



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

IN THE MATTER MISC. APPLICATION NO. 39 OF 2017(OS)

OF: AN APPLICATION BY SKOROSTINSKAYA SVETLANA AND SUSSANA SCIACOVELLI

FOR ORDERS NULLIFYING THE WILL DATED NOVEMBER, 27, 2015

BY DONATO SCIACOVELLI (DECEASED)

IN THE MATTER OF: THE LAW OF SUCCESSION ACT CAP.160 LAWS OF KENYA

SVETLANA ISKOROSTINSKAYA.....1ST APPLICANT

SUSANNA SCIACOVELLI.....2ND APPLICANT

AND

GLADYS NASERIAN KAIYONI.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Obinju Rondo for the Applicants

E.N.Karomo & Associates

RULING

There are two applications before me which require my attention. First is the application by **Gladys Naserian** seeking an order for revocation of grant issued to the Respondents on **8.7.2020**. Secondly, it is the application by the Respondents dated **25.2.2020** for leave of this Court to commence contempt proceedings against **Gladys Naserian** for breach of a Court order.

BACKGROUND

From the record it's crystal clear that the Respondents as duly appointed administrators to the Estate of the deceased one **Donato Sciacovelli** applied for and appropriately were issued with a Certificate of Confirmation of grant of letters of administration dated **8th July, 2020**.

The arguments being canvassed by the applicant are to the effect that she was never notified nor served with the summons for confirmation of grant as one of the beneficiaries to the estate of the deceased. According to the applicant on or about **9.7.2015** jointly with the deceased they entered into a sale agreement to purchase an interest in **LR 13402 Malindi**. Thereafter their interest was registered jointly in the Certificate of title. The borne of contention and motivation by the applicant to apply for revocation of grant stems from the fact of that share being incorporated as part of the estate capable of being distributed to the beneficiaries. I am of the view with respect to this issue, there is no conflict a decision on the matter has been addressed by the Court in another suit between the same parties.

As regards revocation it is premised, on section 76 of the Law of the Succession Act. It provides inter alia that; -

“A grant of representation whether or not confirmed may at any time be revoked or annulled if the Court decides; -

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 concealment from the Court of something material to the case

c. that the grant was obtained falsely by means of an untrue allegation of fact essential to justify the grant being revoked.

The principal and the only ground of revocation before the court is that the administrators in taking out confirmation proceedings omitted to issue notice of the intended summons and the proceedings went on without her participation. Contrary to the applicant's assertion, the court has to ask itself what is meant by the words stated in the application that the Respondents are guilty of misrepresentation, concealment, defects, acts of omission or fraudulent statement in the making of the Certificate of confirmed grant of letters of administration. Contrary to the applicant's assertion, pursuant to Rule 41(5) of the Probate and Administration Rules, the court must give effect to the provisions of section 76 of the Act. That sections in its proper construction seems to embody the provisions of section 53 and 54 of the Law of Succession Act. Therefore, excluding the certificate of confirmed grant of letters of administration from the purview of revocation or annulment. As stated by *Musyoka J in the Re Estate of Ongayo Nande (Deceased) [2020] eKLR*:-

“A certificate of confirmation of grant is akin to an order or decree that is extracted from a ruling or judgement of the Court, Clearly, therefore a certificate of confirmation of grant of representation, and for that reason it is not available for revocation under section 76 of the Law of Succession Act.”

According to the applicant she is aggrieved with the orders preceding to the making of the grant of representation in favour of the Respondents which purported to include her share in the immovable property in the hands of the administrators to distribute it at will without her consent. The applicant considers herself a beneficiary to the estate on that ground alone.

The main question is whether or not the applicant is entitled to any benefit from the disputed property. The object of construction of grant of legal representation under section 53 and 54 of the Law of Succession Act is to ascertain the intestate estate of the deceased, that is to say Assets and Liabilities. The Court is concerned with determination and the distribution of the Estate to the beneficiaries as ascertained under section 29 of the Act. The provisions of the Act are very clear, effect being given to the presumed intention of the deceased.

One of the fundamental tasks of an appointed administrator in intestate proceedings is to identify the assets, debts and liabilities of the estate. I take it to be a cardinal rule that the administrators at the earliest opportunity should sort out any debts or liabilities to give way for distribution of the net estate to the beneficiaries. It must be admitted and great weight has to be given to the earlier findings made by the Court of concurrent jurisdiction that she has never been recognized as a beneficiary to the estate of the deceased. How far she has litigated over this estate including presentation of a forged will which was declared repugnant demonstrates that her entitlement to the estate cannot be achieved in terms of section 76 of the Law of succession. This means that regarding that property purportedly held in common tenancy, there is a single interest and right of survivorship *jus accrescendi* applies. In the case at bar that property as ruled by this Court fell into exceptions to directly vest the share with the applicant.

The overreaching issue in the case at bar is the fact of the applicant claim or acting on the basis of a forged will of the deceased. Therefore, undoubtedly intermeddled, wasted, dissipated and depleted the Estate of the deceased.

Following a careful analysis of the evidence and circumstances of the case, in respect to the Estate of the deceased on **7.2.2019** the Court ruled that the Respondent fraudulent activities had deprived the Estate of Kshs.15,800,00/-. At that juncture, the conclusion of the Court was an issuance of a declaration for the applicant to indemnify the Estate of the deceased with equal quantum. If this court were to find that the applicant is or will receive the benefit of the disputed property, it would have first to ensure, the declaration of indemnity pronounced in the judgement by *Weldon Korir J of 7.2.2019* has indeed been executed and enforced.

I have to recognize the force of that judgment. I have also to recognize that it is this Court's consideration that when it comes to revocation/annulment under section 76 of the Act against Certificate of Confirmed grant, whether it is consistent with the approach of interpretation by reference to the factual context. This Court, in putting itself in the administrators arm-chairs construes the proceedings in the making of the certificate of confirmed grant for being are neither defective, fraudulent, misrepresented, or falsely obtained by the concealment from the Court of something material to the case.

Based on the established principles and the circumstances in the instant case, it is best for this court to state that on a balance of probabilities there is no evidence before me to conclude the essential elements under section 76 of the Act have been discharged, to revoke the Certificate of Confirmed grant to the deceased estate.

As a result of this the application on revocation of the certificate of confirmed grant is devoid of merit. It's sufficiently good for dismissal.

On Reverting to the application by the Respondents dated 25.2.2020 the Court is being asked to grant leave for commencement or initiating contempt proceedings against one *Gladys Naserian Kaiyoni*.

Given the judgement of the Court, delivered on 7.2.2019, the issue of whether or not there is a duty on the part of the contemnor, *Gladys Naserian Kaiyoni* to render a detailed account of the estate diverted to her own use without a valid will or certificate of confirmed grant is nonsuited. It is plain from the judgement that;

“Any monies withdrawn from the estate of the deceased based on invalidated will should be paid back to the estate of the deceased for distribution by whoever will be appointed to administer the estate.”

There has been a great lapse of time since the death of the deceased and subsequential intermeddling of his estate by *Gladys Naserian*

Kaiyoni. The Court has frequently been kept busy by a plethora of applications being lodged by **Gladys Naserian Kaiyoni** ignoring the context and precise order of refund of the Estate money fraudulently obtained from the bank account of the deceased. Against this background the question that is considered is whether or not Gladys Naserian is culpable in reference to the fact pattern and final order of the Court on refund of the Estate of money.

The most appropriate starting point is the first legal proposition taken on execution and enforcement of judgements. The Court in the case of **Exclusive Estate Ltd V Kenya Posts and Telecommunication Corporation & Another [2005] 1EA 53**. It was held; -

“That a decree holder as defined under the Civil Procedure Act means a person in whose favor a decree capable of execution has been passed. The execution of a decree capable of execution may be enforced in any of the methods stipulated under the provisions of section 38 of the Civil Procedure Act. The various modes of execution provided for include; -

- a. by delivery of any property decreed;**
- b. by attachment and sale, or by sale without attachment, of any property;**
- c. by attachment of debts;**
- d. by arrest and detention in prison of any person;**
- e. in such other manner as the nature of the relief granted may require.”**

As far as the facts of the application are concerned the application is concerned there is already a judgement of the Court in the sum of Kshs.15,000,000/-. The amount remains unsettled as per the Court order. The Respondents have applied for institution of contempt proceedings against **Gladys Naserian Kaiyoni** as a way of execution of the judgement.

“The purpose of the jurisdiction to initiate contempt proceedings is not for the prove at of judicial dignity but for the prevention of interference with the administration of justice or maintenance of the Court’s dignity. See Eddy and Truth9961) (29); - “An application for leave to commence contempt proceedings is applied for the first instant Exparte. See Africa Management Communication International Ltd V Joseph Mugo(2013)eKLR,in Board of Governors, Moi High School Kabarak V Malcom Bell & Another S.C. Petition No. 687 of 2013, the Court held inter alia “that, the power to punish for contempt is given to the court to safeguard itself against contemptuous and disruptive intrusion, and it is one of the indisputable attributes of the Court’s inherent power. That it would be virtually impossible for the Courts to protect the citizens’ rights and freedoms.”

In the absence of this power with reference as to the purported objective to initiate contempt proceedings, the Court in **Football Kenya Federation V Kenya Premier League Ltd (2015) eKLR** the court clarified; -

“that the object of the contempt jurisdiction is not being a vehicle to punish or compensate the judges injured feelings but is meant to protect the due administration of justice and maintenance of law and order” See also **Christine Wangari Gachunge V Elizabeth Wanjira Evans & 11 Others (2014) eKLR, R V Returning Officer of Kamukunji Constituency and The Electoral Commission of Kenya (HCMA No. 13 of 2008).**”

In the instant case, the punishment of contempt are for the enforcement of a judicial decree. I agree with Learned Counsel for the applicants that the Court in terms of section (5) of the Judicature Act as read with 3 and 3A of the Civil Procedures Act do grant leave to commence contempt proceedings against the Respondent – **Gladys Naserian Kaiyoni** as a condition necessary to compel obedience to the decree issued on **7.2.2019**.

In the same terms as provided under section 38 of the Civil Procedure Act the applicants are at liberty to execute the judgment by electing to invoke any of the modes of execution in the provisions. Notwithstanding these provisions I am mindful of the trite principle that disregard of an order of the Court is a matter of sufficient gravity, whatever the nature of the order may be. In the case of **Housing Finance Bank Ltd V Edward Musisi Misc Application No. 158 of 2020 CA**, the Court in Uganda held; -

“A party who knows of an order, regardless of whether in view of that party the order is null or valid, regular or irregular cannot be permitted to disobey it by reason of what that party regards the order to be. It is not for the party to choose whether or not to comply with such order. The order must be complied with in totality, in all circumstances by the party concerned, in case that party for some genuine reason finds compliance with the Court order not possible to appropriately move Court issuing the order and bring to the attention of the court the reasons for non-compliance. A court of law never acts in vain, as such issues touching on contempt of Court take precedent over any other case of invocation of the jurisdiction of the Court.

From the record there is prima facie evidence that the Respondent **Gladys Naserian Kaiyoni** is yet to comply with an extracted order of the Court following the judgement which was delivered on **7.2.2019**. The Respondent by virtue of being a litigant in these proceedings has been aware of the existence of the Court Order as granted in those proceedings and subsequent judgement.

For the above reasons I find that there is merit in the application dated **25.2.2020** for grant of leave to commence and initiate contempt proceedings against **Gladys Naserian Kaiyoni**. That the aforementioned Certificate of Confirmed grant issued to the Administrators shall not be revoked. The Respondent shall also bear the costs of this application.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MALINDI THIS 8TH DAY OF JUNE, 2021

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R. NYAKUNDI

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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