



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

SUCCESSION CAUSE NO. 128 OF 2005

IN THE MATTER OF THE ESTATE OF KIOKO KWEOA (DECEASED)

MUTISYA KIOKO.....1ST ADMINISTRATOR/RESPONDENT

PHILACE NTHENYA MUTUKU.....2ND ADMINISTRATOR/RESPONDENT

VERSUS

MARTIN MUTINDA NGUNGUNI.....OBJECTOR/APPLICANT

RULING

1. By a Summons for Revocation of Grant dated 19th April, 2018, the Objector herein seeks the following orders:

- a) **The Rectified Certificate of Confirmed Grant of Letters of Administration Intestate issued to the Administrators/Respondents on 30th November, 2016 and dated 19th December, 2016 be revoked;**
- b) **The Administrators/Respondents be restrained to continue carrying out any administrative duties on the estate of the late Kioko Kwoea pending the hearing and final determination of the summons for revocation of grant; and**
- c) **The costs of the application be borne by the Respondents.**

2. The application was based on the following grounds:-

- a) **The Rectified Certificate of Confirmed Grant of Letters of Administration Intestate was obtained fraudulently and after concealment of material facts to this Honourable Court;**
- b) **The Administrators/Respondents failed to disclose to this Honourable Court that the Applicant/Objector is a bona fide beneficiary of part of the estate of the Deceased in this matter – Kioko Kwoea;**
- c) **The Applicant/Objector purchased half of the title known as Mbiuni/Mumbuni/773 and had been recognized by this Honourable Court as a beneficiary and as such included in the Certificate of Confirmed Grant issued by Justice Isaac Lenaola (as he then was) dated 29th July, 2008; and**
- d) **The Administrators/Respondents proceed to rectify the Certificate of Confirmed Grant effectively removing the Applicant/Objector from the list of beneficiaries of the estate of the Deceased without the knowledge of the Objector/Applicant.**

3. The crux of the applicant's case is that by a certificate of confirmation dated 29th July, 2008, Land parcel no. Mbiuni/Mumbuni/773 was to be subdivided amongst the Respondents and the Objector with the Respondents getting one quarter each while the Objector getting the remaining half. Pursuant to that the Registrar of lands issued a title to the three persons in which the portions of each of the parties was clearly stated. It was then agreed that since the Objector had the larger portion, he would keep the title as he was the one to steward the process of subdivision.

4. However in mid-2009, the Respondent informed the Objector that he had been served with summons to revoke the confirmed grant dated 14th April, 2009 and the Objector advised him to get an advocate to protect their interests. They then approached the firm of B M Musau &

Co. Advocates and since the 1st Respondent had no money the Objector paid the advocate's fees and the said firm came on record for both. However, on 8th July, 2017 the said firm was served with a notice to act in person by the 1st Respondent and thereafter the 1st Respondent became very evasive and completely cut links with the Objector.

5. It was deposed that thereafter, the advocate for the Objector informed him that the file could not be traced at the Registry and in April, 2018 the Objector learnt that this Court had issued a rectified certificate of confirmation on 30th November, 2016 dated 19th December, 2016. On the face of the certificate, the Objector's name was removed amongst the beneficiaries of the deceased in respect of the said land and only the Respondents were left to equally share the same.

6. The Objector deposed that on 14th April, 2018, a group of people accompanied by three sons of the 2nd Respondent and a son of the 1st Respondent went to the land and started surveying the same. The Objector was therefore apprehensive that the Respondents were intending to dispose of the land to his detriment.

7. In opposing the application, the 2nd Respondent averred that a purchaser has no capacity to seek revocation of a confirmed grant since he is not a beneficiary to the deceased's estate. According to her if the Objector bought the said property then he did so from the 1st Respondent and not the 2nd Respondent. It was the 2nd Respondent's case that since the said property has already been shared between the Respondents, the Objector ought to lodge his claim against the 1st Respondent at the Environment and Land Court after new titles are issued. It was disclosed that the rectified grant was issued pursuant to a consent recorded before this Court on 30th November, 2016 which was adopted as an order of the Court. Pursuant to the same, the Objector was to pursue his claim from the 1st Respondent. It was averred that the Objector was present on 14th April, 2018 when the land was surveyed and subdivided but did not raise any objection before the surveyor.

8. The 2nd Respondent averred that this litigation ought to come to an end.

9. On his part the 1st Respondent adopted the averments made by the 2nd Respondent but did not dispute the fact that the applicant purchased a portion of land parcel no. Mbiuni/Mumbuni/1773 from his brothers. According to him the problem was that the applicant had not been cooperating in measuring the land sold to him and is not entitled to ½ of the land but is out to grab the same.

10. It was the 1st Respondent's position that if the applicant is willing to have the land surveyed and get the first portion, the case will rest.

Determination

11. I have considered the application, the affidavits both in support of and in opposition to the application.

12. Section 76(a), (b) and (c) of the **Law of Succession Act** provides as hereunder:

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;

13. In this case the facts are not seriously in dispute. It is not in dispute that by a certificate of confirmation dated 29th July, 2008, Land parcel no. Mbiuni/Mumbuni/773 was to be subdivided amongst the Respondents and the Objector with the Respondents getting one quarter each while the Objector getting the remaining half. That decision was perfected by issuance of title in the name of the three persons. However, the Respondents went behind the applicant's back and purported to record a consent rectifying the said grant and in effect depriving the applicant of his interest in the subject property.

14. The Respondents now, and callously in my view, have the audacity of telling this Court that the applicant, being a mere purchaser has no locus standi in an application for revocation of grant. In my view this is not merely an application for revocation of grant but a situation where parties, being well aware of an existing court order, surreptitiously connive to defeat the course of justice. The fact remains, whatever the procedure adopted by the applicant that the applicant was not a party to the purported consent rectifying the grant. It is not even contended that he was aware of the intention to rectify the grant.

15. I associate myself with the decision of **Musyoka, J** in **In re Estate of Ernest Kerry Komo (Deceased) [2016] eKLR** that:

“Once a grant is confirmed and the property is distributed, as is the case here, the probate court becomes *functus officio*. The property in question is no longer estate property. It no longer vests in the administrators. It is no longer subject to the Law of Succession Act, Cap 160, Laws of Kenya, from which the probate court draws its authority and jurisdiction.”

16. It is therefore clear that following the confirmation of the grant and the issuance of the title in the joint names of the applicant herein and the Respondents, Land Parcel No. Mbiuni/Mumbuni/773 was no longer a property of the deceased estate and the Respondents could no longer

unilaterally rectify the grant in order to re-distribute the same as if it was the deceased's property. On this point **Musyoka, J** in **Re Estate of Mwangi Komo Ruhangi (Deceased) [2015] eKLR** held that:

“An application to redistribute the estate or to vary the distribution is really an application for review of the orders on the confirmation of the grant. It should be handled in much the same way as a confirmation application. The other parties or survivors of the deceased must concur to the redistribution or the changes being proposed. It is not something that can be done *ex parte*.”

17. The general rule is that orders which are personal in nature, or orders *in personam* in legal parlance, do not affect third parties to the cause. See **Ernest Orwa Mwai vs. Abdul S Hashid & Another Civil Appeal No. 39 of 1995**, **Kotis Sandis vs. Ignacio Jose Macario Pedro De Silva Civil Appeal No. 38 of 1950 [1950] 1 EACA 95**, **The Town Council of Ol'kalou vs. Ng'ang'a General Store Civil Appeal No. 269 of 1997** and **Sakina Sote Kaitany and Anor. vs. Mary Wamaitha Civil Appeal No. 108 of 1995**.

18. In **Gitau & 2 Others vs. Wandai & 5 Others [1989] KLR 231**, **Tanui, J** expressed himself as hereunder:

“The plaintiffs in this suit were not party to the suit in which the consent judgement was entered and consequently they are not bound by a compromise made between the advocate who acted for the second, third, fourth, fifth and sixth defendants on one part and the advocates for the first defendant on the other.”

19. I associate myself with the decision of **Mativo, J** in **A O O & 6 others vs. Attorney General & Another [2017] eKLR** that:

“This court is not powerless to grant a relief where the interests of justice demand...The fundamental duty of the court is to do justice. The court is required, where the circumstances so require, to act upon the assumption of the possession of an inherent power to do real and substantial justice for the administration, for which alone, it exists.”

20. In my view breach of the rules of natural justice cannot be justified on alleged procedural defaults. In **Onyango Oloo vs. Attorney General [1986-1989] EA 456** the Court of Appeal expressed itself as follows:

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard... A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at ...Denial of the right to be heard renders any decision made null and void ab initio.” [Emphasis mine].

21. This was a restatement of Lord Wright's decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

“If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision.”

22. In **Ridge vs. Baldwin [1963] 2 All ER 66** at 81, **Lord Reid** expressed himself as follows:

“Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void.”

23. It follows that the purported consent rectifying the certificate of confirmation was a nullity and the rectified certificate of confirmation issued on 30th November, 2016 and dated 19th December, 2016 is null and void.

24. In the premises this application succeeds and I issue the following orders:

(a) **The Rectified Certificate of Confirmed Grant of Letters of Administration Intestate issued to the Administrators/Respondents on 30th November, 2016 and dated 19th December, 2016 is hereby revoked;**

(b) **The Administrators/Respondents are hereby directed to immediately commence the process that will facilitate the subdivision of half of the land parcel Mbiuni/Mumbuni/773 to the Objector/Applicant herein.**

(c) **The Objector/Applicant will have the costs of this application to be borne by the Administrators/Respondents.**

25. It is so ordered.

Read, signed and delivered in open Court at Machakos this 4th day of February, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Awuor for Mr Malelu for the Objector/Applicant

Mr Muema for Mr Mutua for the 2nd Respondent

CA Geoffrey