



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 2630 OF 2007

IN THE MATTER OF THE ESTATE OF ANTONIO FERRO (DECEASED)

GABRIELLA ZOURAS.....APPLICANT

VERSUS

MOHAMED TARIQ KHAN.....RESPONDENT

RULING

1. Antonio Ferro, the deceased whose estate is in issue herein died on 21st February, 2007. At the time of his death, the deceased was domiciled in Lamu within the Republic of Kenya, and his last known residence was at Lamu. The deceased was survived by three beneficiaries: Gabriella Zouras Ferro the Applicant herein, Federica Ferro the deceased's daughter and Nicoletta Garbosi, a former wife. The deceased left a valid written will dated 6th September, 2006 and a codicil thereto dated 11th December, 2006. A grant of letters of administration with written will (codicil) annexed of the deceased's estate was made to Mohamed Tariq Khan and Federica Ferro on 28th July, 2008. The grant was duly confirmed on 25th May, 2011.

2. On 4th May, 2017 the Applicant filed an application for revocation of grant via summons dated 27th April, 2017 and brought under **sections 47 and 76 of the Law of Succession Act and rules 44 and 73 of the Probate and Administration Rules, 2011**. The application is supported by an affidavit sworn by the Applicant on 27th April, 2017 in which she deposes that she is a widow to the deceased and a beneficiary of the deceased's estate.

3. In the application, the Applicant seeks that the grant of letters of administration with written will (codicil) annexed confirmed to Mohammed Tariq Khan and Federica Ferro be annulled and revoked with respect to the confirmation of Mohammed Tariq Khan as an administrator; the Applicant be appointed as an administratrix in place of Mohammed Tariq Khan who should provide the Applicant with a full and accurate account of all dealings he has had with the estate since the confirmation of the grant.

4. The Applicant asserted that the beneficiaries of the deceased's estate entered into a Settlement Agreement for the division of the deceased's assets. In the agreement duly executed on 21st April, 2011, the three parties agreed that the Applicant would inherit the deceased's properties situate in Kenya while Federica and Nicolleta would inherit the deceased's properties situate in Italy. She urged that there is no contention on the distribution of the deceased's estate in accordance with the agreement. Further that there is no contention with respect to Federica Ferro being an administratrix.

5. The contention with respect to the Respondent Mohamed Tariq Khan is that he wrongly advised the Applicant that in order for the estate of the deceased to be administered, she was required to donate a power of attorney to him, which the Applicant did trusting fully on the legal advice so provided to her by the Respondent, who was also her legal representative. That the Respondent failed, neglected and avoided to advise the Applicant that she was capable and had the capacity to apply for letters of administration on her own. The Applicant has since revoked the special power of attorney that she had donated to the Respondent. A copy of the Revocation of the Special Power of Attorney dated 12th March, 2017 is annexed to the Applicant's further affidavit sworn on 15th April, 2019. That as such, there is no basis nor justification for the Respondent to continue as the administrator of the estate of the deceased.

6. It is the Applicant's assertion that the grant of letters of administration with will annexed is now inoperative and there is a real fear and apprehension that the Respondent has an intention to deprive the Applicant of her inheritance. Further that the Respondent has failed, neglected and avoided to communicate with her on his dealings with the estate.

7. In her further affidavit sworn by herself on 15th April, 2019 the Applicant contends that the Respondent's act of attempting to oppose the revocation of the grant, which was made to him pursuant to a Power of Attorney which has since been revoked is unprofessional conduct.

8. It is the Applicant's assertion that the Respondent has no inheritance right in the deceased's estate enforceable in law since he is neither the appointed executor pursuant to the deceased's last will, a beneficiary of the estate nor is he related to the deceased to be eligible for appointment as administrator under **section 66** of the **Law of Succession Act**. She urged that the Respondent's right as an administrator is derived from the law of Agency and the law governing Advocates.
9. In opposition to the application, the Respondent filed a Notice of Preliminary Objection dated 18th January, 2018 in which he states that the application is bad in law, misconceived and unsustainable owing to the non-joinder and consent of all beneficiaries and his co-administrator. Further that this court lacks the jurisdiction to hear and determine the application.
10. The Respondent also filed an affidavit sworn by himself on 18th January, 2018 in which he deposed that he is a co-administrator of the estate of the deceased herein, and as administrator, he is duty bound to protect the estate and grant the beneficiaries of the estate their rights.
11. The Respondent contended that the Applicant has intentionally misled this Honorable Court in the instant application in order to circumvent the law. He stated that there is pending an appeal at Malindi being Civil Appeal No. 55 of 2016 in which himself and one Federica Ferro are the Appellants jointly suing as co-administrators to the estate of the deceased with full knowledge and approval of the Applicant. It is the Respondent's statement that when the appeal came up on 29th March, 2017 for highlighting of submissions, the Applicant applied to be enjoined as an Interested Party.
12. The Respondent asserted that the Applicant blatantly misled the Court of Appeal at paragraph 11 of the general grounds of her application by stating that an application had been filed in the Family Division of the High Court seeking that the grant of Letters of administration confirmed to the Respondent be revoked and his name replaced with that of the Applicant. He asserted that the Applicant perjured herself since the instant application was nonexistent at the time. That it is on this basis that the Court of Appeal adjourned the matter.
13. There is on record an application dated 23rd March, 2017 lodged by the Applicant herein in the Court of Appeal at Malindi. Whereas the Applicant stated at paragraph 11 of her general grounds that an application for revocation of grant and substitution of the Respondent as administrator had been filed, the instant application filed by the Applicant for revocation of grant is dated 27th April, 2017 and filed on 4th May, 2017. The instant application was therefore filed after the Applicant's application in the Court of Appeal at Malindi.
14. The Respondent contended that since the estate of the deceased was being administered jointly, the Applicant ought to have enjoined his co-administrator, Federica Ferro to the instant application. Further that the Applicant ought to have sought the consent of Ms. Federica since she is not only a co-administrator but also a beneficiary to the estate.
15. It is the Respondent's statement that he has acted for the Applicant for a period of over ten (10) years and that the Applicant granted him the Special Power of attorney in relation to the deceased's estate on his suggestion because the Applicant would frequently travel to Europe for long durations of time. He asserted that contrary to the Applicant's allegations, he has continuously updated her on matters touching on the estate and continuously pursued all assets and accounts of the estate. That as such, the Applicant's claims that she was duped or that the Respondent has a mischievous intention of depriving her of her inheritance are baseless.
16. The Respondent stated that this application is not filed in good faith and is detrimental to Civil Appeal No. 55 of 2016. That owing to the delay occasioned by the Applicant, the appeal has been pending since March 2017 even though all the pleadings and submissions in the matter have been filed. The Respondent feels apprehensive that with the manner in which the Applicant is conducting herself, there is a great risk that the matter pending before the Court of Appeal may fail and he does not wish to be held liable.
17. It is the Respondent's contention that the Applicant's supplementary affidavit and further affidavit both dated 15th April, 2019 contain salacious, spiteful and ill-mannered averments. Further that the affidavits are produced on the pre-text that they were sworn before a commissioner for oaths on 15th April, 2019 whereas the Applicant's Advocate on record confirmed that the Applicant was presently residing outside Kenya. He asserted that it is imperative that the Applicant provide this court with a copy of her passport to conclusively ascertain that she was in the country on the said 15th April, 2019.
18. During the hearing of the matter on 17th September, 2019, learned Counsel Mr. Amollo for the Applicant told the court that while the Respondent rightfully advised the Applicant to apply to court for letters of administration and cite the named executor who had failed to execute the will, he did not advise the Applicant that she was legally capable and had the capacity to apply for letters of administration in her own name. Instead, the Respondent advised the Applicant to donate to him a Special Power of Attorney with which he would act to apply for letters of administration and properly distribute the estate. The grant of letters of administration with written will annexed was consequently made to the Respondent and Ms. Federica Ferro, the deceased's daughter.
19. Mr. Amollo submitted that there is no contention on the distribution of the deceased's estate as per the Settlement Agreement entered into by the beneficiaries of the estate on 21st April, 2011. That the contention is with respect to the Respondent to whom the grant was made but which grant is now inoperative as a result of the Respondent's failure, neglect and avoidance to communicate to the Applicant of his dealings with the estate.
20. Counsel contended that the decision to make the Respondent an administrator flows from the Special Power of Attorney donated to him by the Applicant but which has since been revoked. That as such the Respondent is not a substantive administrator. He urged the court to revoke the grant in respect of the Respondent on the strength of **rule 44** of the **Probate and Administration Rules**.
21. On his part, the Respondent submitted that indeed a Power of Attorney was donated and a suit filed under it. This he says was to move the matter forward because the Applicant spent most of her time in Europe. Counsel submitted that the grant was confirmed and distribution of the estate is complete save for one property in Kenya which had been given to the Applicant but was repossessed by the government. This

is the subject of Civil Appeal No. 55 of 2016 in the Court of Appeal at Malindi.

22. The Respondent asserted that he is an Advocate of the High Court of Kenya and an officer of this court. Further that he has a duty to the deceased's estate and is answerable to the beneficiaries and his co-administrator and not only to the Applicant. He urged that the Respondent has not met the provisions of **section 76** of the **Law of Succession Act** to warrant the revocation of the grant as sought. Further that this application cannot proceed in the absence of his co-administrator and the other beneficiary. He urged that if his co-administrator were present he would have no objection to the application.

23. The Respondent pointed out that on 9th April, 2019 the Advocate for the Applicant had informed the court that the Applicant could not be availed for cross-examination because she was in Europe. However, a week later, affidavits sworn by the Applicant were filed in court. He urged that what the Applicant has done is refile the affidavits which had been withdrawn.

24. In determining this application, I will first deliberate on the notice of preliminary objection filed by the Respondent the gist of which is whether this court has the jurisdiction to hear and determine the present application and whether the non-joinder and consent of all the beneficiaries and the co-administrator to the application is fatal.

25. With regard to jurisdiction, **section 47** of the **Law of Succession Act** stipulates that the High Court shall have jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders as may be expedient. The application filed hereto is for revocation of grant and under **section 76** of the **Law of Succession Act**, a grant of representation, whether or not confirmed, may at any time be revoked or annulled by the court if the Applicant satisfies the requirements of the section. As such, the Respondent's assertion that this court lacks jurisdiction to hear and determine the instant application is without basis and is unfounded in law.

26. On the second issue, I note that whereas all the beneficiaries and the co-administrator ought to have been enjoined in the application, their non-joinder is not fatal to the application. The Respondent herein is neither a relative nor a beneficiary of the deceased's estate and does not qualify in the order of preference provided under **section 66** of the **Law of Succession Act**. The Respondent's authority flows from the special power of attorney granted to him by the Applicant.

27. An examination of the special power of attorney on record reveals that it was made by the Applicant herein on 30th July, 2007 and registered on 3rd August, 2007. The Special Power of Attorney is in relation to documents, correspondence, meetings and other activities relating to the estate of the deceased herein. Having been made and registered in 2007, the Special Power of Attorney is governed by the provisions of the now repealed **Registered Land Act CAP 300** which was the law in force at the time. **Section 166(3)** thereof provided thus:

“The donor of a power of attorney registered under this section may at any time give notice to the Registrar in the prescribed form that the power has been revoked, and thereupon the revocation shall be entered in the register of powers of attorney and noted upon the power, and the notice shall be filed in the file of powers of attorney.”

28. The Applicant as the donor of the power of attorney from which the Respondent derived his authority to be appointed as administrator has since revoked the power of attorney. Annexed to the Applicant's Further Affidavit of 15th April, 2019 is a Revocation of the Special Power of Attorney which is dated 21st March, 2017 and registered on 12th September, 2017. By virtue of the revocation, the Respondent no longer has power to act on behalf of the Applicant in respect of the deceased's estate.

29. It is noteworthy that the Special Power of Attorney from which the Respondent derived his authority did not contain a term making it irrevocable. As such, the Applicant as the principal reserved the right to revoke the power of attorney at any time which she did upon registration of the revocation of power of attorney.

30. In light of my finding that the special power of attorney donated to the Respondent was not an irrevocable power of attorney, and by virtue of the revocation of the power of attorney, the Respondent herein has no claim or interest in the deceased's estate. He is neither a beneficiary nor a relative of the deceased and is therefore not a proper administrator. He was appointed an administrator of the deceased's estate by virtue of the special power of attorney donated to him by the Applicant who is a wife of the deceased and therefore a beneficiary of his estate as provided under the deceased's last written will and codicil.

31. Whereas the Respondent pointed out that his substitution with the Applicant would be detrimental to the Civil Appeal in the Court of Appeal at Malindi in which he is one of the Appellants, I note that the appeal is in relation to the estate of the deceased and is not personal to him. As an agent of the Applicant and an administrator of the estate, he was therefore representing the interests of the Applicant in the deceased's estate. As such, there is nothing that would estop the Applicant from being substituted in his place. As a donee, the Respondent was deemed to have been acting on behalf of the Applicant.

32. The deceased herein died testate and left behind three beneficiaries. The beneficiaries entered into an Agreement for the division of inherited assets on a settlement basis which agreement was executed by all three beneficiaries and Matteo Pagani the executor named in the deceased's last will. In the agreement executed on 21st April, 2011 by all four parties before a notary public, the parties agreed that the letters of administration be confirmed in the name of the Applicant and the deceased's daughter Federica. A wholesome reading of the agreement reveals that even though the letters of administration had been made to the Respondent, the agreement mentions the Applicant since the Respondent was acting as an agent of the Applicant by virtue of the power donated to him by the Special Power of Attorney which has since been revoked.

33. Paragraph 12 of the agreement further states that “...anything regarding the inheritance that could possibly need to be dealt with, administrated, and or confirmed in any other court anywhere in the world shall be done by the co-administrators, as well as Mr. Pagani in his capacity as executor according to the provisions of the agreement and the letters of the administration granted in Kenya shall be used for such

purpose.”

34. From the Settlement Agreement which is signed by all beneficiaries, it is evident that none of the beneficiaries takes issue with the Applicant being appointed as administrator. There is no dispute on the distribution and the Applicant is not seeking to take any share from the other two beneficiaries. They did agree that all properties in Kenya shall devolve to the Applicant. Whereas the Respondent is categorical that the Applicant is driven by ill motives, I note that he is not a beneficiary of the deceased’s estate and therefore has no basis to oppose her appointment as a co-administrator of the deceased’s estate. In any event, his appointment as administrator was as an agent of the Applicant and everything he did in that capacity is therefore deemed as though done by the Applicant herself.

35. In light of the foregoing, I find that the grant of letters of administration with written will annexed confirmed to Federica Ferro and the Respondent herein has become useless and inoperative by virtue of the revocation of the special power of attorney from which the Respondent derived his authority. As such, the Applicant has fulfilled the requirement in **section 76(e)** of the **Law of Succession Act** to warrant the revocation of the grant as sought.

36. I note however that where a party files an application seeking the revocation of grant, the court has the discretion to make orders as it considers fit in the circumstances and is not bound to issue orders for the revocation of the grant as sought. (See - **Angelas Maina vs. Rebecca Waiyego Mwangi and Another Succession cause 692 of 2012, [2016] eKLR**) In the instant case, revocation is not necessary for the ends of justice to be met.

37. In the end, I make the following orders:

- a. The Respondent is not a proper administrator of the deceased’s estate following the revocation of the special power of attorney donated to him by the Applicant.
- b. The grant of letters of administration with written will (codicil) annexed confirmed to Mohammed Tariq Khan and Federica Ferro on 25th May, 2011 be and is hereby confirmed to Gabriella Zouras and Federica Ferro.
- c. The Respondent shall furnish the Applicant with a full and accurate account of all the dealings the Respondent has had with the estate since the grant was confirmed to him.
- d. Each party shall bear their own costs.

SIGNED DATED and DELIVERED in open court this **8th day of October, 2019.**

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L. A. ACHODE

HIGH COURT JUDGE

In the presence ofAdvocate for the Applicant.

In the presence ofAdvocate for the Respondent.