELIVERED AT MERU THIS 20TH DAY OF JULY, 2007

W. OUKO

JUDGE