



REPUBLIC OF KENYA



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**In re Estate of Makokha Elima Mafwabi (Deceased) (Succession Cause
344 of 2010) [2023] KEHC 17587 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17587 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 344 OF 2010**

SC CHIRCHIR, J

MAY 18, 2023

**IN THE MATTER OF THE ESTATE OF MAKOKHA ELIMA MAFWABI –
(DECEASED)**

BETWEEN

MWANAISHA MAKOKHA OPONDO PETITIONER

AND

VIRGINIA MAKOKHAH BARASA 1ST APPLICANT

JULIUS WAWIRE MAKOKHA 2ND APPLICANT

RULING

1. The Applicants, Virginia Makokha Barasa and Julius Wawire Makokha have brought the summons dated 26.10.2020. They seek for the following orders:
 - a. That this court be pleased to grant leave to the 2nd Applicant to join proceedings as a party and beneficiary to the Estate.
 - b. That this court be pleased to review its order dated 29.3.2017 and revoke the certificate of confirmation of grant and further revoke letters of grant of administration intestate dated 13.12.2016 issued to the petitioner and thereafter appoint the Applicants as Administrators of the estate herein
 - c. That costs of the application be provided for.

The Applicants case

2. The Application is supported by the grounds appearing on the face of the Application as well as the supporting affidavits of the Applicants both sworn on 26th October 2020. The 1st Applicant avers that she is the widow of the deceased; that she is aggrieved by the confirmation of the grant for the



reason that it included her son's(2nd Applicant) property namely Title No. Ewanga/ malaha /47 (suit property), in the deceased's Asset list, which was erroneous .She further contends that she did not consent to the distribution and was not in court during the confirmation , as she was not made aware of the hearing date. It is further submitted that by misrepresenting the ownership status of the suit property, the Administrator has abused her position as the Administrator of the Estate. She wishes to take part in the proceedings as one of the beneficiaries.

3. The 2nd Applicant's complain is that the suit property is his, yet it was erroneously included as part of the Deceased Estate; that he never consented to any distribution and did not attend court during the confirmation hearing because he was not notified; that the beneficiaries have been kept in the dark by the petitioner . He wants the court to revoke the Grant and appoint him and the 1st Applicant as Administrators of the Estate. He prays that he be allowed to participate in the proceedings as beneficiary of the Estate.

The Respondents case

4. The Application is opposed through the affidavit sworn on 20-1-2021 and a further affidavit sworn on 8-4-2022 by the Respondent. It is the Respondent's case that the Applicants were aware about the succession proceedings. She also points out that the 1st Applicant had earlier filed an Application for revocation which was dismissed; that no grounds have been advanced to warrant a review and that there has been an inordinate delay in filing the Application. It is asserted that the Estate has been managed well and there is no reason to remove her. She believes that the Applicants' intention is to disinherit her. The respondent asserts that the 2nd Appellant is facing fraud charges where he is accused of fraudulently transferring the suit property to himself.

It is further stated that the Application by the 2nd Applicant to join the suit has been overtaken by events.

In her further affidavit, she has attached a copy of the judgment in Mumias chief magistrate's criminal case no. 1139 of 2019, where the 2nd Applicant was convicted of the fraud in the transfer of the suit property.

5. The Application was canvassed by way of written submissions

Applicant's submissions

6. On whether the 2nd applicant should be enjoined to this suit, it is the applicant's submission that he is entitled to be enjoined as a party as there is no contention on the fact that he is a beneficiary. On the proprietorship of suit property, the appellant submits that the property had been transferred to him by the Deceased as a gift, prior to the Deceased 's demise, and was therefore not part of the Estate.
7. On whether the grant made on 28.10.2005 and confirmed on 13.12.2016 was obtained fraudulently, the applicant contends that there was no consent from the other dependants and that the process of obtaining the Grant was not transparent. It is further argued that the mode of distribution violated section 40 of the *Law of Succession Act* and that they were not in court when the confirmation hearing was done.

Respondent's submissions

8. It is the Respondent's submission that the joinder of parties can only happen when a suit/case is subsisting; that in this case the cause has been completed and it is too late for the 2nd Applicant to seek to be enjoined in the cause.



9. It is further submitted that the confirmation proceedings were heard and determined due to the applicant's disinterest in prosecuting the objection proceedings. On review the respondent submits that the applicants have not met the threshold of review; that the delay in seeking review is long and inordinate. As for the 2nd applicant the Respondent submits that he lacks the locus standi, since he was not a participant in the proceedings in respect of which he is seeking a review.
10. On revocation of the grant, it is submitted that the threshold for revocation under section 76 of the Law of succession Act has not been met. It is further argued that in any case the application for revocation having been dismissed, the 1st applicant should have appealed against the dismissal and not seek for a review.

Determination.

11. A brief background to this Application is necessary:

The Respondent herein applied for letters of administration intestate in respect of the estate of Makokha Elima Mafwabi (deceased) at the chief Magistrate's court at Mumias on 1-7-2009. The proceedings were later transferred to this court. She later applied for confirmation of grant. The confirmation proceedings were heard and determined the same day, on 13.12.2016.

Prior to confirmation, the 1st Applicant had filed an objection to the issuance of the grant to the respondent/petitioner herein but did not prosecute the said application. That Application was dismissed for want of prosecution on 13.12.2016 paving way for the confirmation of grant.

12. I have considered the application, the affidavits, parties' submissions and the cited Authorities. I have identified the following issues for determination:
 - a). Whether the 2nd Applicant should be joined as an interested party
 - b). Whether the orders confirming the Grant should be reviewed
 - c). Whether the Grant of letters of administration made on 13.12.2016 should be revoked

Whether the 2nd Applicant should be joined as an interested party

13. The law of succession Act and probate and administration Rules (P&A) do not have provisions for joinder of parties in succession matters. However, Rule 73 of *P&A* provides for inherent powers of the court to make any order for the interest of justice to be met.
14. Black's law dictionary, 10th Edition (page 298), defines an interested party as "a party who has a recognizable stake (and therefore standing) in the matter". A party may be said to have a recognizable interest in a matter if the outcome of such matters or proceedings are likely to adversely affect their interest. It is an uncontested fact that the 2nd Applicant is a beneficiary to the Deceased's Estate, and being a beneficiary, he would be said to have a stake.
15. But can he be enjoined in the proceedings?

The law on joinder of parties envisages ongoing proceedings. In the case of *Meme vs Republic* (2004) 1EA 124 the court observed that a party could be enjoined in a matter for reasons that:

 - a). joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings
 - b).



- c). joinder to prevent a likely course of proliferated litigation
17. A casual perusal of the aforesaid reasons for joinder of parties clearly show that enjoining the 2nd Applicant will not serve any purpose. In a nutshell the purpose if any was spent when the cause came to an end. The prayer to be enjoined in the proceedings is therefore not tenable, and I disallow the same. Whether the applicants are deserving review orders.
16. The review sought for is the setting aside of the confirmation orders of 13th December 2016 and the revocation of the certificate of confirmation of Grant. The 2nd applicant has stated that she did not attend the confirmation hearing as she was not informed about the hearing.
17. The record shows that on 19th October 2016, when the court Registry fixed the hearing for 13.12.2016 the Applicant's Advocate was absent and the petitioner's advocate was directed to effect service. On the hearing date the 1st- Applicant was absent. I have perused the record and I did not find any evidence of service on the Applicants to appear in court on 13.12.2016. It is apparent that the hearing proceeded without the court ascertaining whether the Applicants had been notified about the hearing date.
18. where a party is alleging lack of service he can apply to court to set aside the orders/proceedings made on that particular day. The setting aside or review in my view would have the same effect.
19. Review of orders/judgment order, under order 45 of the civil procedure rules were imported to the [law of succession Act](#) under section 63 of the [Law of Succession Act](#).
20. Order 45 of the [Civil procedure](#) allows review for inter alia other sufficient reason.
21. In Re estate of Miriam Wangare Njau the judge stated ‘ I will begin by pointing out that the provisions for setting aside or reviewing a decision, judgment or decree of a court in order 45 are applicable to succession cases. Alternatively Rule 17 of [P & A](#) rules which give the court inherent powers to make such orders as may be necessary for the ends of justice can be the source of the court's Authority to set aside a decision to dismiss a protest for non-attendance”.
22. In the case of *Philip Mitahi Thagane vs. Peter Kaniki* (2014) eKLR. The issue was one of setting aside orders dismissing an affidavit of protest. The court while allowing an application to set aside the dismissal order stated “I am persuaded that under Article 159 of the Laws of Kenya and Rule 73 of the [P & A Rules](#) the court has powers to set aside an ex parte order dismissing an affidavit of protest since the power to set aside an ex parte order are provided for to ensure that litigants does not suffer injustice or hardship as a result of, among other things exercisable mistake of error”.
23. In setting aside ex parte orders, the court is required to consider the applicant's case (see *Sebei District Administration vs Gasyah & others*(1968)EA 300). One of the grounds of contest in this cause is the manner of distribution of the property and whether the same complies with section 40 of the [Law of succession Act](#). Also, the question of whether the suit property forms part of the Deceased's Estate needs to be determined. The above issues raised by the Applicants are valid and deserving of a chance to be heard on merit. I am satisfied that the Applicants have placed enough material before me to warrant the setting aside of the certificate of confirmation of Grant.

Should the Grant be revoked?

24. The 2nd applicant first applied for revocation of grant through the Application dated 17.1.2011. That Application was never prosecuted, and the same was dismissed for want of prosecution on 13.12.2016. The 2nd applicant has never applied for reinstatement of the said application. She cannot come back and seek similar prayers as in the dismissed application The proper procedure would have been for the



applicant to seek reinstatement of the dismissed summons. From the supporting affidavit I note that the 1st Applicant is seeking revocation and to be appointed as an Administrator but at the same time seeking to participate in the proceedings as a beneficiary. The contradiction may suggest that she really has no issue with the Administration perse. It is not lost on me that the main contention in this cause is the mode of distribution of the Estate and the question of whether or not the suit property is Estate property.

25. The Respondent was accused of failing to disclose material facts but it has not been pointed out which of those particular facts have not been disclosed. The issue of the suit property is a contested fact and that cannot be said to be an undisclosed fact. Also, there is no evidence that the Respondent has failed to administer the Estate. From the record it is apparent that all the listed beneficiaries are now Adults, and therefore the need for a 2nd or more Administrators is not pertinent.

I see no reason therefore to revoke the Grant, and this prayer is consequently dismissed

In conclusion up, I make the following orders:

- a. The 2nd Applicant's Prayer to be joined as an interested party is hereby dismissed
- b. The confirmation orders of 13.12.2016 are hereby set aside and the certificate of confirmation of Grant is hereby cancelled.
- c. The petitioner to reapply for confirmation of Grant.
- d. The prayer for revocation of Grant for letters of Administration is hereby dismissed.
- e. Each party to meet their own costs.

Right of Appeal- 28 days.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA VIRTUALLY THIS 18TH DAY OF MAY 2023.

S. Chirchir

Judge

