



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. SUCCESSION APPLICATION NO. 187 OF 2016

IN THE MATTER OF ESTATE OF SAVERIO RURI NJUIRI (DECEASED)

MONICAH GIKIRI NJAMWEA.....1ST APPLICANT

MARY M. WAMBUGU.....2ND APPLICANT

LAURA CUKA RURI.....3RD APPLICANT

VERSUS

PELISTAH CIAMWARI RURI.....RESPONDENT

RULING

1. The applicants approached this court by way of summons dated 18.10.2016. They seek for orders that the certificate of confirmation of grant of administration of the Estate of Saverio Ruri Njuiri issued on 16.04.1993 in SRM Succession Cause No. 65 of 1992 at Embu be revoked or annulled and further that the costs of the summons be in the cause.

2. The summons are premised on the grounds on its face and further supported by the affidavit sworn by the 2nd applicant with authority from the 1st and 3rd applicants. In a nutshell, their case is that the proceedings to obtain the grant were defective in substance and that the same was obtained by concealment of the fact that Bibiana Gicuku Kagime, Posiana Rwamba Kinyua, Monicah Gikiri Njamwea (1st applicant), Mary M. Wambugu (2nd applicant), Juliana Gicuku Ruri and Laura Cuka Ruri (3rd applicant) are children and dependants of the deceased. Further that the grant does not provide for them and they were not aware of the succession proceedings. As such the grant was obtained by means of untrue allegations.

3. Juliana Gicuku Ruri opposed the application vide the replying affidavit sworn on 30.01.2017 and wherein she deposed that the succession was filed by their mother (respondent herein) and in the confirmed grant their mother was given land to hold in trust for her own and her daughters. Further that all the daughters of the deceased are married and live at their homes and she is the only unmarried daughter who live with their mother. Further that she supported the application for revocation of the grant as they did not consent to the same and so that they can be allowed to make a proper consent on the mode of distribution.

4. Charles Njeru Njiru who is one of the beneficiaries (2nd born child of the deceased) opposed the summons by way of an affidavit sworn on 26.01.2017. He deposed generally that at the time of filing the petition for grant of letters of administration in 1992, the applicants herein were in stable marriages and all being employed as P1 teachers. He deposed that under the then Constitution of Kenya, married women were never entitled to inherit but could benefit with a section of the estate if the marriages failed. Further that the petition was filed using the right procedure and there was no objection which was filed after the gazettelement.

5. It was further deposed that on the day of confirmation of the grant, all the beneficiaries were present save for Bibiana Gicuku Kagime, Posiana Rwamba Kinyua, Monicah Gikiri Njamwea and Mary Igandu Wambugu who were all married and hence did not attend as they were not beneficiaries of the estate under the law. He deposed further that one Juliana Gicuku Ruri had benefitted from the estate as she had been give LR. Kyeni/Mufu/6095 and a Plot No.19 Kathanjuri which she had been given by their mother. As such, he deposed there was no discrimination and the estate was administered as per the law.

6. Parties took directions that the application be canvassed by way of written submissions. However, the respondent did not file her submissions.

7. The applicants reiterated the fact that the grant ought to be revoked for the reasons that they were not involved in the process. Further that their names and addresses do not appear on the summons and which was contrary to Section 51(g) of the Law of Succession Act and Rule 7(1)(e) of the Probate and Administration Rules. The applicants submitted that the names and addresses of all surviving spouses and children ought to be disclosed and thus the confirmation was thus obtained fraudulently by making of false statements, by concealment of material facts and by means of untrue allegations of facts which are essential in a point of law. As such, the same ought to be revoked. Reliance was

made on the case of **Re Estate of Solomon Ngatia Kariuki (Deceased) [2008] eKLR**.

8. I have considered the application herein, the replying affidavit and the submissions filed by the applicant. As I have already pointed out, the respondent did not oppose the application herein. However, this court is bound to consider the application and see whether it meets the threshold for revocation of grant as required in law. This is bearing in mind that there are two replying affidavits filed by the beneficiaries of the estate.

9. The said application is brought under the provisions of section 76 of the Law of Succession Act and Rules 44 and 73 of the Probate and Administration Rules. Section 76 deals with revocation of grant. The application herein does not seek revocation of grant and thus the said section is not applicable.

10. The applicants essentially seek revocation or annulment of the certificate of confirmation of grant of administration of the Estate of Saverio Ruri Njuiri (deceased herein) issued on 16.04.1993 in Embu SRM Succession Cause No. 65 of 1992. The ground in support of the said application is that they were not involved in the succession process. Charles Njiru Njeru deposed that the applicants were never involved since they were married. As such it is not disputed that indeed the applicants were never involved in the process of confirming the grant.

11. However, section 76 provides for revocation of grant. The circumstances under which the same can be revoked are well spelt out in the said section. As I have regularly opined and which position I still hold, from the reading of section 76, the same allows for revocation of grant before or after confirmation. However, the conditions under which revocation can be done are clearly limited to obtaining of the said grant (where the proceedings to obtain the grant were defective in substance; and/or where 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; and/ or where 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).

12. As thus revocation proceedings can only be limited to the process of up to issuance of the grant such that even where non-disclosure of material facts or where fraud is alleged, the same can only be limited to up to the stage of issuance of the grant. As the Learned Judge held in **re Estate of Prisca Ong'ayo Nande (Deceased) [2020] eKLR** and which decision I find persuasive; -

“16. Section 76 of the Law of Succession Act has nothing to do with confirmation of grants. It carries no provisions which relate to what a court should do with confirmation orders or certificates of confirmation of grant. Indeed, the provision says nothing about the powers prescribed in it being used for the purpose of the court intervening in the confirmation process, once orders are made on a confirmation application. The only connection between confirmation of grants and revocation of grant is that set out in section 76 (d) (i) of the Law of Succession Act. It has nothing to do with a grant having been confirmed, rather it deals with situations where a personal representative or holder of a grant or administrator has failed to apply for confirmation of their grant. Section 76 of the Act relates to confirmation of grants to that very limited extent, not with confirmation itself, but the failure to apply for confirmation. A person who is aggrieved by the orders made with respect to a confirmation application, which are encapsulated in the certificate of confirmation of grant, has no remedy under section 76 of the Law of Succession Act, for that provision does not envisage revocation of certificates of confirmation of grants.

17. I have very closely perused through the provisions of the Law of Succession Act, and I have not come across any provision that provides a remedy to a person who is aggrieved by confirmation orders. Sections 71, 72 and 73 of the Law of Succession Act, which deal with confirmation of grants, do not address the question of redress for parties who are unhappy with the confirmation process, nor do they deal generally with flaws in the confirmation process. As stated above, section 76 has nothing to do with the confirmation process, and provides no relief at all to any person unhappy with the confirmation process. In the absence of any provision in the Law of Succession Act, for relief or redress for persons aggrieved by such orders, the aggrieved parties have only two recourses under general civil law, that is to say appeal and review, to the extent that the same is permissible under the Law of Succession Act. I would believe that one can also apply for the setting aside or vacating of confirmation orders, where the same are obtained through abuse of procedure.....”

13. The Learned Judge In **re Estate of Juma Shiteswa Linani (Deceased) [2021] eKLR** held that where a person is unhappy with the process of confirmation of grant, such a person ought not to move the court under section 76 for revocation of grant. Instead, the person should file an appeal against the orders made by the court on distribution or apply for review of the said orders. This is because the court confirming a grant largely becomes *functus officio* so far as confirmation of the grant is concerned, and cannot revisit the matter unless upon review.

14. In the instant case, it appears that the applicants premised their application on the process of confirmation of the grant. That being the case, it therefore means that the grant herein cannot be revoked on the said grounds. The applicants ought to have applied for review of the orders confirming the grant.

15. However, it is trite that this court can revoke a grant *suo moto* where the grounds under section 76 are evident. The Court in the case of **Matheka and another v Matheka (2005) 2 KLR 455** held that even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate. So can the grant herein be revoked by this court on its own motion?

16. I have perused the lower court's file and I note that the respondent herein when applying for letters of administration intestate indicated all the beneficiaries of the deceased in the affidavit in support of the petition. In the circumstances of this case, the applicants' consent (and that of other children of the deceased) was not required as it is required under Rule 26(1) and (2) of the Probate and Administration Rules. This is because the respondent herein being their mother and the surviving spouse ranked higher in priority to the applicants. (See in **re Estate of Festo Akwera Kusebe (Deceased) [2019] eKLR**).

17. Their presence however was required when the grant was being confirmed. This is by virtue of provisions of Rule 40(8) of Probate and Administration Rules that require that there be a consent in writing to the confirmation of grant.

18. As such, it is my considered view that it cannot be said that the grant in this matter was obtained in a manner that rendered the grant defective in substance, or fraudulently by the making of a false statement, or concealed from the court something material to the case, or made an untrue allegation of a fact essential in point of fact to the case. The grant cannot be revoked by this court *suo moto*.

19. As I have already found above, the right thing the applicants ought to have done was to apply for review of the orders confirming the grant. In the instant case however Charles Njeru Ruri who deposed to being the first born son deposed that the applicants herein were not involved in the process of the confirmation of grant because they were married and employed. Further that the law at that time did not allow married women to inherit their parent's estate. It is however a legal requirement that all the beneficiaries must consent to the mode of distribution of the estate and that on the day of the confirmation of grant the court ought to make sure that all the beneficiaries are in court and they consent to the mode of distribution. The record does not indicate who amongst the beneficiaries were in court on the day of confirming the grant. But Mr. Njeru conceded to the fact that the applicants were not present. As such, it is clear that there is an error apparent on the face of record being an error on a point of law. It is clear that the estate herein was distributed in the absence of some of the beneficiaries and whose presence was necessary.

20. The applicants did not seek review or setting aside of the confirmed orders but only sought revocation of the certificate of confirmation of the grant made by the court and is not possible as I have already explained hereinabove.

21. However, the above notwithstanding, this court notes that the summons herein raises a weighty issue as to failure by the respondent to involve them in the distribution of the estate for the reason that they were married. The estate was shared amongst the respondent and the sons of the deceased leaving out the applicants. The applicants being the children of the deceased had the right to inherit their father's estate and thus their presence in court was a must. In their absence, they ought to have signed a consent to the effect that they were agreeable to the mode of distribution as was suggested by the respondent.

22. This court is bestowed with jurisdiction to determine any dispute which comes before it in relation to an estate of the deceased (see section 47 of the Law of Succession Act) and further the inherent powers to make orders for the ends of justice to be met or to prevent abuse of the process of the court. (See Rule 73 of the Probate and Administration Rules 1980). In my view, even if the issues raised herein cannot amount to grounds for review of the orders of 16.04.1993, the court cannot turn a blind eye to the same and proceed to dismiss the application just because the applicants did not expressly seek review of the said orders. Then what can this court do in the circumstances? I will seek refuge in the Court of Appeal's decision in **Kenya Power & Lighting Company Limited –vs- Benzene Holdings Limited t/a Wyco Paints [2016] eKLR**. In this case, the Learned Judges of Appeal held that; -

“The extent of inherent powers of the court was eloquently explained by the authors of the Halsbury’s Laws of England, 4th Edn. Vol. 37 Para. 14 as follows;

“The jurisdiction of the court which is comprised within the term “inherent” is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.” See also **Meshallum Waweru Wanguku** (supra)

This inherent jurisdiction is a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice...

23. Where a party abuses the procedure/process of the court this court ought to invoke the inherent powers so as to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between the parties. The said powers can be invoked even in relation to matters not raised in litigation between the parties. In the circumstances of the case herein, it is my view that this court ought to invoke its inherent powers and review the orders of 16.04.1993 as it has jurisdiction to review confirmation orders in succession as recognized by the court in **re Estate of Prisca Ong’ayo Nande (Deceased) (supra) and in re Estate of Juma Shitseswa Linani (Deceased) [2021] eKLR**.

24. The question therefore is whether the applicants made a case for review of the confirmation orders of 16.04.1993.

25. Review of decisions of a probate court is governed by Rule 63 of the Probate and Administration Rules, which imports Order 45 of the Civil Procedure Rules in probate matters. An application for review in succession proceedings can be brought by a party to the proceedings, a beneficiary to the estate or any interested party. However, the application must meet the substantive requirements of an application brought for review set out in the said Order 45 of the Civil Procedure Rules (See **John Mundia Njoroge & 9 Others vs. Cecilia Muthoni Njoroge & Another [2016] eKLR**).

26. The requirements under Order 45 are to the effects that, to be successful, the applicant must demonstrate to the court that; -

- i. There has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed; or
- ii. That there has been some mistake or error apparent on the face of the record; or
- iii. That there is any other sufficient reason.

27. In the instant case, and as I have already noted, the applicants were never involved in the confirmation process and neither did the court ensure compliance with the law. The Court of Appeal in **Muyodi vs. Industrial and Commercial Development Corporation & Another (2006) 1 EA 243** considered what constitutes a mistake or error apparent on the face of the record, and stated as follows:

“In Nyamogo & Nyamogo vs Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal.”

(See also **Paul Mwaniki v National Hospital Insurance Fund Board of Management [2020] eKLR**).

28. It is my view that failure to involve the applicants in the proceedings was indeed an error apparent on the face of record. It amounted to an injustice bearing in mind the dictates of the Constitution of Kenya and the Law of Succession Act to the effect that every person has a right to inherit and that there should be no discrimination in any form including gender.

29. A clear case of error apparent on the face of the record is definitely conspicuous. As such, the orders made confirming the grant by this court are a candidate for review. The said orders are hereby reviewed and set aside.

30. The respondent should then proceed to file for confirmation of grant and after filing of the same serve the application upon all the beneficiaries of the estate of the deceased herein (including the applicants).

31. The applicants and all the other beneficiaries should then file their protests, if any, within 30 days upon service of the application.

32. The court having reviewed the orders, any transactions in relation to the estate herein which were undertaken pursuant to the certificate of confirmation of grant are declared null and void.

33. The applicants prayed for the costs of the application. However, I note that the respondent is a sister-in-law to the applicants and as such, the dispute involves family members. In exercise of the discretion bestowed upon this court in awarding costs, it is my view that in the circumstances of the case, each party should bear his or her own costs.

34. Considering all the above, the court makes the following orders;

- 1) ***That the orders of 16.04.1993 are hereby reviewed and/or set aside.***
- 2) ***That the respondent is hereby ordered to file for confirmation of grant and after filing of the said application do serve the same upon all the beneficiaries of the estate of the deceased herein (including the applicants).***
- 3) ***That the applicants and/or all the other beneficiaries shall be at liberty to file their protest within 30 days upon service of the application.***
- 4) ***That upon the expiry of the said thirty (30) days the respondent shall fix the application for confirmation of grant for hearing.***
- 5) ***That each party to bear his or her own costs.***

35. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF SEPTEMBER, 2021.

L. NJUGUNA

JUDGE

.....for Applicant

.....for Respondents