



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
SUCCESSION CAUSE NO. 759 OF 2012
IN THE MATTER OF THE ESTATE OF JAMES WACHIRA MIHUNYU (DECEASED)

RULING

1. The deceased herein James Wachira Mihunyu whose estate these proceedings relate died intestate on 30th January 2012 leaving behind the following survivors:

- (1) Ruth Wanjiru Wachira (widow)
- (2) Margaret Kirigo Wachira (daughter)
- (3) Jacinta Wamuyu Wachira (daughter)
- (4) Lydia Wanja Wachira (daughter)
- (5) Julian Wanja Wachira (daughter)
- (6) Francis Maina Githaiga (son)
- (7) Jane Nyachomba Wachira (daughter)
- (8) Maurice Murathimi Wachira (son)
- (9) Joyce Mumbi Wachira (son)
- (10) Catherine Nyaguthi Wachira (daughter)

2. Among the listed properties in form P & A 5 comprising the estate are:

- (1) Laikipia/Kalalu/56
- (2) Laikipia/Kalalu/79
- (30) Mutara/Thome block 1/1693

Having petitioned for a grant of representation on 4th June 2012, the estate was gazetted on 10th August 2012 and a grant of letters of administration intestate issued to Ruth Wanjiru Wachira and Jacinta Wamuyu Wachira as joint administratrixes on the 27th September 2012.

3. Subsequently, the grant was confirmed and a certificate of confirmation issued on 27th May 2013. Consequently, the estate was shared out equally to the ten beneficiaries listed herein above.

4. On 20th August 2018, one Patrick Machehu Chege filed summons of even date seeking revocation or annulment of the grant on grounds that:

- (1) At the time of confirmation of the grant of letters of administration, one of the properties listed for distribution, being

Plot No. Laikipia/Kalalu/56 was a subject of an ownership dispute in Nyeri ELC Case No. 65/2013 wherein vide a court decree, there was an order that the property's title be rectified in favour of the applicant's deceased father.

(2) The proceedings to obtain grant were defective in substance.

(3) The grant was obtained fraudulently by concealment from the court of something material to the case.

5. Application is supported by an affidavit sworn by Patrick Machehu Chege (the applicant herein) together with the annexures thereof. Basically, the applicant's case is hinged on a claim that Plot No. Laikipia/Kalalu/56 which was listed as part of the estate herein and shared out equally amongst the beneficiaries belonged to his late father John Chege Machehu whose estate he is representing as a legal representative.

6. He averred that, at the time of issuance and confirmation of the said grant to the respondents in May 2013, the respondents failed to disclose to court material facts which they were well aware of; that the land was a subject of an ownership dispute in Nyeri ELC Case No. 65/2013 between Patrick Machehu Chege and Ruth Wanjiru Wachira and another.

7. The applicant stated that after hearing the above stated ELC case, the court delivered its judgment on 28th January 2016 and a decree was then issued on 2nd March 2016 wherein there were orders that there be a rectification and cancellation of the registered owner James Wachira Mihunyu (deceased herein) and title to be registered in the name of John Chege Machehu being the late father to the applicant. He annexed a copy of the said judgment and decree as Ex. PMC1.

8. That despite having knowledge that there was a civil suit pending before Environment and Land Court touching on the disputed property, the respondents (administrators) moved to register the grant at the land registry and transferred the land in question into their names on 7th October 2013. A copy of the green card reflecting the said transfer was attached as proof and marked as PMC2.

9. Despite service of the application for revocation, the respondents did not file any response. Although severally served with hearing notice by a process server at the instruction of the court, the respondents did not turn up in court. The application therefore proceeded ex parte (unchallenged) with the applicant alone giving his testimony which is a replica of the affidavit in support of his application.

10. Although represented, the applicant's counsel did not bother to file any submissions. I have considered the application herein which is not opposed, supporting affidavit and annexures thereof. The issues that crystalize for determination are; whether the proceedings leading to confirmation of the grant were defective in substance and; whether the respondents (administrators) concealed material facts by not disclosing to the court that plot No. Laikipia/Kalalu/56 was a subject of dispute before the ELC.

11. Although the applicant has not specified the provisions of the law under which the application for revocation is filed, it is clear that the law in reference and applicable is Section 76 of the Law of Succession and rule 44 (1) of the Probate and Administration rules.

12. 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 upon proof that:

(a) 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 untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or in advertently.

(d) That the person to whom the grant was made had 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 produce to the court within the time prescribed, any such inventory or account of administration as required by the provisions of paragraphs (e) and (g) Section 83 or has produced any such inventory or account which is false in any material particulars.

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

13. Unless proved, an application for revocation of grant anchored on the above stated grounds which is a replica of rule 44 (1) of the Probate and Administration rules is bound to fail (**See in the matter of the estate of Patrick Mbugua Njoroge (deceased) Nairobi HCC Probate and Administration No. 659/1989.**

14. In the instant case, the applicant has cited two grounds for revocation of the grant. Firstly, he has alleged that the proceedings to obtain grant were defective in substance. The applicant did not elaborate on the defects alluded to. This court is left to speculate on the said defects and make a conclusion which is not its duty.

15. It is trite that he who alleges the existence of any fact material to the case must prove (**See Section 107 and 108 of the Evidence Act**).

Since the applicant has not specified the exact defect in reference, this court will not speculate hence that ground must fail.

16. Regarding the second ground on concealment of material facts or information, the applicant a legal representative to the estate of John Chege Machehu stated that, the land in question was allotted to his father on 12th February 1983 by settlement fund trustee. That 10 years after his father died, the deceased in this case without any colour of right fraudulently, unlawfully and irregularly forged transfer documents and consent form purportedly signed by a dead person (John ChegeMuchehe) thus transferred the land in question into his name.

17. He contended that, the ELC having determined ownership by finding that the registered herein James Wachira Mihunyu had forged the transfer documents and transferred the said land into his land, the court ordered the Land Registrar who was the 1st defendant in that case to cancel the transfer and have the land revert back to the original owner.

18. Since a court of competent jurisdiction dealing with disputes over ownership of land has already determined the issue of ownership, this court does not have the capacity to distribute property that does not belong to the estate. Although by the time the grant was confirmed the issue of ownership had not been determined, the suit was already in place and pending. The respondents were fully aware of the dispute over ownership in respect to that property but opted to proceed with confirmation of grant and subsequent distribution.

19. Although the applicant is not a direct beneficiary of the estate herein, he has an interest on the suit property on behalf of his father's estate. Failure to disclose to the court that there was a suit pending before the ELC affecting part of the estate was an act of dishonesty and concealment of material facts. It is no wonder that they did not bother to defend the suit before ELC and revocation application before this court.

20. It is my holding that, land parcel No. Laikipia/Kalau/56 does not form part of the deceased's estate by virtue of the ELC judgment hence the certificate of confirmation including the said land cannot stand. Although the facts and nature of the concealment of the material facts herein cannot occasion a general revocation of the grant which will be premature, it will definitely affect the schedule of assets available for distribution thus calling for amendment of the certificate of confirmation of grant by removing the said land.

21. In the interest of substantive justice and in exercise of this court's inherent powers, I will order for amendment of the certificate of confirmation of grant herein by removing land Ref. Laikipia/Kalalu/56 from the schedule of assets.

22. Accordingly, the application is hereby allowed with orders that:

(a) That the certificate of confirmation made and issued on 27th May 2013 be and is hereby amended by removing L.R. Laikipia/Kalalu/56 from the list or schedule of assets.

(b) That the respondents shall surrender the original grant to the Deputy Registrar for cancellation.

(c) That the Land Registrar of Laikipia is directed to cancel the transfer of L.R. No. Laikipia/Kalalu/56 pursuant to this court's grant of 27th May 2013 to revert back to its former position or status prior to the submission of the certificate of confirmation.

(d) Costs awarded to the applicant

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 4th Day of March, 2019.

J.N. ONYIEGO

(JUDGE)