



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1842 OF 1999

IN THE MATTER OF THE ESTATE OF NYAMBIA MUKAYA (DECEASED)

RULING

1. Through a summons for revocation/annulment of grant dated 29th January 2001 and filed on 8th February 2001 pursuant to Section 76 and rules 44 (1) of the Probate and Administration Rules Cap 160 laws of Kenya, the applicants sought orders that the grant of probate issued to Wangari Maina on 14th January 2000 be revoked/annulled on the ground that; the grant was obtained fraudulently by making of false statement and concealment from court of something material to the court.

2. The application is premised on grounds set out on the face of it and an affidavit in support jointly sworn by Douglas Gichure Gicheru and Edmund Mwangi Ngoiyo on the 12th January, 2001. It is the applicant's averment that the deceased whose estate these proceedings relate one Nyambura Mukaya died intestate on 8th August 1994 leaving behind her two daughters as the only dependants and therefore beneficiaries to her estate. That the said children namely; Wangari Maina and Wanjiru Mwangi petitioned for a grant of letters of administration intestate and the same was made and issued to them jointly on 21st September 1995 vide Murang'a SRM'S Court Succession Case No. 132/95.

3. That before the grant could be confirmed, the 1st applicant and one Hiram Ngoiyo father to the 2nd applicant herein filed a protest in their capacity as the nephews to the deceased's late husband arguing that they were the bonafide beneficiaries entitled to the estate against the petitioners who were daughters and therefore not entitled to inherit their parents' property in accordance with Kikuyu customs and practices.

4. They averred that, upon hearing the protest, the court delivered its judgment dated 22nd December 1998 and the property in question (estate) being L.R. No. 13/Gitugi/803 awarded to them. They attached a certificate of the confirmed grant dated 12th November 1999 (DG2) as evidence. That to their surprise, the respondent who did not appeal against the said judgment moved to the high court and filed a fresh succession case No. 1842/99 seeking a grant of probate with written Will purportedly executed by the deceased in 1993.

5. It is their contention therefore, that the grant before the high court was fraudulently obtained by making of a false statement and by concealment from court of something material to the case i.e. failure to disclose that there was succession cause No. 132/95 which she had filed in Murang'a Court. They claimed that they were the rightful heirs (beneficiaries) of the estate as per the decision in SRM's Court Murang'a case No. 132/1995.

6. In response to the application, the respondent filed a replying affidavit sworn by Wangari Maina stating that she was the executrix of the Will of the deceased and therefore properly issued with a grant of probate in respect to her late mother's estate which was duly confirmed on 4th July 2000. They averred that, the applicants have never been administrators of their later mother's estate hence have no locus standi as they are strangers to the estate and without any relationship to the deceased.

7. They further claimed that the existence of their late mother's Will overrides any claim by the applicants that they are the bonafide heirs.

8. Before the application could be heard, the 1st applicant and respondent died on various dates and it took time for parties to apply for replacement and or substitution with the current parties namely James Kariuki Maina and Florence Wanjiku Maina replacing their mother Grace Wangari Maina (respondent) and Charles Ngoiyo Mwangi replacing his deceased father Edmund Mwangi Ngoiyo the 2nd applicant herein.

When the matter came for interpartes hearing on 2nd October 2018, parties agreed to have the matter disposed off by way of written submissions. Consequently, the respondents filed their submissions on 15th October 2018 through the firm of Mwaniki Kariuki and Company Advocates. The applicants also filed theirs through Gacheru and Company Advocates on 12th October 2018.

10. In his one page submissions, Mr. Gacheru submitted that it was the respondent and her sister Wanjiru Mwangi who petitioned Murang'a SRM court vide succession cause No. 132/95 seeking a grant of letters of administration intestate which they obtained on 21st September 1995. Learned counsel submitted that, the applicants having challenged the application for confirmation by the respondent and her sister in that case by way of a protest, and the court having ruled in their (applicants) favour and confirmed the grant awarding the entire estate to the

applicants, the respondents had no legal basis to file a second succession case in respect of the same estate.

11. Mr. Gacheru opined that Succession file No. 1842/99 was secretly filed without the applicant's knowledge and that the respondent did not disclose to the court that they had filed another case in Murang'a where they lost.

12. On the other hand, Mr. Mwaniki for the respondent reiterated his written submissions. He gave a historical background relating to the applicant's beneficial interest vis a vis that of the respondent in respect of the property in question. Mr. Mwaniki submitted that the grant made and confirmed in succession file 1842/99 was properly obtained and that there was no fraud committed nor concealment of any material facts or information. Counsel accused the applicants of laxity in that they have failed to prosecute their application for over a period of 17 years. He contended that entertaining the application would be tantamount to condoning indolence and sanitizing laxity thus undermining the court process hence acquiescing the back log of court cases. He urged the court to dismiss the application for want of prosecution.

13. Further, Mr. Mwaniki stated that the applicant did not object to the existence of a Will executed by the deceased. He asserted that the applicants were not dependants of the deceased hence could not benefit from the estate. Learned counsel submitted that the existence of the Will and subsequent filing of this suit overrides the previous succession cause filed under the intestacy law. That owing to the discovery of the Will, the subordinate court lacks jurisdiction and the judgment arising from the intestate proceedings is inferior to this court's proceedings.

14. Mr. Mwaniki stated that, following the confirmation of the grant in this file (Succession 1842/99) bequeathing L.R. Loc.13/Gitugi/803 to Grace Wangari as the sole beneficiary and the said Grace Wangari having died and her estate including the land in issue in this case distributed to her children vide Succession 1723/2012, there is no land available for distribution.

15. Lastly, Mr. Mwaniki urged the court to find that the applicant's intention was to disinherit the respondent simply because the deceased had no son.

Analysis and Determination

16. I have considered the application herein, affidavit in support, replying affidavit and written submissions by both counsel. The only issues that crystallize for determination are whether the respondent (administratrix) obtained the grant of probate and subsequent certificate of confirmation fraudulently without material disclosure that another succession case No. 132/1995 Murang'a SRM's court touching on the same estate had been filed, litigated on and confirmed grant issued to the applicants.

17. Briefly, the respondent one Wangari Maina together with her sister Wanjiru Mwangi now deceased petitioned Murang'a SRM's court for a grant of representation in respect of their mother's estate vide Succession Case No. 132/1995. A grant of letters of administration intestate was issued to the two jointly on 21st September 1995. Before confirmation, one Douglas Gichure (1st applicant) and Hiram Ngoiyo father to Edmund Mwangi Ngoiyo (2nd applicant) filed a protest dated 19th September 1996 claiming that the petitioners in that case were not the rightful heirs to inherit the estate as they were daughters who under Kikuyu Customary Law could not inherit their parent's estate. On 22nd December 1998, the court upheld the protest and distributed the estate Loc.13/Gitugi/803 to the two protestors thus excluding the petitioners from inheriting their mother's estate.

18. Aggrieved by that decision, the petitioners appealed to the High Court vide Appeal Case NO. 371/2000. The appeal was however not admitted for non-compliance to Order XLI rule 1A of the Civil Procedure rules. On 25th August 1999, the respondent moved to this court and filed a fresh succession case in respect of the same estate and same property as a testate estate case founded on alleged discovery of a written Will executed by the deceased in the year 1993.

19. Pursuant to that development, the respondent obtained a fresh grant of probate of written Will on 4th November 1999 and confirmed on 14th July 2000 and the property distributed to Grace Wangari as the sole beneficiary. Upon transferring the property into her name, Grace Wangari died on 25th February 2010. Her children filed a succession cause No. 1723/12 in respect of her estate with L.R. Loc.13/Gitugi/803 compromising part of the estate. The grant in that case was on 7th October 2014 confirmed and the land shared amongst Wangari's children.

20. It was upon discovery that a fresh grant had been issued in respect of the same estate that the application for revocation on the grounds already stated was filed.

21. The power to revoke a grant whether testate or intestate is anchored under Section 76 of the Law of Succession and rule 44 (1) of the Probate and Administration rules of the Law of Succession Cap 160. Under section 76, 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 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)

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

22. Where any of the elements set out under Section 76 of the Law of Succession is established, the court has the discretion to revoke the grant for the ends of justice to be met.
23. The crux of the matter is that, the respondent herein did file a fresh succession case (Succession file No. 1842/1999) while fully aware that the same estate was the subject of litigation and fully finalized before another court with competent jurisdiction.
24. There is no dispute that Murang'a SRM's court Succession Case No. 132/1995 dealt with the estate of Nyambia Mukaya and that a grant of letters of administration intestate was confirmed and estate shared out.
25. According to the applicant, these facts were not disclosed to the High Court in this case by the time the grant herein was made and confirmed. It is the applicant's contention that there cannot be two confirmed grants.
26. There is no doubt that there are two subsisting grants in respect of the same estate affecting the same property. It is further contented that the SRM court Murang'a had no jurisdiction to handle the case and that the applicants had no locus to claim a share of the estate as they had no relationship with the deceased.
27. It is trite that a court order whether bad or not is valid until set aside by a superior court. To recognize the grant issued under this file which ignored a grant issued at Murang'a court touching on the same estate and same property is to say the least a dishonest submission by Mr. Mwaniki.
28. The application herein has raised only one pertinent ground. It is not dealing with the validity of the will who is entitled to get what. It is concern with abuse of the court process by filing two separate petitions in two different courts relating to the same estate and property. In the case of **Selina Tipango vs Emily Wambui Ishamael & 7 others (2016) eKLR** Justice Nyakundi while faced with a similar scenario revoked a grant on grounds of concealment of material facts. In that case, the administrator filed a succession cause in Nairobi Succession Cause No. 607/2000 and another one at Machakos Succession file No. 520/11 in respect of the same estate without disclosing to the court of the existence of the previous one. The court found that the act amounted to concealment of material facts and therefore an illegality.
29. The Hon. Judge went further to state that:
- “In applying Section 76 of the Act, I am satisfied that the proceedings to obtain the grant at Machakos High Court were defective and illegal in substance”.**
30. The respondent does not deny filing both succession causes. What justification is there in filing a succession cause in respect of one estate affecting same property in two different courts and worse still after losing the first one?
31. I do agree with Mr. Gacheru there cannot be two separate succession files in respect of the same estate. It does not matter whether there is a Will. The best the respondent would have done was to disclose to the High court of the existence of a similar file already determined. Alternatively, the respondent should have filed an appeal to the high court for revocation of the grant on account of discovery of new material evidence in this case a Will. It is embarrassing to the court process to have two parallel proceedings touching on the same estate with different enforceable orders.
32. Without considering the merits or validity of the Will, it is my conviction that the respondent is guilty of concealment of material facts and or information by failing to disclose that there was another case having been filed at Murang'a, fully determined and estate fully distributed.
33. The respondent cannot argue that Murang'a SRM Court had no jurisdiction yet she was the one who petitioned the court for a grant. Definitely, the petition filed before the High Court being a fresh succession cause after losing before Murang'a court and having had the appeal No. 371/2000 dismissed is indeed an abuse of the court process.
34. We cannot have two grants for enforcement at the same time. Although courts are quite often at the receiving end for the slow motion of the wheels of justice, in this case, inactivity of both parties in presenting the revocation application and prosecuting the same contributed in delaying this matter unreasonably. However, there is no time limitation in filing succession cause proceedings. We cannot blame the applicant alone for the delay. Both parties contributed by not substituting their deceased relatives who were parties to the case. I do not agree with Mwaniki that the application should be dismissed for want of prosecution at this stage. They should have moved the court before fixing the suit for hearing.
35. As to the validity of the Will, the same should have been properly introduced before court using the Murang'a court proceedings and then the High Court for revocation instead of filing a fresh suit.
36. For the above reasons stated, it is my finding that the application herein seeking revocation of the grant of probate issued on 6th November 1999 and confirmed on 14th July 2000 is merited and the same is allowed with orders that the said grant and subsequent certificate of confirmation are revoked. The respondent is also directed to submit and surrender to the Deputy Registrar Family Division the original grant and certificate of confirmation for cancellation. That the land registrar Murang'a is directed to cancel the subdivisions in respect of L.R. Loc/13/Gitugi/803 and have the same revert to the position it was prior to the confirmed grant dated 14th July 2000.
37. However, this court cannot ignore the fact that there is now an alleged will in place affecting the estate which was discovered much later

after the confirmation of Murang'a court proceedings. Although there was an appeal lodged but dismissed summarily due to non compliance with order 41 of the civil procedure rules the same was not determined on merit. However, this court has inherent powers under rule 73 and section 76 [e] to revoke the grant on its own motion in the interest of justice on account that the grant has become useless and inoperative through subsequent circumstances in this case, discovery of a Will.

38. The net effect of the above holding is that, the grant issued in Murang'a SRM case no132/1995 on 12th November 199 is equally revoked. The two files that is H.C. succession file number 1842/1999 and Murang'a SRM court succession cause No 132/1995 be consolidated so as to ascertain the validity of the will and subsequent determination of the beneficiaries of the estate. For avoidance of doubt subsequent proceedings shall proceed under this high court file no 1842 /1999. The respondents are hereby given 30 days within which to move the court for determination of the validity of the will as well as the appointment of new executors in place of the executrix now deceased. In default the confirmed grant in Murang'a court shall be reinstated.

39. Accordingly, the application for revocation grant dated 29th January 2001 is allowed with orders as follows:

a. That the grant of probate issued on 6th November 1999 and certificate of confirmation issued on 14th July 2000 be and are hereby revoked.

b. That the respondent [petitioner] is hereby directed to surrender to the Deputy Registrar the original Grant of probate of written will for cancellation

c. That the Land Registrar Murang'a is hereby directed to cancel subdivision of L.R. Loc./13/Gitugi/803 so as to revert to the position it was prior to the confirmed grant of 14th July 2000

d. That the grant issued and confirmed in Murang'a SRM court on 12th July 1999 be and is hereby revoked.

e. That succession file no 1842/1999 and Murang'a succession no 132/1995 be and are hereby consolidated and same to proceed under file no 1842/1999.

f. That the respondents/petitioners shall file an application seeking determination of the validity of the will and the new executors to be issued with a grant of probate of written will in place of grant of letters of administration intestate within 30 days in default the grant and confirmed certificate issued in Murang'a SRM court shall be reinstated.

DATED, DELIVERED AND SIGNED AT NAIROBI ON THIS 11TH DAY OF MARCH, 2019.

J.N. ONYIEGO

(JUDGE)