



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1327 OF 2010

IN THE MATTER OF THE ESTATE OF BRYAN WALTER SHEPARD (DECEASED)

AGNES NYAMBURA MUNGA.....APPLICANT

VERSUS

LITA VIOLET SHEPARD.....EXECUTRIX/RESPONDENT

RULING

1. By way of Summons for Revocation or Annulment of Grant, dated 4th March, 2020, the applicant seeks revocation of the Grant of Probate issued to Lita Violet Shephard in respect of the estate of Bryan Walter Shepard (deceased) and confirmed on 27th January, 2020. The application is premised on the grounds that, the grant was fraudulently obtained by the executrix through concealment from court of material facts. Secondly, that the applicant and the executrix are parties in Civil Application No. 22 of 2018 (**Agnes Nyambura v Lita Violet Shepard**) being an appeal that is yet to be determined, a fact concealed by the executrix. Finally, that the applicant's objection to the making of the grant dated 21st January, 2011 is yet to be determined by this Court.
2. The applicant through her affidavit dated 4th March, 2020 in support of the summons for revocation of grant, depones that upon the passing on of the deceased herein on 29th March, 2010, a grant of probate was made to Lita Violet Shepard. She avers that on 21st January, 2011 she filed an application under **Section 26** of the Law of Succession Act for reasonable provision of a dependant together with an objection to the making of the grant to the respondent. The court determined the application in her favour but the respondent aggrieved by the decision, filed an application for review which was dismissed.
3. Subsequently, the respondent successfully appealed the review application in the Court of Appeal, a decision which was made on 9th November, 2018. Aggrieved by the decision of the Court of Appeal, the applicant avers that she has lodged an application for certification to appeal to the supreme court of Kenya. The application for certification to appeal before the highest court in the land is yet to be heard.
4. In her application, the applicant avers that she only learnt that this matter was before court on 14th February, 2020 had come for confirmation of grant on 27th January, 2020. She contends that she was never served with the application for confirmation of grant despite the executrix being aware of her interest as an objector in the matter. She further claims that the executrix concealed from court the existence of **Civil Application No. 22 of 2018**, lodged at the court of Appeal and further failed to inform the court of the objection dated 21st January, 2011 which is yet to be heard and determined. It is her case that the grant should be revoked as the administration of the estate will begin anytime, to avoid rendering her appeal nugatory.
5. The summons for revocation of grant is opposed by the executrix/respondent who relies on her replying affidavit dated 25th March, 2020. She depones that upon the passing on of the deceased, he left behind a Will executed on the 29th January, 1999. Pursuant to the will, she was appointed as the sole executor of the Will and bequeathed all his property to herself and their daughter, Jeneatte Dorothy Labonte. She avers that as the executrix, she petitioned the court for grant of probate of the deceased's estate. Subsequently, the applicant filed an objection thereto.
6. The respondent further states that when the matter came to court, Kimaru J in his decision of 5th April, 2014 found that the applicant was a wife under Kikuyu Customary Law and was entitled to reasonable provision which the court assessed at Kshs. 50,000,000/-. She depones that she was aggrieved by the decision and unsuccessfully challenged the High Court decision by way of review before Musyoka J on 25th September, 2015. The respondent contends that unsatisfied with that decision, she successfully challenged the ruling in the Court of Appeal in Civil Appeal No. 91 of 2017 in its decision of 9th November, 2018.
7. The respondent contends that although the Applicant has sought leave to appeal to the Supreme Court in Civil Application No. Sup 22 of 2018 (UR 16/2018) against the Court of Appeal decision, such leave has not been granted. Further, that the applicant has not sought or been granted stay orders in the proceedings, or further action on matters relating to the Estate of Bryan Walter Shepard. She asserts that the applicant is neither a dependant nor a beneficiary of the estate and therefore lacks the locus standi to bring this application.

8. The respondent avers that the grounds raised in the objection of 21st January, 2011 have already been litigated in **Civil Suit No. 94 of 2013 Agnes Nyambura Munga versus Lita Violet Shepard** and a decision made by J Ogola in a ruling delivered on 17th July, 2012. The applicant aggrieved by the said decision appealed in **Civil Appeal no. 334 of 2013** which appeal was dismissed. She asserts that the substantial prayers and issues raised in the objection and the claim before the High Court were similar.
9. The respondent affirms that she was under no obligation to inform the applicant of the impending summons for confirmation of grant which were properly before court. She avers that the court was fully aware of the objection of 21st January 2011 before the Grant of Probate was confirmed and the decision of the Court of Appeal. She urges the court to dismiss the summons for revocation of grant.
10. The summons were canvassed by way of written submission and each party through their advocates on record filed their submissions in support of their respective positions. The applicant submitted that the objection proceedings are different from applications for reasonable provisions under **Section 26** therefore the Respondent failed to inform the court of the existence of the Applicant's objection to the making of the grant which is yet to be determined. She relied on the case of **Re Estate of Wangoi Mutonga (Deceased) [2014] eKLR.**
11. The applicant further submitted that failing to disclose the existence of Civil Application No. 22 of 2018, a matter yet to be determined, was a material matter which should have guided the court in deciding whether or not to confirm the grant to the respondent. She relied on the case of **Re Estate of Emily Wairimu Chira (deceased) [2019] eKLR** where the court revoked a grant due to the material non-disclosure of a dispute. She urged the Court to exercise its discretion in her favour given the prejudice that she would suffer if the orders sought are not granted.
12. In response, the respondent submitted that the principles of res judicata apply to the summons for revocation of grant, since the Applicant is attempting to revoke the grant on the basis of an objection that has already been determined by both the High Court (HCC No. 94 of 2012) and the Court of Appeal (Civil Appeal No. 334 of 2013). The respondent submitted that the Court is estopped by the principle of *res judicata* from re-opening the applicant's case. She relied on the cases of **Njue Ngai v Ephantus Njiru Ngai and another [2016] eKLR** and the **Matter of the estate of MNJ (Deceased) – Succession Cause No. 41 of 1992** in support of this position.
13. The respondent further submitted that litigation must come to an end and accused the applicant of abusing the court process by continuously filing suits against her. She urged the court to invoke the principle of finality of litigation as elaborated in the case of **Benjoh Amalgamated Limited and another v Kenya Commercial Bank Limited [2014] eKLR** where the Court of Appeal in examining the finality of disputes referred to the case of **Management Corporation Stratta Title Plan No.301 v. Lee Tat Development Pte Ltd [2009] S GHC 234, the Court of Appeal (of Singapore)**. In this decision it was observed that the policy reasons underlying the doctrine of *res judicata* as a substantive principle of law are first "the interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decisions" and second, "the rights of the individual to be protected from vexatious multiplication of suits and prosecutions.
14. Lastly, she submitted that the applicant lacked the *locus standi* to file the present application and had not given any basis for the Court to revoke the grant of probate issued. She urged the court to dismiss the application with costs.
15. I have considered the summons, the affidavits in support and in opposition to and the written submissions by counsels. The key issue for the Court's determination is whether the application meets the threshold for revocation or annulment of grant under **Section 76** of the Law of Succession Act.
16. **Section 76** of the Succession Act provides that;
- 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.*

It is upon any party seeking the revocation or annulment of a grant to demonstrate the existence of any, some, or all of the grounds set out in **Section 76** as outlined above.

17. The Applicant invited the court to revoke the Grant of Probate made to the Respondent stating that the proceedings to obtain the grant were defective and were based on concealment of material facts. It was her case that the executor/respondent failed to inform the court of the existence of the objection to the making of the grant dated 21st January, 2011 which is yet to be heard and determined. The applicant further contended that she was never served with the application for confirmation of grant despite the executrix being aware of her interest as an objector in the matter. It was also her case that the executor intentionally concealed the existence of **Civil Application No. 22 of 2018** lodged at the court of Appeal.

18. On the other hand, it was the respondent's contention that he objection of 21st January, 2011 had already been litigated conclusively in **Civil Suit No. 94 of 2013 Agnes Nyambura Munga versus Lita Violet Shepard** and a decision made by J Ogola in a ruling delivered on 17th July, 2012. The applicant aggrieved by the said decision appealed in **Civil Appeal no. 334 of 2013** which appeal was dismissed. It was her case that the prayers sought in the objection were similar to the ones sought in this claim before the High Court and the matter was therefore *res judicata*.

19. I have perused the record and indeed there is an objection filed by the applicant herein dated 21st January 2011. Her objection is grounded on the claim that she is a beneficiary and creditor to the deceased who held USD 50,000 in trust for her as well as a debt of USD 40,000 plus accumulated interest all amounting to an equivalent of Kshs. 43,200,000 owing to the estate of William Earl Nelson wherein the objector is the sole beneficiary. In the bundle of documents provided by the respondent, the same issue was raised in the originating summons dated 14th February, 2012 in Civil suit No. 94 of 2012(O.S) before the High Court in Nairobi between Agnes Nyambura Munga (**suing as the Executrix of the estate of the late William Earl Nelson**) vs Lita Violet Shepard (**Sued in her capacity as the Executrix of the Estate of the late Bryan Walter Shepard**)

20. In a decision of J Ogola of 17th July, 2012 the court determined that the defendant (executrix herein) did not owe the plaintiff (applicant herein) any money and consequently dismissed the originating summons dated 14th February, 2012. Aggrieved by the decision, the Plaintiff unsuccessfully appealed the decision of the High Court in the Court of Appeal. In its determination of 9th November, 2018 Civil Appeal No. 334 of 2013, the appellate court found no merit in the appeal and it was dismissed with costs.

21. As observed, the amount of litigation undertaken by the parties herein has been enormous and unrelenting. A plethora of suits has been canvassed in all the courts of record, all geared towards resolving the same dispute arising from the same facts and involving the same parties. This matter falls under the doctrine provided for in our jurisprudence under **Section 7 of the Civil Procedure Act** as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

22. Expounding on the rationale of the doctrine, the Court of Appeal remarked as follows in a recent appeal; **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR**,

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

23. The Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

- a) **The suit or issue was directly and substantially in issue in the former suit.**
- b) **That former suit was between the same parties or parties under whom they or any of them claim.**
- c) **Those parties were litigating under the same title.**
- d) **The issue was heard and finally determined in the former suit.**
- e) **The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.**

24. Going by the conditions stipulated, the record shows that the issues were directly similar, the former suit was between the same parties, parties were litigating under the same title, and the issue was heard and determined by a court of competent jurisdiction. To my mind, there is no better case in which the Court ought to invoke the doctrine of *res judicata* than in the present case. The specific issue raised in the objection has been litigated and determined to its conclusion.

25. The second issue raised by the applicant was that the executrix concealed to court the existence of **Civil Application No. 22 of 2018 (UR 16/2018)**. This is an application for leave to lodge an appeal in the Supreme Court against decision of the Court of Appeal issued on 9th November, 2018. In the said application, the applicant has not been granted orders of stay of execution of these proceedings or further action on matters relating to the Estate of the deceased herein.

26. The applicant argued that in the event that the grant is not revoked, her intended appeal would be rendered nugatory by the distribution of the estate. However, this is not an application for stay of execution. The applicant's lodging of a notice of appeal to the Supreme Court cannot be used as an automatic stay of execution in this matter. For the foregoing reasons, I am inclined to reject the argument that the court ought to revoke the grant on account of non-disclosure of material facts.

27. The upshot of the foregoing is that the summons for revocation and annulment of grant dated 4th March, 2020 is found to be lacking in merit and is dismissed. Each party to bear their own costs. It is so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 6TH DAY OF OCTOBER, 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