



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 493 OF 2019

IN THE MATTER OF THE ESTATE OF HENRY KITHIA MWITARI (DECEASED)

RULING

1. Before this Court for determination is the summons dated **14th April 2021** by which **MAVUENI PROPERTIES KILIFI LTD** (hereinafter 'the **Objector**') seeks that the Grant of letters of Administration Intestate issued to **AGNES NKATHA MUTUNGI** be revoked on grounds that:-

“i. The High Court at Nairobi had no jurisdiction to issue a limited grant ad litem.

ii. The proceedings to obtain the grant were defective by concealment from this court of material fact that there was already pending in the High Court at Kajiado a succession matter involving the same estate.

iii. MAVUENI PROPERTIES KILIFI LIMITED possess a legitimate interest in ALL THAT PROPERTY known as L.R. No. 20780 (formerly 27/34 Ridgeways Estate) the listed asset of the aforesaid estate after having purchased the same from the deceased owner with the full knowledge of the Administrator. The same should therefore be excluded from the list of Assets of the Estate.”

2. The summons which was premised upon **section 76** of the **Law of Succession Act**, and **Rule 44(1)** of the **Probate and Administration Rules** was supported by the Affidavit of even date and the Further Affidavit dated **14th April 2021** sworn by **DENNIS KAGIRA MWANGI** a Director of the Objector.

3. The Respondent/Administrator **AGNES NKATHA MUTUNGI** opposed the summons by way of a Replying Affidavit dated **25th May 2021**. One **JOHN NZIOKI GITAU** who describes himself as a Creditor also filed a Replying Affidavit dated **10th May 2021** opposing the application.

4. The application was canvassed by way of written submissions. The Objector filed the written submissions dated **29th June 2021**, the Respondent filed the written submissions dated **15th September 2021** whilst the Creditor filed written submissions dated **15th July 2021**.

BACKGROUND

5. This Succession Cause relates to the estate of **HENRY KITHIA MWITARI** (hereinafter 'the **Deceased**') who died intestate on **18th August 2018**. A copy of the Death Certificate Serial No. **xxxx** is annexed in the file. Following the demise of the Deceased his widow **Agnes Nkatha Mutungi** (the Respondent herein) filed a Petition seeking Grant of Letters of Administration Intestate. In the Affidavit in support of said Petition the following were named as the persons surviving the Deceased-

(1) Agnes Nkatha Mutungi – Widow

(2) Violet Kathambi Kithia

(3) Kelvin Mwenda Kithia

(4) Nelson Muriungi Kithia

(5) **Nickson Bundi Kithia**

6. The estate of the Deceased was said to comprise of a sole asset namely the property **L.R. 20780** (formerly **27/34 Ridgeways Estate** valued at **Kshs 450,000,000/-** (hereinafter the '**suit property**').
7. Grant of letters of Administration Intestate were issued to the Respondent as Administrator of the Estate on **12th July 2019**. Thereafter the Respondent filed a summons for confirmation of Grant dated **21st January 2020**. That application is yet to be determined.
8. The Objector **Mavueni Properties Kilifi Limited** claims to have a legitimate interest in the suit property having purchased the same from the Deceased with the full knowledge of the Administrator. The Objector alleges that the Respondent obtained this Grant fraudulently by failing to disclose to the **High Court in Nairobi** a material fact to wit, the existence of another **Succession Cause No. 2 of 2019** which she had filed in **KAJIADO** involving the same estate. That the matter filed in **Nairobi** is therefore *sub-judice*.
9. The Respondent denies having obtained this Grant fraudulently. She avers that the cause filed at the **Kajiado Law Courts** was an application for Grant as letters of Administration Ad Litem to enable her represent the estate in **Nairobi ELC Petition No. 8 of 2017**. She denies that the present cause is *sub-judice*. The Respondent further denies the sale of the suit property to the Objector. She maintains that said property belongs to the estate of the Deceased.
10. The Creditor raises the same arguments as those raised by the Respondents in opposition to the application for revocation of Grant.

ANALYSIS AND DETERMINATION

11. I have carefully considered this summons, the Affidavits in Reply as well as the written submissions filed by both parties. The following are the issues which arise-

(i) **Whether this cause is *sub-judice*.**

(ii) **Whether the Grant issued to the Respondent issued to the Respondent ought to be revoked.**

(i) **SUB-JUDICE**

12. The Objector states that the Administrator failed to reveal to this court the fact that a limited Grant of letters of Administration Ad Litem was issued to **Agnes Nkatha Mutungi** and **Nicholas Bundi Kithia** by the **High Court in Kajiado** in respect to the same estate. The Objectors state that the proceedings in **Kajiado** were undertaken with the full knowledge and consent of the Objector.
13. The Objector submit that the cause in the **High Court in Nairobi** was filed without their knowledge and/or consent. They allege that the Respondent actively conceded from them as Interested Parties the existence of the Succession Cause filed in Nairobi.
14. The Respondent readily concedes that she together with her son **Nicholas Bundi Kithia** did petition the **High Court at Kajiado** for Grant Ad Litem. However, she states that the sole purpose of that Grant was to enable them represent the estate in a Suit No. **Nairobi ELC Petition No. 8 of 2017** filed at the **Environment and Land Court**.
15. As far as the Respondent is concerned she had no obligation to inform the Objector before filing the Petition in the **High Court in Nairobi** as the Objector is not a beneficiary to the estate of the Deceased. The Respondent categorically denies that claim that the suit property was sold to the Objector.
16. **Section 6** of the **Civil Procedure Act**, which defines out the *sub-judice* rule on the following terms:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

17. The question then is whether filing and obtaining a Grant of letters of Administration Ad Litem is tantamount to filing a Petition for Grant of letters of Administration.

18. **Section 54** of the **Law of Succession Act** authorizes a court to issue limited Grant for various purposes. **Section 54** provides as follows:-

“A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the fifth schedule to this act.

The Fifth Schedule of the Act gives details of various limited grants and the correct format to use in petitioning the court. Limited Grants Ad Litem fall under paragraph 14 of the Fifth Schedule of the Law of Succession Act which paragraph is specific that the grant of administration ad litem is limited to filing suit. **Paragraph 14** states that:-

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.”

19. Therefore it is clear that a Grant Ad Litem is issued for a specific, limited and finite purpose. Once the purpose for which such Grant is issued is achieved then the Grant is exhausted and becomes obsolete. More pertinently a Grant Ad Litem **cannot** be used to collect, preserve or to distribute the estate of the Deceased.

20. In the **RE ESTATE OF HELENA WANGECHI NJOROGE (Deceased) [2015] eKLR** the Court referring to a Grant Ad litem held that:-

“It was limited to the purpose of filing suit to preserve the three assets of the estate. It is what is called a grant of letters of administration ad Litem. The suit envisaged to be filed on the strength of a grant ad litem is not a probate or succession case, or an interlocutory application within a probate or succession cause, but rather a civil suit. Indeed, one need not obtain a grant of any sort to enable him file a succession cause. A grant of representation is only necessary where one intends to file a civil suit to protect or defend the estate against third parties.”

21. The limited Grant obtained to the Respondent and her son from the **Kajiado High Court** was issued **solely** for the purposes of representing the estate in a civil suit. That Grant was limited in scope. A limited Grant is totally distinct from a full Grant which has a totally different purpose and scope. Where one has obtained a limited Grant, they would still have to pursue the protracted process of obtaining a full Grant in order to represent the estate in all aspects.

22. In the premises I find that the *sub-judice* rule cannot apply as the two Grants are totally different and distinct and are issued for separate purposes. Therefore, the filing of a petition for Grant Ad Litem in the **Kajiado Court** is not incompatible with filing another Petition for full Grant in a different court. As such *subjudice* is not applicable.

(ii) **Revocation of Grant**

23. The circumstances under which a Grant may be revoked are clearly set out in **section 74** of the **Law of Succession Act** which provides as follows:-

“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;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) 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

(ii) to proceed diligently with the administration of the estate; or

(iii) 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) that the grant has become useless and inoperative through subsequent circumstances.”

24. The Objector alleges that the Grant issued to the Respondent was obtained through fraud by concealment of a material fact. In view of my finding that this matter is **not subjudice** then the Respondent had not obligation to reveal the fact of the existence of **Succession Cause No. 2 of 2019** at the **Kajiado High Court**. 25. The Objector claims to have a legitimate interest in the suit property based on their claim to have purchased the same from the Deceased. The Objectors claim to the suit property cannot be litigated in this Succession Cause.

26. The duty of the **Probate (Family) Court** is to oversee the transition of the estate of a Deceased person to the genuine beneficiaries – to ascertain the assets and liabilities of the estate identify the beneficiaries and set out the mode of distribution of the Estate. The question of who is the rightful owner of the Suit Land cannot be determined by the **Probate Court** in this Succession Cause.

27. In Alexander **Mbaka – Royford Muriuki Rauni & 7 others [2016] eKLR**, it was held thus:-

“It is only where one has established claim against the estate that has already crystallised that he can litigate it before a Family Court. The claim is to be considered as a liability to the estate. This Court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystallised. The right must be shown to have crystallised before the Family Court can entertain it.” (own emphasis)

28. **Article 162(b)** of the **Constitution of Kenya 2010** gives to the **Environment and Land Courts** the sole mandate and jurisdiction to determine issues of ownership, use and occupation of land. Accordingly, the Objector can only prosecute his claim to the suit property in the **ELC Court** not in this Succession Cause. Once the matter has been litigated in the **ELC Court** and if the Objector proves his claim to the suit property in that court then he is at liberty to approach this Probate Court for orders to effect the judgment.

29. Finally I find no merit in the summons for revocation of a Grant. The same is hereby dismissed in its entirety. Each party to meet its own costs.

DATED IN NAIROBI THIS 3RD DAY OF DECEMBER 2021.

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MAUREEN A. ODERO

JUDGE