



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO 423 OF 2004

In the matter of the Estate of the late Gerald M'Riria M'Mbogori alias Riria Mbogori alias M'Riria s/o Mbogori

SABELA NCHEKEI KIRIMA.....PETITIONER

VERSUS

PETER KIRUKI M'NKANATA.....APPLICANT

RULING

[1] Before me is a Chamber Summons dated 27th May 2019. The significant order sought is an inhibition on the estate property pending the hearing and determination of application for revocation of grant in this cause. However, the way the prayer is couched is as if there is another independent application for revocation of grant which I searched frantically but found none. Nonetheless, the Applicant has cleverly cited rule 44 and 73 of the Probate and Administration Rules as well as article 159(2)(d) of the Constitution on Revocation or Annulment of Grant, inherent jurisdiction of the court, and prohibition to unduly relying on technicalities to decide case, respectively. The omission is but a venial one in law. Accordingly, courts should strive to render substantive justice, so shall I in this case by considering the request for revocation of the grant about which parties have made substantive arguments and averments. See their affidavits as well as submissions.

[2] Three major argument were made by the Applicant in support of his application, namely; (1) that the petition was filed secretly; (2) that the petitioner did not disclose to the court that he was a heir of the estate of the deceased who is their father and uncle; and (3) that the grant was obtained through untrue allegations of fact. He explained his claim; that the deceased was the brother to his late father one M'Nkanata M'Mbogori and held the estate property in trust for himself and his late father in equal shares. The said claim was even a subject of Meru HCCC NO 184 OF 1988 between the two brothers. He stated that he was in occupation of one half of LR. NO. NTIMA/NTAKIRA/763. He therefore accused the petitioner of a cognizable offence under section 52 of the Law of Succession Act of wilfully and recklessly making a statement which is false. He also cited judicial decision and provisions of the law in his submissions.

[3] The petitioner opposed the application through her replying affidavit filed in court on 25th October 2013. She accused the applicant of peddling naked lies in order to steal a match from her. She denied the alleged trust in favour of the Applicant's father who was a stepbrother of the deceased. She averred that the applicant's late father had his own land. She took the view that the applicant is not a beneficiary or dependant of the deceased. As such, she was not under legal obligation to seek consent from the applicant. She stated that she obtained the necessary consents from the rightful beneficiaries before filing these proceedings.

[4] The petitioner stated further that the decree in Meru HCCC NO 184 OF 1988 was on 30th June 2004 declared by the court to be unenforceable. In addition, she accused the applicant of not disclosing to the court that succession cause number 22 of 2016 was withdrawn on 9th July 2018 after she informed the court that the estate of the deceased had been fully administered. She sees this application as an afterthought aimed at impoverishing her and the beneficiaries of the estate. She asked the court to dismiss his claims.

ANALYSIS AND DETERMINATION

[5] Section 76 of the Law of Succession Act CAP 160 of the Laws of Kenya governs revocation or annulment of grants and it sets out circumstances in which a Grant can be revoked or annulled. Of significance in light of the arguments advance is whether:-

(a) The proceedings to obtain the grant were defective in substance; or

(b) 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; or

(c) 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

[6] In the case of **SAMUEL WAFULA WASIKE vs. HUDSON SIMIYU WAFULA CA NO.161 OF 1993** (Kwach, Omolo and Tunoi JJA):-

“A grant obtained on the strength of false claims, without obtaining the consent of persons who had prior right to the grant and on the basis of facts concealed from the court, is liable to revocation.”

[7] Is this case a candidate for revocation? I note with tremendous respect that the court declared the judgment and decree obtained in MERU HCCC NO 184 OF 1988 to be unenforceable against the estate of the deceased for it was not executed within 12 years as provided for in the Limitation of Actions Act. The court in the said ruling also ordered the status quo in respect of the suit premises to be maintained for the benefit of the petitioner. The Applicant herein did not appeal against the said ruling. It is not therefore legally tenable for him to attempt to override the ruling in the civil suit through these proceedings which relate to the estate of the deceased. It be known, and I have stated this before, that disputes relating to ownership of land or trust in land fall within the jurisdiction of the environment and Land Court. This court only gives effect to a judgment by ELC on ownership of land. This case is however peculiar because the court in the civil case number 184 of 1988 declared the judgment therein to be unenforceable against the estate of the deceased on account of limitation of time. Notably, the petitioner had applied as the legal representative of the estate of the deceased. There is therefore nothing to enforce through these proceedings. This is a rather sad state of affairs. And with much trepidation, I must admit that the Applicant is in an awkward position such that he may not stand on such judgment to make a claim in these proceedings; he may be said also to be abusing the process of the court to enforce a judgment the court decreed was unenforceable against the estate of the deceased. I could be wrong but I should think that an order from the Court of Appeal in an appeal on the order of Sitati J could be the only way to create an aperture into these proceedings. For those reasons, I do not find any proper ground or legal basis to revoke the grant herein. I also do not think it is proper in these circumstances to clog administration of the estate of the deceased. In the upshot, I dismiss the application. I however order each party to bear own costs.

Dated and signed at Meru this 4th day of November, 2019

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F. GIKONYO

JUDGE

In presence of

Applicant

Petitioner absent

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F. GIKONYO

JUDGE