



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO 1490 OF 2016

IN THE MATTER OF THE ESTATE OF STANLEY NDUNG’U NG’ANGA (DECEASED)

DAVID NGANGA NDUNGU

SAMUEL WACHIRA NDUNGU.....APPLICANTS

VERSUS

MILKAH WANJIRU KAMAU.....RESPONDENT

RULING

1. David Nganga Ndungu and Samwel Wachira Ndungu, the applicants herein, have moved the court by way of a summons for revocation of grant dated 1st September 2016, brought under **section 76 of the Law of Succession Act (Chapter 160) Laws of Kenya, Rule 44 and 55 of the Probate and Administration Rules** seeking the grant of letters of administration issued to Milkah Wanjiru Kamau, the Respondent, on 25th September 2013 and confirmed on 18th April 2014 be revoked in the Chief Magistrates Court at Thika. The application was accompanied by a supporting affidavit by the applicants in which they deposed that they had together with their late mother, Margaret Wanjiru Ndungu petitioned for letters of administration intestate for the estate of the deceased in the High Court of Nairobi in **Succession Cause No. 2934 of 2014** and filed citation against the respondent who entered appearance through the firm of M/S Miciimi Mbaka & Co. Advocates.

2. They averred that they later found out that the Respondent had obtained grant of letters of administration on the 25th September 2013 and had the same confirmed on 18th April 2014 without including the beneficiaries of the deceased estate, being all the members from the 1st and 2nd house. They deposed that the purported mode of distribution for LOC.1/MBUGITI/2264 solely in the name of the respondent is to deprive the two houses of their share in the property.

3. The respondent then filed a Notice of Preliminary Objection to the Summons for Revocation of grant, on grounds that;

1. The said application offends the provisions of Section 23 of the Magistrate’ Court, Act No. 26 of 2015 and Sections 48 of the Law of Succession Act, Cap 160, Laws of Kenya. The Grant of Letters of Administration intestate were issued under Succession Cause Number 378 of 2013 at the Chief Magistrate Court at Thika and therefore the application herein should have been filed in the said Magistrate’s court in the first instance.

2. The application offends the provisions of Section 50 of the Law of Succession Act, Cap. 160 Laws of Kenya as the same is not an appeal arising from an order or decree made by the Magistrates Court.

3. The said Application offends the provisions of Sections 49 the Law of Succession Act, Cap. 160 Laws of Kenya regarding the territorial jurisdiction of Magistrates. The deceased was a resident of Thika hence Succession Cause Number 378 of 2013 at the Chief Magistrate in Thika. As such, the application herein should have been filed in Thika and an appeal lies in the High Court at Kiambu which exercises supervisory jurisdiction of the Magistrates Court at Thika.

4. It addition to Succession Cause Number 378 of 2013 at the Chief Magistrate Court at Thika, there is an existing succession cause filed by the Applicants in the High Court being Succession Cause Number 2934 of 2014 at the High Court of Kenya at Nairobi between the same parties and concerning the same subject matter as alluded in paragraph 4 of the Applicant’s supporting affidavit dated 1st September, 2016. Therefore, the present application is an abuse of the court process.

5. The Applicants are guilty of laches and cannot therefore be availed the remedy as sought. As early as August, 2014 the Applicants were aware that the Respondent had been issued with Grant of Letters of Administration intestate and for two and a half

years they never challenged the said grant.

6. The application has been brought to this court in clear disregard of the above provisions and is an abuse of the due process of court and wasteful of judicial time.

4. The respondent submitted that a preliminary objection must be confined to matters on the points of law and that it cannot be raised if any fact is to be ascertained and urged court that the preliminary objection has met the said requirements. She submitted that the plain reading of **Section 23 of the Magistrate's Court Act No. 26 of 2015** reveals that the Magistrate's Court have jurisdiction to deal with applications for revocation or annulment of grants which have been issued as long as the value of the estate is within their pecuniary jurisdiction. They advanced that since it is the Chief Magistrate's Court at Thika that issued the grant, it is that same court that has the jurisdiction to entertain any application and to determine any dispute and pronounce such decrees and orders as contemplated under **section 23 of the Magistrate's Court Act** as read together with **Section 48 (1) of the Law of Succession Act**. She also advanced that the deceased having been a resident of Thika and the subsequent **Succession Cause No. 378 of 2013** having been filed in Thika then the summons herein ought to have been filed in Thika following the territorial jurisdiction of the Magistrate's Court. She further submitted that the summons herein are clearly not an appeal arising from an order or decree as provided by **section 50 (1) of the Law of Succession Act**. She advanced that this court does not have power to entertain the present summons and that the Applicant's summons must attract the remedy of dismissal. In ventilating her argument she relied on the cases of *Joseph Odera Ombayo b Robert Ombayo Wambogo [2019] Eklr, In re Estate of Ashby Masila Muia (Deceased) [2019] eKLR, Salome Wambui Njau (Suing as an Administratrix of the Estate of Peter Kiguru Njuguna (Deceased) v Caroline Wangui Kiguru [2013] eKLR and James Gathirwa Nguji v Multiple Hauliers (E.A) & 2 Others [2016] eKLR.*

5. The Applicants while relying on **Article 165 (3) of the Constitution of Kenya** advanced that this court has the jurisdiction to entertain this matter. They contend that according to **Rule 44 of the Probate and Administration Rules** made under the **Law of Succession Act** any person seeking the revocation of a grant shall apply to the High Court for such relief by summons in Form 107.

6. From the preliminary objection and the submissions filed herein the issue for consideration is whether this court has the jurisdiction to hear the summons for revocation of grant. The circumstances under which a preliminary objection can be entertained are well established in the case of **Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd [1969] EA 696** where Newbold P., held as follows:

A preliminary objection is in the nature of what used to be called a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

Law, JA observed as follows:

A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the way the suit is framed, or an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

7. **Section 23 of the Magistrate's Court Act, 2015 No. 26 of 2015** provides as follows;

23. Amendment of section 48 of Cap. 160

The Law of Succession Act (Cap. 160) is amended, by repealing section 48(1) and substituting therefor the following new subsection-

(1) Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7(1) of the Magistrates' Courts Act, 2015.

8. In the *Joseph Odera Ombayo case (supra)* summons for revocation of grant were filed before the high court after the grant was issued and confirmed by the Principal Magistrates Court. The court found that it had no jurisdiction to hear the matter noting that the effect of the amendment of **Section 48(1) of the Law of Succession Act (Cap. 160)** was to accord jurisdiction to the magistrates to deal with applications under **Section 76 of the Law of Succession Act**.

9. In this case the respondent was issued with letters of administration on 25th September 2013 at Chief Magistrates Court at Thika and the same were confirmed on 18th April 2014. The succession cause filed by the applicant before the High Court in Succession Cause No. 2934 of 2014 was filed on 7th August 2014 after the respondent had the grant issued at the Chief Magistrates Court at Thika was confirmed. It is not clear from the pleadings how far along the Succession Cause No. 2934 of 2014 has proceeded before that court. Nonetheless I am of the view that the summons for revocation of grant should have been filed before the Chief Magistrates Court at Thika as the court is competent to hear applications brought under **section 76 of the Law of Succession Act**.

10. Although the applicants advanced that persons seeking revocation of a grant shall apply to the High Court in accordance to **Rule 44 of the Probate and Administration Rules** I take a different view on the matter. I concur with the holding in **Turfena Anyango Owuor & another v Mary Akinyi Dengo [2018] eKLR**;

"9. Before I come to the end of this ruling I must also clarify that Rule 44 of the Probate and Administration Rules, 1980 which

requires applications seeking the revocation or annulment of grants to be exclusively filed in the High Court was not amended. However, given that the Probate and Administration Rules, 1980 are subsidiary legislation they cannot override any of the provisions of the Act and as such the position remains that the Magistrates' Court have jurisdiction to deal with applications for revocation or annulment of grants issued by those courts subject to their pecuniary jurisdiction.

10. Having said so, there is need for the Rules Committee to amend Rule 44 of the Probate and Administration Rules, 1980."

11. In conclusion, I allow the Notice of Preliminary Objection dated 29th November 2016. The Summons for Revocation of Grant is hereby struck out but with no orders as to costs this being a family matter.

Dated, signed and delivered at Kisii this 4th day of October, 2019.

R. E. OUGO

JUDGE

In the presence of;

Applicant

Absent

Miss Maina h/b Mr. Mwangi

For the Respondent

Patrick

Court clerk