



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

P&A CASE NO. 85 OF 2007

IN THE MATTER OF THE ESTATE OF THE LATE TABITHA WAITHERERA KAMAU – DECEASED

NGARUIYA KAMAU.....OBJECTOR/APPLICANT

VERSUS

ELIUD NJOGU KIHUGA.....PETITIONER/RESPONDENT

RULING

There are two summons seeking revocation of grant issued to the petitioner by this court on 11th July, 2007.

In the summons dated 1st March 2010 the applicant seeks the following orders;

- a) Grant of letters of administration issued to *Eliud Njogu Kihuga* on 11th July 2017 be revoked.
- b) The applicant be awarded costs.

The 2nd summons relates to Vincent Njogu Kihuga & 20 other applicants described as the objectors. It is dated 19th February 2010 and seeks the following orders;

- a) The grant of letters of administration issued to *Eliud Njogu Kihuga* on the 11th day of July 2017 be revoked or annulled based on the following grounds;
 - i) The proceedings to obtain the same were fraudulent and defective in substance.
 - ii) The grant was obtained fraudulently by the making of a false statement or by concealment of material facts
 - iii) The grant was obtained by untrue allegations of a fact which was essential in point of law.
 - iv) The person who was given the grant has failed to disclose to the court there are other members of the family entitled to benefit from the deceased.
 - v) The proposed distribution of the estate is vitiated by the forgery of the respondents' ill attempts in depriving other beneficiaries
 - vi) The distribution shall favour the respondent alone yet there are other beneficiaries
 - vii) The distribution has favoured the respondent alone who has also benefitted from his late father's estate
 - viii) There are other P&A causes pending before this court.

OBJECTOR'S CASE: APPLICATION DATED 1ST MARCH 2010

The petitioner did not disclose that the objector and the deceased person were owners in common of Eldoret Municipality/ Block 12/184. Annexure NK2 to the application is a sale agreement entered into on 16th October 1981 which confirmed that the deceased and the objector were having equal share as joint tenants in common, material facts not disclosed to the honourable court.

The petitioner did not disclose that there were two other causes that were filed relating to the same estate and which the objector was a party. The grant and the confirmation issued to *Samuel Kihuga*, who alleged to be a husband to the deceased, in cause No. 146 of 1994 were revoked vide an order of the court on 3rd April 2006 as evidenced by annexure NK4 to the supporting affidavit. The court barred any further dealings in relation to the deceased's estate through an order issued on 5th June 2006. The non-disclosure was deliberate.

The petitioner chose not to disclose that the deceased and the objector held Eldoret Municipality/ Block 12/184 in common although he intended to administer the estate. He further chose not to disclose that prior to him obtaining the grant of administration. The honourable court had revoked and annulled grants issued to his father with respect to the estate of the deceased.

The failure by the petitioner to involve the objector at the time of filing those proceedings, failing to list him among the beneficiaries and failure to disclose that there were other existing succession causes that were pending and which grants were revoked amounts to concealment of material facts making the proceedings leading to the issuance of the grant defective.

The petition was filed contrary to rule 26 of the probate and administration rules. Failure to disclose the interest of the objector amounted to abuse of the court process and the court should revoke the grant. The objector falls within the definition of rule 2 of the probate and administration rules.

OBJECTOR'S CASE: SUMMONS/APPLICATION DATED 19TH FEBRUARY 2010

The objectors in this summons did not file any submissions/ there are no submissions on record.

RESPONDENT'S CASE: SUMMONS DATED 1ST MARCH 2010

The objector submitted that the petitioner misled the court by alleging he was the son of the deceased. The petitioner did not disclose that the objector and the deceased were owners in common of the parcel of land initially known as section 2 plot no. 45 now known as Eldoret Municipality/ Block 12/184. The objector has attached an agreement dated 16th October 1981 which relates to a partnership.

The assets the petitioner sought to administer were registered in the full names of *Samuel Kihuga* and not in the name of the deceased. He relied on search certificates that were filed in court but not attached to the affidavit. Further, the search certificates filed on this cause do not relate to the deceased and he blamed the petitioner of failing to disclose that there were two other causes i.e. Succession Cause 146 of 1994 and succession case 253 of 2008 that had been filed in Eldoret High Court relating to the same estate in which the objector is a party. They had been filed by *Samuel Kihuga* who claimed to be the husband of the deceased and *Stephen Kihuga* together with 3 other people claiming to be the sons of the deceased.

The grant issued to *Samuel Kihuga* and the confirmation of grant in Cause No. 146 of 1994 had been revoked by an order of the court on 3rd April 2006.

On the agreement, the objector submitted that the objector and the deceased were in a partnership in respect to the business premises designated as *Section 2 no. 45* and issues regarding it can only be addressed by the high court through *Order 37 rule 10* of the *Civil Procedure Rules*.

The objector submitted that the applicant is indeed a third party and not a beneficiary to the estate therefore he cannot litigate any interests he has in the succession cause. He relied on the case of *Re: Estate of the late Alice Mumbua Mutua (Deceased) 2017 eKLR.*

He further submitted that the court is devoid of jurisdiction to entertain the claim by the applicant and that it should be dismissed with costs based on the case of *Owners of the Motor Vessel 'Lillian S' v Caltex oil (Kenya) Ltd. [1989] KLR 1.*

It was submitted that the applicant is not an objector within the meaning of rule 2 of the Probate and Administration Rules, 1980.

The applicant has not been able to substantiate his claims on the summons for revocation. He alleged the petitioner is not a son of the deceased but no evidence has been led on this account.

The applicant alleges that the ownership of Eldoret Municipality Block 12/184 was in common but there has been no evidence led on this. The applicant did not establish that the petitioner had knowledge of the existence of other succession causes. The applicant failed to discharge the onus of proof.

RESPONDENT'S CASE: APPLICATION DATED 19TH FEBRUARY 2010

The issue raised by the applicants on whether the properties listed as the assets of the late *Tabitha Waithera Kamau* do not bear her names can only be addressed at the stage of confirmation of the grant. The applicant's claims ought to be ventilated through a protest against the confirmation of grant as provided in *rule 40(6)* of the *Probate and Administration Rules, 1980*. The issue of beneficiaries having been left out should also be raised at the stage and further, the applicants have not placed any evidence before the court that they were being maintained by the deceased or depended on her prior to her death. He relied on the case of *Mpatinga Ole Kamunye v Meliyo Tipango & 2 others (2017) eKLR.*

No documentary proof has been placed before the court to prove that the applicants are beneficiaries. The respondent invoked Section 29 of the Law of Succession Act with regards to this.

The allegations that there are two other succession causes filed was not proven by way of tendering the register of succession causes to establish the same. The certificate issued by the principal registrar in form 30 annexed as an exhibit to the petitioners replying affidavit confirms that no other succession cause existed in respect to the deceased. The certificate was duly received as per *rule 4* of the *Probate and Administration Rules*.

The application lacks merit as the summons list a total of 21 applicants while in the body of the application only 3 applicants seek for revocation of the grant. The applicants lack locus to claim they are objectors as they have not filed any objection as per rule 17.

The allegations of concealment are devoid of substance as the same was duly gazetted on 31st May 2007. A fact in the Kenya Gazette is a presumption of public knowledge and is inconsistent with an allegation of concealment.

The applicants have not proven that the grant ought not to have been made to the petitioner who proved he was a son through the chief's letter. The applicants have not established that they hold any rights in priority to his to petition for a grant. He relied on section 66 of the Law of Succession Act and the case of *Nairobi HC Succession Cause 2015 of 2012 – Re – Estate of the late Joshua Orwa Ojode* – Deceased.

ISSUES FOR DETERMINATION

WHETHER THE GRANT OF LETTERS OF ADMINISTRATION ISSUED TO ELIUD NJOGU KIHUGA ON 11TH JULY 2007 SHOULD BE REVOKED.

According to section 76 of the Law of Succession Act;

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.

In the Matter of the Estate of L A K – (Deceased) [2014] eKLR the court held that;

Revocation of grants is governed by Section 76 of the Law of Succession Act. The relevant portions of Section 76 are paragraphs (a), (b) and (c) since the issues raised relate to the process of the making of a grant. A grant may be revoked where the proceedings leading up to its making were defective, or were attended by fraud and concealment of important matter, or was obtained by an untrue allegation of a fact essential to the point.

In order for the orders sought to be granted, the objectors must prove that the grounds for revocation have been satisfied.

WHETHER THERE WAS MATERIAL NON-DISCLOSURE OF FACTS

The objector submits that the petitioner did not disclose that the objector and the deceased were owners in common of the parcel of land known as Eldoret/Municipality/Block 12/184. The agreement marked as NK1 states that the parties were tenants in common and that upon dissolution of the partnership each of the parties would share the properties equally. This therefore means that the objector, *Eliud Ngaruiya* had interests in the land thus as one of the assets cited in as part of the estate, it did not entirely belong to the deceased. This was a material fact that should have been disclosed.

The objector submitted that there were other causes that had been filed in respect to the same estate. Succession Cause No. 146 of 1994 and Succession Cause No. 235 of 2008. A perusal of the file proves that indeed there were other causes filed with respect to the estate of the deceased. In succession cause 146 of 1994 the court revoked the grant issued to *Samuel Kihuga*. This is evidenced by pleadings and orders related to the causes mentioned above.

The affidavit in support of the summons for confirmation of the grant has listed the properties that comprised the deceased's estate. However, the petitioner is the only listed beneficiary.

There are also documents on record including a letter from the chief listing the applicants in the application dated 19th February 2010 as dependants of the deceased. It was the respondents' submission that the chief's letter was proof of his dependency therefore it is admissible that these letters are also proof that they were dependants. Failure to disclose this is proof of material non-disclosure. However, these documents were submitted in other causes and not this particular one. Further, the applicants did not file submissions to support their application.

On material non-disclosure, of essence is the failure by the petitioner to acknowledge that the land known as Eldoret/Municipality/Block 12/184 was not entirely owned by the deceased and that the objector, *Eliud Ngaruiya* had an interest in the same. Grants of representation can only be issued with respect to properties of the deceased. The objector is indeed not a member of the family but still qualifies to be an objector within the definition of *rule 2* of the *probate and administration rules*.

On the foregoing reasons, the grant is revoked for material non-disclosure.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 17th day of June, 2019.

In the absence of:-

Mr. Mathai, Ngigi and Ms Bonareri for the objectors/applicants

Mr. Kigamwa for the petitioner/Respondent

Ms Sarah - Court clerk