



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 371 OF 2005

IN THE MATTER OF THE ESTATE OF EWM (DECEASED)

JM.....APPLICANT

VERSUS

SNM.....RESPONDENT

RULING

1. By way of Summons for Revocation of Grant, dated 28th March, 2018, the Applicant seeks revocation of the Grant of Letters of Administration issued in respect of the Estate of EWM (deceased) granted to SN M and ASM (Deceased) on 18th April, 2005.
2. The application is supported by an affidavit dated 28th March, 2018 sworn by the Applicant. It was her deposition that she was married to the deceased for 32 years before they divorced and agreed on a settlement which included a maintenance deed dated 27th March, 1998. She claimed that it was a term of the settlement that she would retain all her shares held in various companies co-owned by the deceased and herself until the deceased fulfilled his obligations under the maintenance deed. She contended that at the time of his demise, the deceased was yet to satisfy the terms of the deed having only remitted the sum of sixty five thousand dollars (\$65,000) to the Applicant.
3. The applicant asserted that the covenant entered into was to bind the deceased personally or his estate and was enforceable by herself or her personal representatives. She further stated that she did not cede her interests in the companies jointly owned by herself and the deceased which have been interfered with by the Respondent and other parties. She claims to have an interest in property including Chatambe Estates Limited which owned Kitale LR No. 308/3 which she accuses the respondent of selling without her knowledge or consent. She also states that she co-owns Mwaja Holdings Limited, Mwaja Industries Limited and Vista Clearing and Forwarding with the deceased.
4. The applicant also claims an interest in shares in Chatambe Estate Limited, Shares in Pigments and Minerals Limited, Shares in Sciencepark Biotech Limited, Plots in Webuye and Bungoma and Shares in Sally Beuty. The applicant alleges that the Respondent fraudulently replaced her as director and shareholder in Mwaja Holdings Limited. Further, that she did not receive any share of the parliamentary retirement benefits accruing to the deceased. She accused the Applicant of forging her deceased's son AM signature when filing the Petition for letters of administration. In addition she claims that the house in Lavington and a property in Kileleshwa was sold for between 18 - 20 million but only 3 million was remitted to her for the Lavington house.
5. It is the applicant's case that she is a creditor with a first right of interest in the estate of the deceased and should therefore be paid dues in terms of her divorce settlement. She prays that the grant be revoked and a proper account be made of the assets of the estate either disposed of or still available in order to settle what is due and owing to her. She also prays for nomination of her son's widow COM as co-administrator of the estate herein.
6. In response to the application, SNM through a replying affidavit dated 18th January, 2019 opposed the application. She deposes that the maintenance deed in issue is ambiguous in nature as it does not refer to any companies co-owned by the deceased and the Applicant. She has challenged the Applicant to provide evidence of the interest she claims to have in various companies. She disputed claims that the applicant is entitled to any amount owed to her by the deceased. She denies that the Applicant is a creditor and avers that any agreement between the Applicant and the deceased had been frustrated by his death.
7. The respondent adds that by virtue of the deceased's marriage to her, the Applicant ceased to be a beneficiary of his estate. She asserts that she had followed the legal procedure in pursuing and obtaining the letters of administration of the estate of the deceased. She avers that the Applicant has not demonstrated any credible grounds under the Law for this court to revoke the grant.
8. In a further affidavit dated 5th September, 2019 sworn by the Applicant, she asserts that the deceased passed on only four years after their

divorce but they had toiled together to acquire estate property which the Respondent was now intending to illegally distribute. Further that the Respondent was receiving and utilising money from Chatembe Estate, Mwaja Holdings Limited, Bata Store, Pigments and Minerals Limited and Bungoma Agency & Bottlers Limited some of which properties have been sold to the benefit of the Respondent. She contends that some of the properties being utilized by the Respondent are under the deceased's name yet she was kept in the dark which in her view amounts to intermeddling. She relied on a report by a private investigator in support of her claims.

9. In a further response dated 2nd October, 2019, the Respondent deposes that her actions do not amount to intermeddling as she is the legal administrator of the estate of the deceased. Further, that the ex-wife of the deceased cannot be a creditor and a beneficiary of the deceased. She disputes claims by the Applicant that she has an interest in the shares of the companies mentioned since there is no documentary evidence thereof. She asserts that the report by a private investigator is hearsay evidence and thus inadmissible in a court of law. She urged the court to dismiss the application.

10. The parties filed written submissions in support of their respective cases. The applicant in reiterating the contents of her affidavits relies on the cases of **RNM V RMN [2017] eKLR** and **Re Estate of Joseph Kilonzo Musyoka (deceased) [2018] eKLR** in support of her case. The respondent relies on the cases of **Re Estate of Cephas Kihanya Nathan (alias Peter Kefa Kihanya)(deceased)[2019]eKLR** in support of her position.

11. I have read and carefully considered the pleadings and submissions made by the Applicant and the Respondent. The issues that emerge for determination are whether the Applicant is a creditor and therefore is entitled to benefit from the deceased's estate; secondly if so, whether the respondent/Petitioner is culpable of non-disclosure of this material fact; and lastly, whether the letters of administration issued to the respondent should be revoked.

12. On the first issue as to the applicant's entitlement to the deceased's estate, the Law of Succession Act recognises adverse interests to the estate of a deceased including those of creditors at **section 66** as follows-

“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;

c. the Public Trustee; and

d. creditors:

In addition, **section 86** of the Law Succession Act enjoins the personal representative of the estate of a deceased, to pay all the estate's debts of every description that are enforceable in law and owed by or out of an estate, before any legacy is paid or settled.

13. One of the definitions of a creditor given by the **Black's Law Dictionary, Tenth Edition** at page 449 is “one to whom any obligation is owed, whether contractual or otherwise.” Another definition is “a person or entity with a definite claim against another, especially a claim that is capable of adjustment and liquidation”. A debt under page 449 includes a contractual obligation therefore an individual owed money pursuant to a contract is deemed to be a creditor and to have a debt owed to him or her by the deceased, to the extent that the deceased was under a legal obligation while alive to pay the money.

14. In the present application, the Applicant claims to have entered into a settlement agreement with the deceased which has been adduced in evidence. The terms of the agreement are that the deceased was to transfer properties known as L.R 209/7773 Lavington, L. R 209/1193 Kileleshwa, and motor vehicle KAG 016Y to the Applicant. Further, that the Applicant was to receive a sum of Kshs. 10,000,000/= on specified dates in 1998 and 1999. It was also a term of the settlement agreement that the Applicant would retain all her shares held in various companies co-owned by the deceased and herself until the deceased fulfilled his obligations under the maintenance deed. She claimed to have only received the sum of sixty five thousand dollars (\$65,000).

15. An elementary principle of law is that ‘he who alleges, must prove’. The principle is firmly embedded in the Evidence Act, Cap 80 of the Laws of Kenya which stipulates that;

“Section 107.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

Section 112 of the Evidence Act further provides that;

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

16. The Applicant claims to have been owed money by the deceased pursuant to the maintenance deed executed. The fact was specifically denied by the Respondent who claimed to have no knowledge of such transaction. The fact of the existence of debt therefore becomes of "special knowledge" to the Applicant and according to Section 112 of the Evidence Act; the Applicant has a legal burden of proving that she was owed money by the deceased.

17. No additional evidence was adduced by the Applicant on her claim that she only received \$65,000(approximately Kshs. 6,500,000/=) from the deceased and that she was owed a balance of Kshs.3,500,000. The applicant also failed to provide evidence of the mode of payment used and when the alleged payment was made or to provide an acknowledgement from the deceased that he was indebted to the Applicant. The maintenance deed in itself is not sufficient as proof of existence of a debt.

18. The Applicant also laid claim to several companies which she alleges to jointly co-own with the deceased. She claims to have an interest in Chatambe Estates Limited which owned Kitale LR No. 308/3 which had been sold without her knowledge and consent, Mwanja Holdings Limited, Mwaja Industries Limited and Vista Clearing and Forwarding, all which she claimed to co-own with the deceased. The applicant also says she has an interest in shares in Chatambe Estate Limited, Shares in Pigments and Minerals Limited, Shares in Sciencepark Biotech Limited, Plots in Webuye and Bungoma and Shares in Sally Beuty. The applicant alleges that the Respondent fraudulently replaced her as director and shareholder in Mwanja Holdings Limited.

19. This is disputed by the Respondent who has called for strict proof. The claims by the Applicant are in regard to property owned by Limited liability companies. She is not a beneficiary of the estate of the deceased as envisaged in the Law of Succession Act but has claimed an interest in companies where the deceased was a shareholder. She has also alleged fraud on the part of the respondent in removing her as a Director. That being the case, her claim should have been the subject of a civil suit against the company and the estate of the deceased in the Commercial Division. It is only after successfully prosecuting such a suit that the Applicant would have a right to enforce such a judgment against the company and the estate of the deceased.

20. Under **Section 76** of the Law of Succession Act this court has wide and unfettered discretion to annul or revoke a grant whether or not confirmed at any stage on the following grounds:-

(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 has ordered or allowed; 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."

21. Under **Section 107** of the Evidence Act, the Applicant was duty bound to lead evidence, to establish that indeed the grant was obtained fraudulently by concealment from court of material facts. This she did not succeed in doing. She cannot then be said to have discharged the burden of proof imposed on her under **Section 107** of the Evidence Act.

22. I say this because, from the evidence on record the Applicant failed to show any irregularities perpetrated by the Respondent during the process of obtaining the grant. She also failed to show the interest she had in the deceased's estate. It is for this reason I find that the objector has not fulfilled the conditions precedent for revocation or annulment of grant as provided for under Section 76 of the Law of Succession Act.

23. Reasons wherefore I find that the Summons dated 28th March, 2018 for revocation or annulment of grant is lacking in merit and is consequently dismissed. Each party to bear their own costs.

SIGNED DATED AND DELIVERED IN OPEN COURT THIS 18TH DAY OF FEBRUARY, 2020.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Applicant

In the presence ofAdvocate for the Respondent