



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

SUCCESSION NO. 346 OF 2013

IN THE MATTER OF THE ESTATE OF ABDULKARIM CHATUR POPAT

also known as ABDUL KARIM CHATURBHAI

ALNASHIR ABDULKARIM CHATUR POPAT..... APPLICANT

VERSUS

ADIL ABDULKARIM CHATUR POPAT.....1ST RESPONDENT

GULZAR ABDULKARIM CHATUR POPAT.....2ND RESPONDENT

KARIM SAIFUDDIN ANJARWALLA.....3RD RESPONDENT

AZIM ABDULKARIM CHATUR POPAT.....4TH RESPONDENT

RULING

1. The undisputed facts of this case are that the deceased herein, Abdulkarim Chatur Popat also known as Abdul Karim Chaturbhai died on 2.3.13 at the Aga Khan Hospital in Nairobi at the age of 87. He is survived by his widow Gulzar Abdulkarim Chatur Popat (the 2nd Respondent) and his 3 sons Azim Abdulkarim Chatur Popat (the 4th Respondent), Adil Abdulkarim Chatur Popat (the 1st Respondent) and Alnashir Abdulkarim Chatur Popat (the Applicant). The deceased died testate and in his Will dated 15.5.08 appointed the 3rd Respondent Karim Anjarwalla together with the 1st, 2nd and 4th Respondents as executors thereof. Grant of Probate of Written Will (the Grant) was issued to the executors on 29.1.14 and confirmed on 20.11.14. The deceased in his Will made no provision for the Applicant.

2. The Applicant has filed this Application dated 20.8.18 seeking in the following orders:

1. THAT this Court be pleased to hear this Application during the current Court Vacation.

2. THAT this Application be certified urgent and placed before the Judge seized of the matter, the Hon. Lady Justice Thande on 26th September, 2018 for Directions as to an expedited hearing and determination of the Application.

3. THAT there be a stay of distribution of the estate of Abdulkarim Chatur Popat also known as Abdulkarim Chaturbhai pending the hearing and determination of this Application.

4. THAT in the alternative to prayer three (3) above, the status quo granted by this Honourable Court on 3rd August, 2018 be extended pending the hearing and determination of this Application.

5. THAT pending the hearing and determination of this Application, an Order do issue for the preservation of all the assets of the estate of Abdulkarim Chatur Popat, which are the subject matter of these proceedings, wherever the said assets are located.

6. THAT the advertisement of an application made in respect of the estate of Abdulkarim Chatur Popat appearing in the Kenya Gazette Special Issue Vol. CXV-No.179 dated 20th December, 2013 be nullified.

7. THAT the Grant of Probate of Written Will issued on 29th January, 2014 and confirmed on 20th November, 2014 be revoked.

8. THAT all transactions undertaken on the basis of the Grant of Probate of Written Will be nullified.

9. THAT the Certificate of Confirmation of Grant dated 2nd December,, 2014 issued on the basis of the Grant of Probate of Written Will be nullified.

10. THAT Orders do issue compelling the Respondents as the Executors and Trustees of the Will and as personal representatives of the estate of the deceased, and within such periods of time as this Honourable Court shall stipulate:-

a) Produce to this Court a full and accurate inventory of the assets and liabilities of the deceased.

b) Produce to this Court a full and accurate inventory of the assets and liabilities comprising the deceased's Residuary Estate as provided for in the deceased's Will dated 15th May, 2008.

c) Produce to this Court full and accurate accounts of all dealings therewith up to the date of the account

11. THAT this Honourable Court be pleased to grant such other or further Orders and/or issue such Directions as it shall deem fit and just having regard to the nature and circumstances of this matter.

12. THAT the costs of and incidental to this Application be provided for.

3. The grounds upon which the Application is premised are that the gazette notice for the application for the Grant was defective in that it indicated that was in respect of the application for a grant of letters of administration instead of grant of probate. As a result, the procedure for obtaining the Grant was defective in substance. As such, the Respondents cannot rely on the same as constituting proper and effective notice upon the Applicant.

4. The Applicant further avers that the proceedings in respect of the confirmation of the Grant were defective in substance in that the Respondents did not involve the Applicant at all in the application for the Grant. The gazette notice being defective did not constitute proper notice to the Applicant of the application for Grant. The Applicant's consent to the confirmation of Grant was not sought nor was he notified of the confirmation of the Grant. No effort to secure the Applicant's attendance in Court for the confirmation was made. The certificate of confirmation of grant which was issued without the participation of the Applicant is null and void and ought to be set aside. The Applicant further avers that the Grant was obtained and confirmed by concealment from the Court of the fact that there exist other assets outside Kenya omitted in the will.

5. According to the Applicant, if the orders sought are not granted, he stands to suffer irreparable loss and damage. It will result in infringement of his constitutional right to information held by the 1st and 2nd Respondents and his right to ownership of property. He will be deprived of his rightful and lawful share of his late father's estate while the 1st Respondent retains a disproportionately large portion of the same.

6. The 1st-3rd Respondents opposed the Application vide a replying affidavit sworn on 22.11.18 by the 1st Respondent. The 4th Respondent did not participate in the proceedings.

7. Upon considering the parties' submissions, my finding is that the following issues fall for determination:

i) Whether the proceedings to obtain the Grant were defective in substance.

ii) Whether the proceedings to obtain the confirmation of the Grant were defective in substance and thereof

iii) Whether the Grant and confirmation thereof was obtained fraudulently by concealment of material facts to the court.

iv) Whether the Executors should produce to this Court a full and accurate inventory and liabilities of the estate and a full and accurate account of their dealings therewith.

v) Whether the Grant should be revoked.

8. The jurisdiction of the Court to revoke and annul grants of representation is contained in Section 76 of the Law of Succession Act (the Act) which provides:

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 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.

Whether the proceedings to obtain the Grant were defective in substance

9. The Applicant's main contention is that the gazette notice published in the Kenya Gazette of 20.12.13 was defective in that it was for a petition for a grant of letters of administration and not grant of probate which was filed in Court. As such, the proceedings to obtain the Grant were defective in substance. The 1st-3rd Respondents acknowledge that the gazette notice contains the error pointed out by the Applicant. They however assert that the cause number in the notice is correct as is the name of the deceased as well as the date of his death. The names of the executors are also correct. To the 1st-3rd Respondents therefore, the gazette notice contained sufficient information to demonstrate to all including the Applicant that succession proceedings relating to the estate of the deceased had been instituted. The 1st-3rd Respondents further contend that the error was made not by them but by the Court Registry and does not prejudice the Applicant and cannot be the basis for revocation of the Grant.

10. Rule 7 of the Probate and Administration Rules (the Rules) contains the general provisions for application for grants. Rule 7(4) provides for the publication in the gazette of the notice of an application for a grant as follows:

The registrar shall cause to be inserted, at the cost of the applicant, in the Gazette and, if he so decides, in a daily newspaper, and to be exhibited conspicuously in the courthouse attached to the registry where the application is intended to be made, a notice of the application for the grant in Form 60 inviting objections thereto to be made known to that registry within a period, to be specified in the notice, of not less than thirty days from the date of the last of such publications.

11. The notice to be published in the gazette is of the application for the grant in Form 60 inviting objections thereto. This rule as well as Form 60 applies to both grants of probate and of letters of administration. Form 60 reads in part:

LET ALL PERSONS CONCERNED TAKE NOTICE that a petition for a grant of probate of the will (and codicil) of (or letters of administration or with will (and codicil(s)) of the estate of the above named deceased who died at...

AND FURTHER TAKE NOTICE that objections in the prescribed form to the making of the proposed grant are hereby invited and must be lodged in this registry within...

12. The purpose of the publication of the notice is to inform all persons concerned that an application for a grant of representation has been filed and to invite objections to the application. The argument by the Applicant that the 1st-3rd Respondents cannot rely on the notice which has the aforesaid error as constituting proper and effective notice upon the Applicant is in my view not persuasive. The fact that the notice was correct in all other respects and further that it referred to an application for a grant of representation is sufficient notice. Upon publication of the gazette notice the Applicant, and indeed any other person concerned or with an interest in the estate was afforded had an opportunity, if so minded, to file an objection thereto never mind that the notice was for a grant of letters of administration and not a grant of probate. The error did not render the notice ineffective nor was any prejudice occasioned to the Applicant thereby. Similarly the error could not have caused confusion to the Applicant or made it impossible for him to challenge the application for the Grant. My view therefore is that the error is a technicality which can easily be cured by Article 159(2)(d) of the Constitution of Kenya 2010 which provides:

159 (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(d) justice shall be administered without undue regard to procedural technicalities;

13. In this regard I am in agreement with Muchemi, J in In re Estate of Thomas Njue Njine Wachira (Deceased) [2018] eKLR where she observed:

The issue of the form of the grant was raised by the applicants as well as the error in the Kenya Gazette referring to the deceased as having died "intestate" instead of "testate". In this regard, I find the provisions of Article 159(2) as relevant herein...

The Constitution calls upon the court not to have undue regard to procedural technicalities in administration of justice but rather focus on the substantive justice.

14. The Applicant further contends that he was not informed or notified of the proceedings leading to issuance of the Grant. The 1st-3rd Respondents contend that the Applicant was duly notified by the notice of the petition published in the Kenya Gazette on 20.12.13. They further argue that the executors were under no duty to personally serve the Applicant with the petition for grant as he was neither an executor nor a beneficiary under the Will of the deceased.

15. It is to be noted that where an executor of the will of a deceased person applies for a grant of probate, the consent of dependants of the deceased is not required as in the case of an application for a grant of letters of administration intestate. Rule 7(1)(g) of the Rules requires that the names and present addresses of the executors be indicated. The law does not strictly stipulate that the 1st-3rd Respondents were under an obligation to inform and notify the Applicant of the proceedings to obtain the Grant. As indicated above, the gazette notice in Form 60 is a notice to all persons concerned. The notice in the Kenya Gazette of 20.12.13, served to notify all persons concerned. This included the Applicant, as a person concerned with the application for a grant of representation in respect of the estate of the deceased. In the circumstances, I find that the 1st-3rd Respondents met the statutory requirement of having the notice of their application for the Grant published in the Kenya Gazette of 20.12.13. The gazette notice constituted adequate notice to the Applicant. The case of re Estate of Wahome Mwenje Ngorano Deceased [2016] eKLR relied on by the Applicant is distinguished in that unlike in the present case, the deceased therein died intestate.

Whether the proceedings to obtain the confirmation of the Grant were defective in substance.

16. The Applicant submitted that he was not informed or notified of the proceedings leading to the confirmation of the Grant nor was his consent sought or obtained. The 1st-3rd Respondents counter this by arguing that the Court's obligation was to satisfy itself that the requirements of Section 71 were fulfilled *to wit* that 6 months had elapsed since the issuance of the grant; the grant was rightly made to the executors; the executors are administering or will administer the estate according to law. It was further submitted that where there is a valid will, the law does not impose a duty on executors to involve strangers to the will. To the 1st-3rd Respondents, the law did not intend that a grant may be revoked for non-participation in the proceedings of a stranger to an uncontested will. This would result in an absurdity. The 1st-3rd Respondents further submitted that the wishes of the deceased should be respected save only to accommodate a dependant who succeeds in an application for reasonable provision under Section 26 of the Act.

17. Contrary to the contention by the 1st-3rd Respondents, the participation of dependants of a deceased person who died testate, in proceedings for confirmation of a grant of representation is a statutory requirement. The reason for this is to enable a party not provided for or adequately provided for, to file an affidavit of protest or an application for reasonable provision as a dependant. The law is that an affidavit of protest and an application for reasonable provision may only be made prior to confirmation of a grant. Thereafter the window is closed. It is therefore imperative that all dependants and all persons beneficially entitled to the estate of a deceased person be involved in the proceedings for confirmation of grant. Default has led to revocation of grants and our Courts are replete with decisions revoking grants where children or dependants have been excluded in the process of confirmation.

18. In the instant case, the Applicant was not notified of the proceedings nor was his consent sought and obtained. This, the 1st-3rd Respondents have freely admitted. The Court notes that there is a common belief among legal practitioners that where a deceased person died testate and a grant of probate has been issued, consent of beneficiaries and dependants at confirmation is not necessary. This is a misapprehension of the law. Rule 40(8) of the Rules is unequivocal:

Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit.

19. It should be noted that the consent is to be in Form 37 and further it is of all dependants or other persons who may be beneficially entitled. This rule requires that all dependants of the deceased whether provided for in the will or not and all persons beneficially entitled under the will must give their consent in Form 37. In the instant case, the record shows that the summons for confirmation of the Grant dated 22.10.14 is not accompanied by the consent in Form 37 of the Applicant or of any of the dependants or persons beneficially entitled to the estate of the deceased under his Will. Further there is no indication on the record that on 20.11.14 when the Grant was confirmed, any of the beneficiaries attended Court. There was therefore no attendance and no consent of the dependants and beneficiaries. Confirmation was therefore done without due regard to the mandatory provisions of the law. To this extent therefore, the proceedings leading to the confirmation of the Grant were defective in substance. This was also the holding of Ouko, J (as he then was) in Charles Mutua M'anyoro v Maria Gatiria [2009] Eklr. He stated:

It is imperative under the rules that all the dependants be in attendance during the hearing of the application for confirmation save where the dependants have signed a consent in writing. See Rule 40(8).

20. I have considered the case of In re Estate of Thomas Njue Njine Wachira (Deceased) [2018] eKLR relied on by the 1st-3rd Respondents. With profound respect, I disagree with Muchemi, J. Having found that the applicants therein were beneficiaries of the estate of the deceased, their consent was necessary as was their participation in the confirmation proceedings.

Whether the Grant and confirmation thereof was obtained fraudulently by concealment of material facts to the court.

21. The Applicant accuses the Respondents of failing to disclose in their application for the Grant, the existence of the deceased's offshore investments including shares in Seagrace Limited. This was contrary to the provisions of the Act and the Rules. The 1st-3rd Respondents however assert that the Applicant did not prove his speculative and mythical allegation of existence of offshore assets.

22. It is mandatory that details of all the assets and liabilities of the deceased are included in an application for a grant of representation. Section 51(2)(h) of the Law of Succession Act provides that every application for a grant shall include *inter alia* information as to:

a full inventory of all the assets and liabilities of the deceased;

23. Information on the assets of a deceased person is something material to the case. Concealment of this information may form the basis for revocation of a grant. In order for the Applicant to succeed in the application for revocation of the Grant on this ground, he must prove that the assets do exist and failure to disclose the same was fraudulent. My own view however, is that where there is proof of non-disclosure of assets, the same can be cured by filing an application of inclusion of omitted assets.

Whether the Executors should produce to this Court a full and accurate inventory and liabilities of the estate and a full and accurate account of their dealings therewith.

24. It was submitted for the Applicant that the Respondents' statutory duty to account for the estate of the deceased commenced on 29.1.14 when the Grant was issued. They should therefore render account of the assets and liabilities of the estate and their dealings therewith. The 1st-3rd Respondents argue that the application to produce accounts is premature as no distribution has taken place since the confirmation owing to *status quo* orders by the Court.

25. The duties of a personal representatives over the estate of a deceased person are well set out in Section 83 of the Act. The requirement to produce accounts is stipulated in the following provisions of Section 83:

(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;...

(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;

(h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.

26. A personal representative is appointed by the Court as trustee to collect in and manage the assets of an estate for the benefit of its beneficiaries in accordance with the law. A personal representative owes a fiduciary duty to the beneficiaries. The dealings of a personal representative with the estate of a deceased person is of great interest to the Court which has the responsibility of ensuring that the estate is not mismanaged or wasted. The production of a full and accurate inventory of assets and liabilities as well as accounts is the tool provided by statute to monitor the dealings by the personal representatives with the estate of the deceased.

27. In re Estate of David Kyuli Kaindi (Deceased) [2015] eKLR Musyoka, J. had this to say on the obligation of personal representatives to render account:

The obligation to account is tied up with the fact that personal representatives are also trustees. They are defined as such in the Trustee Act, Cap 167, Laws of Kenya, at Section 2. This is so as property belonging to another vests in them in their capacity as personal representatives, and they hold the same for the benefit of others – beneficiaries, heirs, dependants, survivors, creditors, among others. They stand in a fiduciary position in relation to the property and the beneficiaries. As they hold the property for the benefit of others or on behalf of others – they stand to account to the persons for whose benefit or on whose behalf they hold the property. It is an equitable duty and a statutory obligation.

28. It is evident from the provisions of Section 83 of the Act that a personal representative is required to produce to Court, accounts within 6 months from issuance of the grant and also within 6 months from confirmation of the grant or after completion of the administration of the estate. Accounts must also be produced when the Court of its own motion or on the application of an interested party requires the same either before or after completion of administration of the estate. In light of the provisions of Section 83 of the Act, the Applicant, being an interested party is well within his right to apply for accounts notwithstanding that distribution has not taken place.

Whether the Grant should be revoked

29. The power of the Court to revoke a grant of representation is discretionary. Section 76 of the Act is not couched in mandatory terms. The discretion must however be exercised judiciously taking all factors into account to meet the ends of justice. In In the Matter of the Estate of Elizabeth Wanjiku Munge (Deceased) [2015] eKLR Musyoka, J. stated as follows and I agree with him entirely:

I note, however, that the power granted under Section 76 of the Act for revocation of grants is discretionary. Where a case is made out for revocation of a grant under Section 76, the court has the option to either revoke the grant or make other orders as may meet the ends of justice.

30. In the instant case, the Applicant has not challenged the validity of the Will. The Grant was issued to the Respondents who were duly appointed by the deceased in the Will. For the reasons indicated earlier, I find no reason to disturb the Grant issued to the Executors on 29.1.14. However, in light of the irregularities identified in the proceedings leading to the confirmation of the Grant I do find sufficient ground to interfere with the confirmation of the Grant.

31. Accordingly, in exercise of the inherent power of the Court I do make the following orders which I deem necessary for the ends of

justice:

- i) The order of 20.11.14 confirming the grant of probate is hereby set aside and the certificate of confirmation of grant issued on 2.12.14 is hereby cancelled.
- ii) The summons for confirmation of grant dated 22.10.14 shall be reheard after service of the same upon the Applicant.
- iii) The Executors shall within 60 days produce to this Court a full and accurate inventory of the assets and liabilities of the estate and a full and accurate account of their dealings therewith up to the date of the account.
- iv) Mention on 23.9.19 to confirm compliance.
- v) This being a family matter, each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 14th June 2019

M. THANDE

JUDGE

In the presence of: -

..... **for the 1st-3rd Respondents**

..... **for the 4th Respondent**

..... **for the Applicant**

..... **Court Assistant**