



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**SUCCESSION CAUSE NO. 689“A” OF 2013**

**IN THE MATTER OF ESTATE OF SYMON GAITHOH NDIRANGU (DECEASED)**

**RONALD MUCHIRI GAITHOH.....ADMINISTRATOR/RESPONDENT**

**VERSUS**

**JOHN NJOMO MUCHIRI.....OBJECTOR/APPLICANT**

**AND**

**KAMAR KUMAR RAMANBAHI PATEL.....1<sup>ST</sup> BENEFICIARY**

**VISHAL DINKAR PATEL.....2<sup>ND</sup> BENEFICIARY**

**RULING**

**A. Introduction**

1. Before me is summons dated 5.07.2017 and wherein the applicant seeks revocation of the certificate of confirmation of grant issued on 12.03.2015.
2. The grounds in support of the said summons are that the proceedings to obtain the grant by the respondent and the subsequent confirmation and distribution of the estate was fraudulent and false as the respondent concealed from the court material facts that the applicant herein is a beneficiary of the deceased's estate comprising of Land Parcel No. Nthawa/Gitiburi/2025. The applicant's deposed that the deceased was his brother and held the suit land as a trustee and the applicant left him out while distribution the estate while well aware of the trust and further that the respondent filed the cause herein without having obtained his (applicant's) consent. That the respondent is at the verge of implementing the grant and hence his rightful share will be distributed to strangers.
3. The summons was supported by an affidavit sworn by the applicant and wherein he reiterated the grounds on the face of summons in support of the same.
4. The 1<sup>st</sup> and 2<sup>nd</sup> beneficiaries opposed the application vide a replying affidavit sworn on 19.01.2019 and whereby they jointly deposed that they are beneficiaries of the estate herein having bought six (6) acres of the suit land from the respondent herein for Kshs. 1,500,000/- and having paid a deposit of Kshs. 1,197,000/- and the balance was payable after the transfer of the six (6) acres and that the respondent did not inform them of the applicant's interest as a beneficiary of the suit land. Further that if the grant is revoked they would lose their Kshs. 1,197,000/- which they had paid to the respondent. They prayed that if the grant was to be revoked, then they should be refunded their money plus the agreed liquidated damages being Kshs, 1,500,000/- making the total Kshs, 2,697,000/-.
5. The parties herein filed a consent dated 5.05.2020 and wherein they agreed that the summons be disposed of by way of written submissions and which consent was adopted as an order of the court vide the orders of 22.02.2021.
6. The applicant in his written submissions and in support of the summons submitted that he was a brother to the deceased herein and who was registered in the suit land in trust for himself and the applicant. But the respondent, being the son of the deceased filed the petition for letters of administration without informing the applicant and proceeded to distribute the suit land to other beneficiaries (who included the 1<sup>st</sup> and 2<sup>nd</sup> beneficiaries herein) and in total exclusion of the applicant despite him living on the suit land. Further that the respondent failed to disclose to the court that the suit land belonged to the deceased and applicant in equal shares. Further that the respondent and his brother entered into a sale agreement for sale of land with the purchasers on 1.10.2013 without having obtained the grant of letters of administration (which was obtained on 21.02.2014) and thus they lacked the capacity to contract and as such the sale was void.
7. The respondent/ administrator on his part submitted that the applicant being a brother to the deceased ranked low in the order of priority

and cannot supersede the respondent's rights over the estate of the deceased. Further that he had not proved the existence of the trust and which issue ought not to be determined by a succession court. Further that he did not satisfy the conditions for revocation of grant as provided for in the Law of Succession Act.

8. I have considered the application herein, the replying affidavit by the 1<sup>st</sup> and 2<sup>nd</sup> beneficiaries and the written submissions filed by the parties.

9. As I have already noted, the application herein seeks for revocation of the certificate of confirmation of grant issued to the respondent herein. However, in the grounds in support of the summons, the applicant averred that what he seeks is revocation of the grant. I have previously held that Section 76 of the Law of Succession Act does not provide for revocation of the certificate of confirmation of grant but the grant itself. However, since the applicant deposed as to seeking the revocation of the grant, I will proceed and make a determination as to whether the same is liable for revocation. Further the said application is brought under Section 71 of the Law of Succession Act and which section deals with confirmation of grant. Nonetheless I will proceed to consider the substance of the said application.

10. Revocation of grant is provided for under Section 76(a) –(e) of the Act. The circumstances under which a grant of representation may be revoked as provided under the said section are; -

*a) If the proceedings to obtain the grant were defective in substance;*

*b) If 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) If 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;*

*d) If the person to whom the grant was made has failed, after due notice and without reasonable cause either to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or to proceed diligently with the administration of the estate; or to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or*

*e) If the grant has become useless and inoperative through subsequent circumstances.*

11. The Court of Appeal in the case of Matheka and Another vs Matheka [2005] 2 KLR 455 laid down the above principles.

12. 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 had the duty to demonstrate the ground(s) which he relies on in challenging the grant.

13. In the instant case, the applicant pleaded that the respondent did not disclose to the court that he (applicant) was entitled to a half of the estate as the brother of the deceased since the deceased held the suit land in trust for him and further that the respondent did not seek the applicant's consent while applying for the grant. These averments were strongly opposed by the 1<sup>st</sup> and 2<sup>nd</sup> beneficiaries and the respondent in their submissions.

14. As the applicant deposed and which fact is not in dispute, he is a brother to the deceased. 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)}.

15. 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.

16. 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 applicant deposed that he is the brother to the deceased. As per the order of priority provided for under section 66 as read together with section 29 of the Act, he ranks lower than the respondent herein (who is the son of the deceased). That being the case, the respondent was not under any legal obligation to obtain the applicant's consent for him to apply for the grant of letters of administration intestate. As such, it means that the grant cannot be revoked for want of consent on the part of the applicant as his consent was not a requirement in law. The consent which was necessary was that of the respondent's brother and which was indeed obtained as per the consent filed with the petition.

17. The applicant further deposed that the grant ought to be revoked on the basis of material non-disclosure to the effect that the respondent failed to disclose to the court that the deceased held the suit land in trust for him and as such he was entitled to half share. As such, he pleads customary law trust as a basis for challenging the grant issued to the respondent herein.

18. Customary law trust is one of the overriding interests which are protected under Section 30 of the Land Registration Act of 2012.

However, for it to affect proprietor's interests in a suit land, it must be established. In the instant case, the applicant did not tender any evidence as to the existence of the said customary law trust. It is trite that customary law trust cannot be imputed but must be proved by evidence. (See **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR**). This court cannot declare the issue to do with customary law trust without prove of the same.

19. Further, despite the applicant having pleaded the said customary law trust, this court is bereft of jurisdiction to determine the same. As the respondent and the 1<sup>st</sup> and 2<sup>nd</sup> beneficiaries submitted, the right court to determine the same is the Environment and Land Court. It's the only court with jurisdiction to determine the issue to do with ownership or title to land. This court cannot determine the same. In **re Estate Of The Late Jonathan Kinyua Waititu - (Deceased) [2017] eKLR** which case was quoted with approval by Sitati J **in re Estate of Samuel Kathieri (Deceased)[2019] eKLR**, the Court held that:-

*“.....Secondly, I do not think that these Succession proceedings are the appropriate way to challenge the title of the deceased to the said properties. Their claim of a trust is or ought to be the subject matter of a separate suit or proceedings. The objectors have to prove the trust and thereafter seek revocation of the title and/or partition thereof. This requires declaratory orders of the existence of trust. This is not the function of a Succession court where the claimant is neither a beneficiary nor dependant. Succession proceedings are also not appropriate for the resolution of serious contested claims against an Estate by third parties.*

*In this case, the objectors ought to institute separate proceedings to articulate or vindicate their claims/rights. They are lucky that the claim or trust is not caught by the laws of limitations of actions. However, this court appreciates that they require a reasonable time to institute proceedings before any distribution of the Estate.*

*I therefore do hereby hold that this court has no jurisdiction to determine the claim of trust or to give any relief in respect thereof.....”*

20. It is my view therefore that the averments of the existence of the trust on the part of the applicant cannot be a ground for revocation of a grant unless the said issue has been adjudicated by a court with jurisdiction and an order having been served to this court in that respect.

21. Having considered the application herein, the applicant did not make out a case for revocation of grant issued to the respondent. As such, the application is hereby dismissed with costs to the respondent.

22. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 7<sup>TH</sup> DAY OF JULY, 2021**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondent