



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 820 OF 2008

IN THE MATTER OF THE ESTATE OF ZAKARIA MUTISO NZIOKA

(DECEASED)

NELSON NGUI MUTISO..... OBJECTOR

-VERSUS-

ESTHER NGINA MUTISO..... 1ST ADMINISTRATOR

ANTHONY MUTUA MUTISO..... 2ND ADMINISTRATOR

RULING

1. By Summons for Revocation of Grant dated 30th September, 2020, the Objector/Applicant herein seeks an order that the Grant of Letters of Administration issued to the Administrators/Respondents herein on 19th February, 2009 and confirmed on 23rd October, 2009 be revoked.

2. According to the Applicant, he is first born son of the deceased, **Zakaria Mutiso Nzioka**, who died on 19th March, 2009 and whose state is being administered by the Respondents herein, who are his mother and brother respectively. According to the Applicant he was unaware of these proceedings as he was never served with any notice to attend or participate therein. He therefore did not consent to the mode of distribution of the estate of the deceased.

3. It was deposed by the Applicant that being the deceased's first born, he has always been trying to get the beneficiaries to have the estate devolved but there has been apathy from the family, apparently because they were aware that these proceedings had been finalised.

4. He disclosed that some time in July, 2020, he started getting threats from **Paul Muvengei** and **Anthony Mutua Mutiso** and their children asking him to vacate parcel number 1761, failure to which they would kill him and he went ahead and reported the threats to the Police vide O.B. No. 20/09/4/2020. Being suspicious, he decided to visit the Land Offices and on 6th July, 2020 conducted a search on Land Parcel Number Iveti/Iveti/1761 which he occupies and it was then that he discovered that the registration was in the name of **Paul Muvengei**. At the registry, he was informed that the subdivisions had been undertaken by the Respondents, and that titles had already been issued and he was issued with a map.

5. It was deposed by the Applicant that it has since come to his attention that the original Land Parcel Number Iveti/Kiandani/884 which was initially registered in the name of the deceased had been subdivided into Land Parcel Nos. Iveti/Iveti/1756, Iveti/Iveti/1757, Iveti/Iveti/1758, Iveti/Iveti/1759, Iveti/Iveti/1760, Iveti/Iveti/1761, Iveti/Iveti/1762 and Iveti/Iveti/884 and that he had been registered in three parcels of lands but not the land which he occupies. Before he could pursue the matter the Respondents and some of the beneficiaries attacked him together with his family seriously injuring them leading to criminal charges being instituted against the said offenders. They also burnt down his house and killed his wife, **Juliana Mwikali Ngui** leading to murder charges being preferred.

Respondents' Case

6. In response, the Respondents relied on the replying affidavit sworn by **Anthony Mutua Mutiso**, the 2nd Respondent on 7th May, 2021.

7. According to him, he is one of the Petitioners in regard to the estate of **Zacharia Mutiso Nzioka** together with her mother **Esther Ngina Mutiso**, the 1st Respondent herein. He admitted that **Zacharia Mutiso Nzioka** died on 6th March, 2006 and they petitioned for letters of

administration in this cause and the Grant was issued on 19th February, 2009 and a Certificate of confirmation of grant was issued on 23rd October, 2009. While confirming that the applicant/objector herein, **Nelson Ngui Mutiso**, is his brother, averred that contrary to his allegations that he was not involved in the Succession proceedings, he was fully informed and involved in the petition of the letters of administration in this cause. He disclosed that the applicant/objector herein signed forms P&A.5 dated 24th November, 2008 which is the affidavit in support of petition for letters of administration and again signed Form 38 dated 24th November, 2008 which is consent to the making of a Grant of Administration intestate to person of equal or lesser priority. The deponent therefore denied that the applicant was not involved and or informed when the petition was filed for the Grant of letters of administration in this matter.

8. It was averred by him that the applicant went to Guru Nanak High School and is a Form 4 leaver and therefore is a person who is well educated and it is curious that the supporting affidavit to the application is just thumb printed instead of a signature and even the thumb print has not identified which thumb print and in whose presence because there is no certificate of the Advocate in whose presence it was allegedly thumb printed.

9. He averred that after their father died the family gave mandate to the applicant, being the first born son of the deceased, well versed with subdivisions having worked as a District Surveyor in Kiambu District, ma to involve a surveyor for purposes of obtaining title deeds in respect of the properties which their father had bequeathed to his beneficiaries when he was alive. However, when the parties appeared before the Judge for Confirmation of the grant the applicant was not present in Court because he was sick though he had been informed and was aware that the Grant was to be confirmed and he duly consented to the mode of distribution of the Estate.

10. The deponent averred that the allegations by the applicant that he received threats to vacate Land Parcel Number 1761 is not true because even the alleged OB No. 20/09/4/2020 has not been annexed to the application and in any event neither him nor his children or **Paul Muvengi** and their mother have ever been arraigned in any court of Law in regard to the alleged threats.

11. According to the deponent, this application has been brought in bad faith taking into account that the grant herein was confirmed on 23rd October, 2009 whereas the application was filed on 30th September, 2020 which is a period of 11 years. In his view, this application was filed with ulterior motives taking into account that himself and his brother **Paul Muvengi** and their sons were charged with the murder of the applicant's wife one **Juliana Mwikali Ngui** in August 2020 vide Machakos Murder Criminal Case Number 25 of 2020 and then thereafter the applicant moved to Court in September 2020 and filed this case purely because there is a bad blood between the applicant, himself and the other petitioner who is their mother. He disclosed that the applicant also lodged a complaint with the police against their mother the Co petitioner in this matter and she has been charged with the offence of conspiracy to murder contrary to Section 224 of the **Penal Code** vide Criminal Case No. 244 of 2020 together with the deponent and others which is a further proof that there is bad blood between the applicant and the petitioners herein and the other beneficiaries of the Estate.

12. The deponent however denied that the Grant herein was obtained fraudulently by concealment from this Court of a material fact and in any event the applicant has clearly demonstrated that he has been provided for in the distribution of the estate.

13. It was deposed that the applicant is the only person who can tell what transpired when he commissioned the surveyor to subdivide the deceased's property known as Iveti/Kiandani/884 because the Certificate of the Confirmation of grant was to the effect that the said property would be registered in the name of **Esther Ngina Mutiso** to hold in trust on behalf of the other beneficiaries and NOT to be subdivided into the various portions shown in paragraph 12 of the supporting affidavit dated 30th September, 2020.

14. He averred that the applicant had not attached an official search from the Ministry of Lands to prove that land Parcel Number Iveti/Iveti/1761 is registered in the name of **Paul Muvengi** as alleged by the applicant and therefore this Honourable Court will never know the truth of such allegations.

15. It was his view that the applicant has not met the conditions set under the Provisions of Section 76 of the **Law of Succession Act** to warrant the Revocation and or annulment of the Certificate of Confirmation of grant issued on 23rd October, 2009. According to him, this application is incompetent, bad in law and an abuse of the court process and therefore ought to be dismissed with costs.

Applicant's Submissions

16. On behalf of the Applicant, it was submitted that while the grant was coming up for confirmation, he was not informed of the same and as a result he neither attended nor participated in the same. Neither was his attendance dispensed with by way of a consent. The Objector further submitted that the same is evinced by the notes of **Lenaola, J** (as he then was) on 19th October, as per the court record. In support of the submissions the Applicant relied on **In re Estate of Abdulkarim Chatur Popat (Deceased) [2019] eKLR.**

17. According to the Applicant, being a dependant of the Deceased, he should have been in attendance during the confirmation and that since that was not the case, the proceedings leading to obtaining the grant were defective in nature. He relied on section 76 and 71 of the **Law of Succession Act**. While conceding that he was not only left out in the proceedings, he contended that he was also left out when the Court was making orders as to how the Estate of the Deceased was to be divided.

18. According to the Applicant, the presence of all the Beneficiaries during the confirmation of a grant was further enshrined in the case of **Charles Mutua M'anyoro vs. Maria Gatiria [2009] eKLR.**

19. According to the Applicant, by the Administrators purporting and successfully confirming the grant without the consent of the Objector, they have concealed a material information from the Court, and as such, the grant should be revoked.

20. While acknowledging that the power of the Court to revoke a grant of representation is discretionary since Section 76 of the Act is not couched in mandatory terms, it was submitted that the discretion must however be exercised judiciously taking all factors into account to

meet the ends of justice. Reliance was placed on the decision of **Musyoka, J In the Matter of the Estate of Elizabeth Wanjiku Munge (Deceased) [2015] eKLR.**

21. In this case it was submitted that the Applicant has proven to this Court that the process undertaken by the Administrators in order to be acquire the grant herein was marred with illegalities, non-disclosure and dishonesty on their part, and that the same grant should hereby be revoked since the grant of the orders sought would not only ensure that justice has been done but also seen to have been done.

Respondents' Submissions

22. On behalf of the Respondents, it was submitted that the Grant herein was issued on 19th February, 2009 pursuant to the petition filed by **Esther Ngina Mutiso** and **Anthony Mutua Mutiso** dated 4th August, 2009. The Petitioners filed an application for confirmation of Grant dated 4th February, 2009 and the Court confirmed the Grant on 23rd October, 2009 and the distribution of the deceased's estate comprising of Land Parcel Number **Iveti/Misakwani/230, Iveti/ Kiandani/884** was to be registered in the names of **Esther Ngina Mutiso** who is the widow of the deceased whereas the share by the deceased in Land parcel number **Machakos Town Block 11/239** was to be registered in the name of **Esther Ngina Mutiso** to hold in trust for the other beneficiaries .

23. It was noted that the applicant did not attach any proof of ownership of land parcel numbers **Iveti/Iveti/1756, 1759, 1760, 1761 and 1762** to enable this court verify who the registered owners are and whether the said properties exist. As regards the said criminal cases, it was submitted that the same are still pending in court.

24. While reiterating the contents of the replying affidavit, it was submitted that none of the Respondents obtained any title in respect to the alleged subdivision of Land parcel number **Iveti/Kiandani/884**. It was therefore submitted that the Grant herein was not confirmed without full disclosure of all the beneficiaries of the estate and neither was it obtained fraudulently by concealment from this court of the material fact that the applicant was a beneficiary and that the applicant has not been provided for in the distribution of the estate. Indeed, the applicant has confirmed that he is the registered owner of Land parcel numbers **Iveti/Iveti/1758 and 1759**. It was submitted that the petitioners fully disclosed all the beneficiaries of the estate of the deceased and that the due process was followed and indeed the applicant signed the necessary forms in support of the petition to wit; Forms **P&A5** and Form **38**. It was reiterated that the Applicant was duly informed of the confirmation of the grant but he did not attend Court on the date of confirmation because he was sick though he had been informed and was aware that the matter was coming up for confirmation. In the Respondents' view, there was no fraud involved in obtaining the grant dated 19th February, 2009 and confirmed on 23rd October, 2009 and that the applicant has failed to show any fraud or concealment of any material from the court by the petitioners so as to revoke and/or annul the grant. In this respect, the decision in **Charles Mutua M'anyaro vs. Maria Gatiria [2009] eKLR** and **Elizabeth Wanjiku Munge [deceased] [2015] eKLR** relied on by the applicant herein is not applicable in this matter and is distinguishable

25. Based on **Prisca Onyango vs. Ong'ayo Nande Succession Cause No. 836 of 2013 [2020] eKLR** and **Estate of Agwang Wasiro alias Achwang Wasino (deceased [2020] eKLR**, it was submitted that none of the grounds set out in Section 76 of the **Law of Succession Act** have been proved by the applicant. The Respondents contended that **Esther Ngina Mutiso** the widow of the deceased who is the 1st Petitioner in these proceedings is given preference as a surviving spouse and therefore the applicant being a child of the deceased did not have preference in obtaining the letters of administration. The Respondents relied on Rule **26** of the **Probate & Administration Rules**.

26. The above provision, it was submitted, gave **Esther Ngina Mutiso** authority to apply for letters of administration on priority being the widow of the deceased and in any event she was not obliged to notify the applicant when she lodged the petition because they are not entitled in the same decree but nevertheless the petitioners duly notified all the beneficiaries of the estate including the applicant and that is why he signed Forms **P&A5** and Form **38**.

27. It was therefore submitted that the application lacks merit as none of the grounds set out on the face of the application have been proved to the required standards and that no supporting evidence has been annexed to the supporting affidavit to enable this court revoke the Letters of Administration issued on 19th February, 2009 and confirmed on 23rd October, 2009. The Court was urged to dismiss the application with costs.

Determination

28. I have considered the application, the affidavits both in support of and in opposition to the application and the submissions filed.

29. Section 76(a), (b) and (c) of the **Law of Succession Act** provides as hereunder:

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(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 the concealment from the court of something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

30. In this case the applicants' contention is that being one of the sons of the deceased, in fact the eldest son, the Respondents who are the administrators of the estate of the deceased did not notify him of these proceedings and that the grant herein was confirmed without his

consent.

31. Section 51 of the *Law of Succession Act* provides as follows:

(1) An application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.

(2) An application shall include information as to-

(a) the full names of the deceased;

(b) the date and place of his death;

(c) his last known place of residence;

(d) the relationship (if any) of the applicant to the deceased;

(e) whether or not the deceased left a valid will;

(f) the present addresses of any executors appointed by any such valid will;

(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; and

(i) such other matters as may be prescribed.

32. In this case, it is not contended by the Applicant that the Respondents did not disclose the material specify above. In fact, the fact of the Applicant being a son and a beneficiary of the estate of the deceased is not contested and was disclosed. It is not contended that any beneficiary or asset was left out or was wrongfully incorporated in the deceased's estate. The Applicant's contention is that he was not aware of these proceedings and was not notified of the same. He further contends that his consent was never obtained. Rule 26 of the *Probate and Administration Rules*, states that;

(1) 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.

(2) 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.

33. Section 66 of the *Law of Succession Act*, Cap 160, Laws of Kenya provides that:

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

34. It follows that the applicant herein did not rank in the same degree as his mother, the 1st petitioner herein. Accordingly, there was no requirement that his consent be sought before the petitioner was filed.

35. As regards his consent during the confirmation, Rule 40(8) of the *Probate and Administration Rules* provides that;

Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit.

36. This provision was dealt with in the case of Charles Mutua M'anyoro vs. Maria Gatiria [2009] eKLR where it was held that:

“...in mandatory language, the proviso to section 71 of the Law of Succession Act enjoins the court, in case of intestacy, to

confirm the grant only if it is satisfied as to the respective identities and shares of all persons beneficially entitled to the estate. Another safeguard in ensuring that only the deceased person's dependants benefit from the estate is in Rule 40(3) of the Probate and Administration Rules which requires that before a grant can be confirmed the particulars of the dependants must be disclosed...*It is imperative under the rules that all the dependants be in attendance during the hearing of the application for confirmation save where the dependants have signed a consent in writing. See Rule 40(8).*"

37. The same position was restated In re Estate of Abdulkarim Chatur Popat (Deceased) [2019] eKLR where the Court pronounced itself as follows:

"Having found that the applicants therein were beneficiaries of the estate of the deceased, their consent was necessary as was their participation in the confirmation proceedings."

38. It therefore follows that the consent of all the beneficiaries to the confirmation of grant is required before the Grant can be confirmed. It was deposed that the Applicant herein signed forms P&A.5 dated 24th November, 2008 which is the affidavit in support of petition for letters of administration and again signed Form 38 dated 24th November, 2008 which is consent to the making of a Grant of Administration intestate to person of equal or lesser priority. The Applicant has not by way of a subsequent affidavit disputed these facts. In the absence of any challenge taken to the consent, pursuant to Rule 40(8) of the *Probate and Administration Rules* there is no basis upon which this court can doubt the said consent.

39. Apart from the foregoing, as rightly appreciated by the Applicant, the power of the Court to revoke a grant of representation is discretionary since Section 76 of the Act is not couched in mandatory terms. As was held by **Musyoka, J** In the Matter of the Estate of Elizabeth Wanjiku Munge (Deceased) [2015] eKLR:

"...the power granted under Section 76 of the Act for revocation of grants is discretionary. Where a case is made out for revocation of a grant under Section 76, the court has the option to either revoke the grant or make other orders as may meet the ends of justice."

40. In other words, the court in deciding whether or not to revoke a grant must take into account the all the relevant facts including the prejudice, if any, that was occasioned by the failure to comply with section 76 of the Act. It therefore follows that the mere fact that the conditions under section 76 of the Act exist, it does not necessarily follow that the grant must be revoked. In my view where no prejudice has been alleged and the justice of the case tilts against the interference with these proceedings, the Court ought not to revoke the grant. As held by **Mwita, J**, Albert Imbuga Kisigwa vs. Recho Kavai Kisigwa, Succession Cause No.158 of 2000:

"Power to revoke a grant is discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of the beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interests of justice."

41. In this case by the Applicant's own averments, he was a beneficiary of the confirmed grant and he has not renounced his titles to the properties which he claims to have been registered in his name. Having considered the issues raised before me in this summons as well as the material placed before me I come to the conclusion that this is not a proper case in which this Court ought to exercise its discretion and revoke the grant.

42. Accordingly, the summons for revocation of grant dated 30th September, 2020 fails and is dismissed but with no order as to cost.

43. It is so ordered.

Read, signed and delivered in virtually at Machakos this 12th day of July, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Uvyu for the Respondent

CA Geoffrey