



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 518 OF 2014

In the Matter of the Estate of Arimba Rithaa alias M'Arimba M'Rithaa (DECEASED)

JENNIFER MUGITO KARIMBA.....PETITIONER/RESPONDENT

VERSUS

PILISILA KIENDE MWITI.....APPLICANT

AND

JAMES MBAABU M'ITONGA.....TRANSFEREE/RESPONDENT

RULING

[1] The significant orders sought in the summons dated 19th January 2017 are inter alia;

1. **That confirmation of the grant and distribution of the estate issued herein on 10th December 2015 be reviewed or otherwise set aside;**
2. **The applicant to be heard before final orders on distribution are made; and**
3. **That the certificate of confirmation of grant issued on 3rd July 2016 be cancelled.**

[2] The summons is expressed to be brought pursuant to **Rules 15, 40 (5) and (8), 63 and 73 of the Probate and Administration Rules, Order 45 Rule 1 of the Civil Procedure Rules 2010 and Sections 68 and 80 of the Land Registration Act, No. 3 of 2012 and Sections 3A, 63 (c) of the Civil Procedure Act CAP 21.**

[3] The application was supported by grounds in the application and supporting affidavit of Pilisila Kiende Mwiti sworn on 19th January 2017. The applicant is a daughter in law of the deceased as she was married to the son of the deceased who is also deceased. She contends that she has always lived on the Suit Land with the grandchildren of the deceased. But, without her knowledge the petitioner sold the Suit Land to a 3rd Party who evicted her and her children from the land. She also stated that the petitioner did not disclose that the applicant is a dependant in the application for confirmation of grant. She averred further that the petitioner described her in the consent as deceased thus misleading the court.

[4] The application was opposed by the replying affidavits of Jennifer Mugito, James Mbaabu M'Itonga and Margaret Nkuene Karimba sworn on 17th June 2017. They deposed that Jennifer was appointed as the petitioner as her mother is quite aged. She affirmed that all the beneficiaries were informed of the cause. She admitted that there occurred an error in the application for confirmation of the grant where some words were omitted and they wrote that the applicant was deceased instead of Silas Mwiti (son of the deceased). They affirmed that the applicant never lived on the Suit Land as she and her deceased brother lived on a separate parcel of land situated in Rukura which was allocated to him.

[5] Jennifer stated that her mother and sister used to live on the Suit Land until they exchanged it with another land due to interference of their peaceable occupation of the land by Peter Kithinji, son of the applicant. He was threatening her mother. A Criminal Case was lodged against him in Nkubu P. M. Cr. Case No. 924 of 2014. Jennifer in her capacity as an administratrix sold the Suit Land which was left for the benefit of her mother, sisters and herself to the transferee as all were in agreement with the arrangement.

Submissions

[6] This matter was canvassed by way of written submissions. The applicant submitted that the petitioner intended to deny her share of the

estate by giving the entire estate out to a 3rd party who unlawfully evicted her. That they were not present when the scene visit was done since the date was not communicated to them. The report does not comment on the obvious damage visible on the photographs they adduced or mention as to who was living there. On the other hand, the petitioner and transferee submitted that the application be dismissed as the petitioner was aware of the cause for she was informed and included as a beneficiary.

ANALYSIS AND DETERMINATION

[7] As directed by the court on 20th April 2017, the first issue to be determined is whether the grant should be revoked and or annulled.

[8] A grant of representation whether confirmed or not may be revoked and or annulled at any time if one or more of the factors stated in **Section 76 of the Law of Succession Act** is established. The section provides:

“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.”

[9] According to the applicant, the grant was obtained fraudulently for her consent was not obtained. Again, she claimed that she was said to be deceased in the summons for confirmation of the grant. Furthermore, she was not consulted from the very beginning as the signature on the consent is forged. Thus, the cause was filed without her knowledge and consent. The petitioner submitted that the applicant was aware and involved in the cause. She explained that an error occurred in the consent for confirmation of the grant that stated that she was deceased instead of her brother.

[10] The applicant claimed the signature on the consent to apply for letters of administration was forged. But see her submissions below:

“The main ground is that the applicant though involved at the petition stage was not involved at the confirmation stage.”

[11] The foregoing submission is a complete deviation from the severe allegations she made in her pleadings. Do not underestimate the value and place of submissions in litigation. Through submissions a party makes an overall impression of the facts of the case and the law applicable in the case. See Chitembwe J in the case of Ali Ngumbao Baya & 2 others v Director of Public Prosecution [2016] eKLR where he stated:

“Submissions simply put means an evaluation of the evidence by each party and analysis of the law. This can be done either orally or in writing. At times parties make oral submissions in furtherance or addition to their written submissions. The idea of filing written submissions is intended to save on judicial time and also to enable the parties or their advocates to condense their thoughts on the matter at their own and in good time. This gives the parties enough time to evaluate the case and put down their view in writing. Written submissions gives parties latitude to explain their respective cases with ease as opposed to oral submissions which can be limited in form of time.”

[12] The applicant also alleged forgery. She did not prove it to the required standard. In any event, from the material before the court, the allegation of forgery seems not to be true. Besides, contrary to her assertions, she was aware of the cause. Evidence shows that consent to the making of a grant of administration intestate to person of equal or lesser priority was signed by the applicant.

[13] The applicant pleaded that she stays on the Suit Land as that is where her matrimonial home is. She produced pictures to demonstrate the destruction of her house and bananas. The petitioner and widow of the deceased affirmed that the applicant has never lived on the Suit Land and neither the houses nor bananas belong to her. The court sought clarity of this matter and directed the EO to visit the suit land as well as the land at Rukura on 31st January 2018.

[14] Before I evaluate the report by the EO, I note that the applicant has introduced extraneous matters in her submission that on 8th March 2018 they wrote to the deputy registrar requesting that the file be placed before the court to give an earlier mention date to come and explain the difficulty they find in the scene visit order. Such is a new matter that cannot be introduced in submissions as there is no way such matter may be tested or rebutted by the other party. I reject the invitation.

[15] Back to the report. According to the report dated 24th May 2018 is that the applicant and her late husband have never lived on the Suit Land. But his son Peter Kithinji used to stay on it until the demise of the deceased when he relocated to Rukura where he has built a house. There was no evidence that anyone has lived on the land for the last two years. As for the plantation and timber structures they belong to the deceased and his wife Margaret. It seems that the applicant yet again misled the court by stating that she lives on the Suit Land and that the structures and plantation belonged to her.

[16] From the report, it is discernible that when the EO visited the Rukura land it was observed that despite communication to her about the visit the applicant seemed to have left the premises in a hurry on learning of the visit for there were wet clothes and freshly cut grass. An enquiry from an elderly man confirmed that the applicant and her late husband/the deceased's son have been in occupation of that land for a long time.

[17] From this report, the applicant acted mischievously to defeat justice. It is now apparent that the applicant has lied to the court. She has never lived on the suit premises as she alleged. She signed consent to apply for letters of administration. She was aware of the cause. The error in the summons for confirmation of the grant has been explained as she was participating in the cause through the principle of representation and taking the share due to her husband who was deceased at the time of filing these proceedings. She is merely trying to take advantage of the error to suit her purposes. Accordingly, nothing supports revocation of grant or setting aside of confirmation herein. Similarly, nothing would warrant issuance of any inhibition on the suit land. As she never was living on the suit property, her restoration to the suit property does not arise. In sum, the application dated 19th January 2017 is a perfect candidate for dismissal. Accordingly, I dismiss the said application. I make no order as to costs as this is a family dispute. It is so ordered.

Dated, signed and delivered in open court this 16th July 2019

F. GIKONYO

JUDGE

IN PRESENCE OF

Ojiambo for Gitonga for petitioner

Murira for applicant.

F. GIKONYO

JUDGE