



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 372 OF 2012

IN THE MATTER OF ESTATE OF ESTON NYAGA NDIRANGU (DECEASED)

JUDITH NYAGA.....APPLICANT

VERSUS

MICHAEL IRERI NYAGA.....1ST RESPONDENT

JULIUS KINYUA NYAGA.....2ND RESPONDENT

LUCY WANJIKU NYAGA.....3RD RESPONDENT

RULING

1. The applicant herein seeks for revocation of the grant issued to the respondents and confirmed on 26.11.2019. The said application is brought pursuant to the provisions of section 76 of the Law of Succession Act and the grounds upon which the application is premised are similar to the grounds provided for under the said section.

2. In a nutshell, the applicant's case is that the deceased was survived by three wives and fifteen children all of whom are beneficiaries of the estate but were left out in its sharing. Further that the succession herein was done secretly and in the absence of the applicant and that even though their names appear on Form P & A 5, they were misspelt and that the applicant never signed any document to the effect that succession be conducted in relation to the estate herein and that if there is any document purportedly signed by any of the daughters, the same was a forgery. The gist of the applicant's case is that the succession herein was done in secrecy and the applicant came to learn of the same in 2019 when the whole of the estate had been distributed amongst the respondents leaving out other beneficiaries including the applicant and that the matter was referred to mediation without their involvement.

3. That the respondents misrepresented to the court that they were the only beneficiaries and thus disinheriting the applicants and thus they are guilty of material concealment of the existence of the applicant and other siblings. That as a result of the said misrepresentation or concealment, the majority of the beneficiaries were not reasonably provided for or were completely left out in the distribution of the deceased' estate. As such the grant ought to be revoked and the estate re-distributed as the law provides.

4. The application is opposed by the three respondents vide the replying affidavits sworn on different dates. The 1st respondent in opposition of the application deposed that the applicant and himself are both from the 1st house and further that the 2nd respondent represents the 2nd house while the 3rd respondent represents the 3rd house. Further that the applicant and the other beneficiaries have been aware of the succession proceedings herein and even attended court when the matter was in court but opted not to participate in the proceedings in court and mediation. Further that the estate was distributed amongst the three beneficiaries/administrators so that they could distribute the same to the members of their respective houses and efforts to have the applicant and other members of the 1st family sit and agree on the mode of distribution have been futile as the applicant and the said members of the 1st house have failed to co-operate.

5. Further that the applicant is aware of the third parties' entitlement to the part of the estate (LR. Mbeti/Gachoka/69) and some of whom had been let to live on part of the said land by the deceased. The 1st respondent further denied any transmission or sub-division as the members of the 1st family have not sat and agreed on how the 1st family ought to sub-divide their share and same for the members of the 2nd and 3rd families. That none of the beneficiaries have opposed the confirmed grant other than the applicant and the beneficiaries should be given time to resolve their issues through dialogue.

6. The 2nd respondent in opposition to the application, deposed that all the beneficiaries of the estate including the applicant have been aware of the succession cause herein and they have been coming to court. Further that the beneficiaries of the 2nd family are not opposed to the confirmed grant and that they are in the process of agreeing on how to distribute the 2nd house's share and it's not fair that the applicant delays the distribution of the estate yet she ought to claim from the 1st house and they ought to dialogue over the same.

7. The 3rd respondent in opposition to the summons herein deposed that the applicant has all along been aware of the proceedings and further that none of the applicant's sisters is supporting the application herein. Further that everything done was above board and there can be no allegations of secrecy or fraud as due process was followed and thus the applicant cannot purport not to be aware of the proceedings herein as the cause was instituted in 2012 and notice issued and wherein the applicant signed all the forms as part of her consent. Further that the applicant cannot speak on behalf of other parties who are not parties to instant proceedings.
8. When the application came up for hearing, the parties agreed to canvass the same by way of written submissions and wherein each of the parties submitted in support of the rival positions.
9. The applicant in support of the application submitted that the respondents herein filed the instant cause without involving all the beneficiaries and as a result of which, not all the beneficiaries signed the consent to making of the letters of administration to persons of equal or lesser priority. She further submitted that the mode of distribution on the affidavit in support of summons for confirmation of grant and the confirmed grant had discrepancies in the mode of distribution and which was aimed at dispossessing the beneficiaries and further that the respondents proceeded to withdraw funds from the deceased's account all in efforts to defraud other family members and thus they have failed to proceed diligently with the estate and the grant ought to be revoked and the respondents ordered to produce inventory or accounts of the administration. That there was no consent filed with the summons for confirmation of the grant and neither did all beneficiaries attend court other than the administrators and that the respondents proceeded to transfer most of the property and money in accounts to themselves purporting that they would distribute to other beneficiaries. She thus prayed that the grant be revoked.
10. On the part of the 1st and 2nd respondents, it was submitted that the applicant is not entitled to the orders sought as her intention is to delay the administration of the estate herein and further that ex-parte orders granted on 22.01.2020 for status quo ought to be set aside and the summons general dated 22.01.2020 be dismissed. On the summons for revocation of the grant, it was submitted that the applicant was aware at the time the petition was filed and her name was included in the list of beneficiaries on Form P&A 5 and that she gave the consent to the respondents being the administrators and she was aware of what was transpiring in the cause herein but opted to not actively participate in the same. Further that during the mediation process, all the beneficiaries sat and agreed that the estate should be shared amongst the three administrators so that each can distribute to the children of each house and the administrators were in the process of distributing the same when the applicant rushed to court and inhibited dealings with the estate herein. As for the money withdrawn from the deceased's account, it was submitted that the same went towards paying school fees for the deceased's children who were still in school. The expenses incurred were done through a court order.
11. On the part of the 3rd respondent, it was submitted that the applicant was aware of the proceedings herein as she signed all the relevant forms for consent when the cause was filed. Further that as a result of the mediation proceedings, the beneficiaries agreed to have the estate registered in the names of the respondents so that they could share amongst the respective beneficiaries of each house and as such, the application herein is premature as the applicant ought to have awaited the finalization of the administration of the estate. Further that allowing the instant application would negate the essence of court annexed mediation which is a very efficient method in dispute resolution. Reliance was made on the case of in the Estate of BM (deceased) (2019) eKLR.
12. I have considered the application herein together with the respondents' replying affidavits on record. I have also considered the rival written submissions.
13. The said application is brought under section 76 of the Law of Succession Act Cap 160 Laws of Kenya and Probate and Administration Rules.
14. Section 76 provides for revocation of grant and the circumstances under which a grant of representation may be revoked. However, from the analysis above, it appears that the relevant provision is Section 76(a)(b) and (c) as the application before the trial court relates to the obtaining of the grant. Under the said provisions, *a grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an interested party or of its own motion on the grounds either that the proceedings to obtain the grant were defective in substance; that the grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case; or that the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently. These grounds ought to be proved with evidence as the power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds but not to be exercised whimsically or capriciously. (See Albert Imbuga Kisigwa –vs- Recho Kavai Kisigwa, Succession Cause No.158 OF 2000). Even when revocation is by the court upon its own motion, there must be evidence to satisfy the grounds for revocation of grant (See Matheka and Another –vs- Matheka [2005] 2 KLR 455).*
15. **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. The applicant has the duty to demonstrate the ground(s) which she relies on in challenging the grant.
16. As I have already noted, the grounds in support of the applicant's application are basically that the succession cause was done without involving the applicant and that the daughters of the deceased did not sign any documents for the succession proceedings to be conducted in respect of the estate and that they came to learn about the instant cause when the same had already been done and finalized. Further that the respondents misrepresented to the court that they are the only beneficiaries whereas there are other beneficiaries and who are being defrauded by the respondents. These averments were strongly opposed by the respondents who deposed and further submitted that the applicant was involved in the proceedings herein and also signed consent to the respondents' appointment as administrators.
17. It is not in dispute that the deceased herein had three wives and two of whom were deceased as at the time of filing the instant cause. The only surviving wife of the three is the 3rd respondent herein. It is further not in dispute that the deceased had fifteen (15) children as was indicated on the Affidavit in support of petition for letters of administration intestate which was sworn on 11.07.2012 and filed in court on 10.09.2012. Further it is not in dispute that the 1st and 2nd respondents are the children of the deceased herein and that the deceased died on 22.0.2012. What this means therefore is that the Law of Succession Act is applicable in the distribution of the estate herein.

18. Rule 7 of the Probate and Administration Rules 1980 provides that application for grant of representation in relation to an estate of a deceased person to whose estate no grant or no grant other than one under section 49 or a limited grant under section 67 of the Act has been made, the application shall be by petition supported by an affidavit. The said affidavit must contain amongst other details, the names, addresses, marital status and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving spouse or child, like particulars of such person or persons who would succeed in accordance with Section 39(1) of the Act {Rule 17(e)(i)}.

19. Rule 26 provides that letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant. Further that in an application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, **in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority**, be supported by an affidavit of the applicant and such other evidence as the court may require.

20. The effect of the above provisions is that where a person is applying for a grant of letters of administration intestate, he must get consent from persons of equal or lower priority than him. The 1st and 2nd respondents having been brothers to the applicant and other beneficiaries, it therefore means that all the remaining beneficiaries ought to have consented to them being given the grant of letters of administration in relation to the estate herein. I have perused the court record and I note that consent to the making of a grant of letters of administration intestate which was filed contemporaneously with the petition was only made by two beneficiaries (being Joyce Ngithi Nyaga and Julius Kinyu) and wherein they were giving the consent to one John Ndii Nyaga, Kennedy Nyaga and Lucy Wanjiku Nyaga (3rd respondent). There is no consent as to the other brothers and sisters having consented to the grant being given to the 1st and 2nd respondent. It is my view therefore that the said grant was obtained pursuant to proceedings which were defective in substance. The respondents ought to have obtained consent from all the other brothers and sisters. In **Antony Karukenya Njeru –vs- Thomas M. Njeru [2014] eKLR**, a grant of letters of administration was revoked as persons with equal priority did not consent to the petitioners therein applying for grant of letters of administration. (See also **In the Matter of the Estate of Muriranja Mboro Njiri, Nairobi H.C. Succ. Cause No. 890 of 2003**).

21. It is my considered view therefore that the failure by the respondents more so the 1st and 2nd respondents to obtain the consents from the other siblings makes the proceedings of obtaining the same to be defective in substance and the said grant ought to be revoked and a new grant issued to the applicants.

22. The applicant also raised an issue as to the matter having been referred to mediation without her knowledge. I have perused the court record and I note that when the 1st and 2nd respondents filed summons for confirmation of grant, the 3rd respondent herein filed her affidavit of protest against the confirmation of grant and it is pursuant to this that the matter was screened and found fit for referral to court annexed mediation. The parties proceeded for mediation and a report was filed in court which was adopted as an order of this court and the grant confirmed in terms of the said mediation agreement. The applicant herein was not a party to the proceedings which were before the court as at that time and therefore her presence in the mediation proceedings cannot be said to have been mandatory. Further, it is clear that the said mediation was in relation to the mode of distribution and settling of the same and not issuance of the grant. In my view, failure to have the applicant participate in the same cannot be a ground for revocation of grant as it did not touch on the process of obtaining the grant. It is trite that section 76 covers only obtaining of a grant as opposed to the process of confirmation of the grant. (See **In re Estate of Prisca Ong’ayo Nande (Deceased) [2020] eKLR**). *The mediation process was not in relation to the issuance or obtaining of the grant.*

23. In obiter, I note that the respondents deposed to the effect that they agreed in the mediation that they be given the various land parcels to hold in trust for their respective families. However, I have perused the said mediation report and the certificate of confirmation of grant and I note that the respondents herein registered some of the estate property in their names wholly. I am aware of the fact that there are orders adopting the mediation report which are in force. However, I must note that the registration of the suit land in the names of the beneficiaries cannot achieve the intended trust. Having revoked the grant, it follows that the order adopting the mediation report has to suffer the same fate. The said orders are hereby set aside.

24. *In the end, the grant is hereby revoked. The respondents should proceed to apply for confirmation of the same within six months and the application for confirmation of the grant should be served upon all the surviving beneficiaries of the estate.*

25. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF JULY, 2021.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondents