



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**SUCCESSION CAUSE NO. 73 OF 2002**

**IN THE MATTER OF THE ESTATE OF RICHARD MURATHI NGARI (DECEASED)**

**DICKSON BUNDI NJAGI.....APPLICANT**

**VERSUS**

**JAMLECK KIURA MURATHI.....RESPONDENT**

**RULING**

**A. Introduction**

1. This ruling pertains to the summons for revocation of grant dated 6<sup>th</sup> April 2017 on the grounds that the proceedings to obtain grant were defective as the grant was obtained fraudulently by making of false statement that concealed something material from the court.
2. It is the applicant's case that Plot No. Kianyaga/Market/11 also known as Baragwe/Raimu/490/11 belonged to the deceased and 4 other partners and that the applicant had purchased 3 shares.
3. The applicant states that the same was affirmed in the judgement of the Chief Magistrate court in Kerugoya Civil Case Nos. 60 of 2011 and 394 of 2008 that determine that the applicant owned 3 out of 5 shares out of Plot No. Kianyaga/Market/11 a fact which the respondent failed to disclose when he was applying for grant.
4. It is the applicant's case that only one share belongs to the respondent's deceased father and not the whole of Plot No. Kianyaga/Market/11 also known as Baragwe/Raimu/490/11.
5. Vide grounds of opposition dated 15<sup>th</sup> June 2017, the respondent opposed the summons for revocation of the grant on the grounds that the application is res judicata and an attempt to bypass and/or appeal the orders of this court and further that the applicant has failed to disclose the pendency of an existing appeal on the same matter in Kerugoya ELC Appeal No. 5 of 2015.

**B. Analysis & Determination**

6. The circumstances in which a grant may be revoked or annulled are set out in section 76 of the Law of Succession Act as follows:

***“76 Revocation or annulment of grant 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.”*

7. After going through the arguments of the parties, I identified the following as the issues for determination: -

*a) Whether the summons for revocation of grant dated 6<sup>th</sup> April 2017 is properly before court and subsequently,*

*b) Whether the grant issued on the 15/3/1999 and confirmed on 4/2/2010 was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case and should be revoked; or*

8. The applicant's case is that plot number Kianyaga/Market/11 also known as Baragwe/Raimu/490/11 belonged to the deceased and 4 other partners and that the applicant had purchased 3 shares a fact which the respondent failed to disclose when he was applying for grant. In rejoinder, the respondent states that the application is res judicata and an attempt to bypass and/or appeal the orders of this court and further that the applicant has failed to disclose the pendency of an existing appeal on the same matter in Kerugoya ELC Appeal No. 5 of 2015.

9. Applying the test of law in section 76 of the Law of Succession Act, it is my considered opinion that the provisions of Section 76 of the Law of Succession Act allows any party to move the court for revocation of grant on grounds set on that section.

10. While the applicant has stated that the proceedings to obtain the grant were defective, I do note that after obtaining judgement in his favour regarding the ownership of Plot No. Kianyaga/ Market/11 also known as Baragwe/Raimu/490/11 in Kerugoya Civil Case Nos. 60 of 2011 and 394 of 2008, there is a pending appeal arising from the said judgment being Kerugoya ELC Appeal No. 5 of 2015.

11. The primary duty of the Probate Court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why Rule 41(3) of the Probate and Administration Rules was enacted so that claims which *prima facie* valid should be determined before confirmation.

12. **Rule 41(3) of the Probate and Administration Rules** provides:

*“.....(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant”*

13. It is not in dispute that when the court confirmed the grant on 4/02/2010. It had no information that the ownership of Plot No. Kianyaga Market/11 was disputed. The respondent did not disclose that that he had filed an appeal against the judgment that was in favour of the applicant. Having won the case whose judgment was appealed against, it is apparent that the said judgment stands unless overturned on appeal. The applicant was declared owner of the shares in the plot. The appeal is said to be still pending before ELC court Kerugoya.

14. This being the status of the proceedings, the applicant cannot apply successfully to revoke the grant at this stage. This can only happen if the judgment in his favour is upheld. With the appeal pending before the appeal court, I am of the considered view that this summons for revocation of grant is premature.

15. The applicant having won the case in the magistrate's court has established interest in the plot pending the determination of the appeal. The applicant who should have moved this court to stay proceedings for confirmation of grant pending the hearing and determination of the appeal but he failed to do so. It is not clear whether the respondent gave notice to the applicant of the proceedings for confirmation.

16. However, this court recognizes the right of every person to be heard under **Article 50 of the Constitution** and has an obligation to facilitate the realization of the said right. For that reason, I find that it is in the interest of justice to have the confirmed grant in this case stayed pending the determination of the appeal.

17. The application is therefore struck out for being premature and incompetent. The applicant should wait for the determination of the appeal and consider filing this application afresh.

18. However, the court makes the following orders in the interest of justice: -

*a) That the confirmed grant only in respect of Plot No. Kianyaga Market/11 also known as Baragwe/Raimu/490/11 is hereby stayed pending determination of Kerugoya ELC Appeal No. 5 of 2015.*

*b) That each party to meet their own costs.*

**19.** It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the absence of the parties**