



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 128 OF 2013

IN THE MATTER OF ESTATE OF CORNELIO NDWIGA ZAKAYO

ALIAS COLINELIUS NDWIGA ZAKAYO (DECEASED)

JULIANA MUTITU NDWIGA.....PETITIONER/RESPONDENT

VERSUS

NELSON NTHIGA MUGU.....OBJECTOR/APPLICANT

RULING

A. Introduction

1. This court is invited to determine summons for revocation and/or annulment of grant dated 31.03.2016.
2. The said summons is based on the grounds on its face and further supported by the affidavit annexed to the application. In a nutshell, the applicant's case is that the said grant was obtained fraudulently by making of a false statement or by concealment from court of something material to the case to the effect that the applicant is a creditor of the estate and is entitled to a share of one acre out of land parcel Ngandori/Kirigi/3770 in the estate of the deceased herein.
3. The applicant deposed that he is entitled to the same for the reasons that he financed legal expenses in suit pitting the deceased, the applicant's father and their brother one Naftary Kaguchia being Civil case No. 1800 of 1979 at Nairobi involving LR Ngandori/Kirigi/349 and wherein it had been agreed that he would be allocated one acre out of their entitled portions in LR Ngandori/Kirigi/349 and at the conclusion of which each of the three brothers was allocated 5 acres of the said land parcel.
4. That he facilitated the sub-division and all the necessary costs leading to the Ngandori/Kirigi/349 being sub-divided into Ngandori/Kirigi/3768, Ngandori/Kirigi/3769 and Ngandori/ Kirigi/3770 and the deceased being registered in Ngandori/ Kirigi/3770 and he retained the title to the said land awaiting them to sub-divide the land and transfer an acre each but they passed on before they could transfer the same.
5. That, however, the respondent filed this succession cause without his knowledge and ensured that he was not included in the mode of distribution. As such, the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant that the applicant facilitated the acquisition, of Ngandori/ Kirigi/ 3770.
6. The petitioner/respondent opposed the summons by way of a replying affidavit sworn on 10.03.2017 and wherein she refuted the applicant's deposition that the deceased sought assistance from the applicant in making payments towards the advocate but the same were paid by the deceased and his brother as the applicant had just completed his secondary education in 1982 and thus was not in a position to make any payment towards the legal fees and that the applicant has never followed up on his claim with the deceased at the time the land was sub-divided. The respondent further denied that the grant was obtained fraudulently or by way of misrepresentation.
7. With the leave of the court, the applicant filed a further affidavit and wherein he reiterated the contents of his application.
8. Parties took directions that the application be canvassed by way of witness statements and written submissions and which directions were duly complied with.
9. I have perused the application herein, the replying and the further affidavits by the parties, the witness statements and the written submissions filed herein.
10. As I have already noted, the application herein seeks for orders that the grant made to the respondent herein on 25.07.2012 and confirmed

on 20.02.2014 be revoked. The circumstances under which a grant of representation may be revoked are provided for under Section 76 (a) - (e) of the Law of Succession Act Cap 180 of the Laws of Kenya. (See **Matheka and Another vs Matheka [2005] 2 KLR 455**).

11. It is clear therefore, that the grounds upon which a grant may be revoked or annulled are statutory and it is incumbent upon any party making an application for revocation or annulment of a grant to demonstrate the existence of any, some or all the above grounds. However, I note that the applicant's claim is based on the fact that he contributed money to help the deceased and his father in a suit they had filed against their brother in relation to the original land parcel which resulted to the suit land. It is on this ground that he deposed to be a creditor to the estate of the deceased.

12. This court has previously held that Section 76 of the Law of Succession Act only deals with revocation of grant and not the process of confirming the grant or the certificate of confirmation of grant. As such, any application for revocation of grant should be limited to the process of obtaining the grant.

13. As a general rule of procedure, a petition for letters of administration intestate is commenced by filing of a petition. Under Section 51(2) of the Act, the petitioner is supposed to include information as to; -

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased; (h) a full inventory of all the assets and liabilities of the deceased.

14. Rule 7(1)(d) of the Probate and Administration Rules also provides that application for a grant of representation to the estate of a deceased person should be by way of a petition in the appropriate Form supported by an affidavit in one of Forms 3 to 6 as appropriate and the said affidavit should contain particulars which include a full inventory of all his assets and liabilities at the date of his death (including such, if any, as may have arisen or become known since that date) together with an estimate of the value of his assets movable and immovable and his liabilities.

15. It is my view therefore, that, the applicant's submissions to the effect that the respondent did not inform him in the whole process are misplaced. He is not a beneficiary of the estate and thus his name ought not to have been included in the Form P & A.5. A creditor is not a beneficiary of an estate of a deceased so as to require his/her name to be included as beneficiaries. In my view, his claim if any, lay in filing an affidavit of protest against the confirmation of the grant and prove his interest therein.

16. However, as I have noted, the dispute revolves around the applicant claiming entitlement to part of the estate herein by virtue of having paid the legal fees in Civil Case No. 1800 of 1979 at Nairobi. As I have already stated, the petitioner for letters of administration has a duty to include in the petition ***a full inventory of all the assets and liabilities of the deceased.*** The applicant having pleaded that he is a creditor of the estate definitely means that his interest ought to have been noted in the petition as a liability. I have perused Form P & A 5 herein and I note that the liabilities are indicated as "NIL". It therefore means that failure to include the interests of the applicant would amount to a non-disclosure of material facts and would entitle the grant to be revoked. The question therefore is whether the applicant is a creditor of the estate.

17. The applicant annexed to the application an agreement allegedly executed on 1.11.1982 and wherein it appears that the deceased and one Mugu Zakayo Mukoma undertook to give the applicant one acre each. However, this note and the payment of the said legal fees was strongly refuted by the respondent herein. The respondent produced receipts evidencing payment of the legal fees to the law firm of Muthoga Gaturu & Company Advocates. The respondent further attached a bill of costs dated 11.03.1992. These documents were produced by consent of the parties herein. I note that the said note dated 1.11.1982 reads in part

"...hereby agree and confirm that all the legal fees in this suit shall be paid by Nelson Nthiga Mugu....."

18. The said note was not evidencing payment of the legal fees but a future performance of the undertaking to pay. The applicant herein has not proved that he indeed paid for the said legal fees. There is no evidence of the said payments having been made. The uncontroverted evidence is to the effect that the said suit proceeded until early 1990s. The question which remains unanswered is as to which legal fees the applicant claim he paid in 1982 whereas the matter was still in court? Further, there is no evidence of the said payment. It is trite law that he who alleges must prove. The applicant did not tender sufficient evidence to prove that he paid for the same. The evidence on record is to the contrary. It is my view therefore, that the applicant cannot be said to be Creditor of the deceased and thus a liability of the estate. The respondent had no business indicating his claim as a liability of the estate.

19. Considering all the above, the applicant did not satisfy the conditions for revocation of grant issued to the respondent herein. He did not satisfy the conditions for revocation of grant under Section 76 of the Act. In the premises, the application is hereby dismissed with costs.

20. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 10TH DAY OF MARCH, 2021.

L. NJUGUNA

JUDGE

.....for Applicant

.....for Respondent