



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION NO. 361 OF 2011

IN THE MATTER OF THE ESTATE OF CHARO NGUMA KALAMA

1. SAMUEL KARISA NGUMAH

2. JULIUS CHARO NGUMAH

3. ERICK KAINGU CHARO.....APPLICANTS

VERSUS

DONALD CHARO NGUMA.....RESPONDENT

RULING

1. The deceased to whose estate the proceedings herein relate is Charo Nguma Kalama. The record shows that a petition for grant of letters of administration intestate was filed in Court on 5.9.10 by Donald Charo Nguma, the Respondent in his capacity as son of the deceased. According to the petition, the deceased died on 27.7.00 at Mtwapa. He was survived by 3 widows, 2 daughters and 6 sons. His estate comprised of a piece of land known as Title No. Kilifi/Mtwapa/558 (the property). Grant of letters of administration (the Grant) was issued on 21.9.12 and confirmed on 14.2.13. The estate was to be distributed equally amongst all beneficiaries.

2. The Application before me dated 10.7.17 is a Summons for Revocation or Annulment of the Grant by Samuel Karisa Ngumah, **Julius Charo Ngumah and Erick Kaingu Charo. The Application is premised on the grounds on the face of it and the facts in the Supporting Affidavit sworn by Samuel Karisa Ngumah on 10.7.17. The grounds are that the proceedings to obtain the grant were defective in substance**, the Grant was obtained fraudulently by the making of a false statements and concealment of facts material to the case. There was also wilful untrue allegation of facts essential in point of law to justify the Grant.

3. The facts of this case according to the Applicants is that the deceased disappeared sometime in 1997 and has never been heard of to date. The date of death stated in the petition was therefore incorrect. A grant could only be issued upon an appropriate order of the court as to the death of the deceased. The Applicants claim that the deceased was survived by 4 widows, 8 daughters and 7 sons but not all these beneficiaries were disclosed to the Court. As such the requisite consent was not given by all beneficiaries. Further the Respondent included one Kibwana Charo Kajisi who is a third party and not a beneficiary of the estate.

4. The Applicants claim that the Respondent has embarked on a subdivision of the property into Plots No. 4211, 4212, 4213 and 4214 (4723 and 4724) without the consent or involvement of the other beneficiaries of the estate. The Respondent seeks to dispose of a portion of the estate without the consent or involvement of the other beneficiaries.

5. The record shows that the Respondent was served with the Application on 15.9.17. On 21.11.17, George Kabebe Advocate filed a Notice of even date that the Respondent had appointed him to act on his behalf in this matter. No reply to the Application was filed. On the hearing date, in spite of service of the hearing notice, there was no appearance by the Respondent or his advocate. The matter therefore proceeded *ex parte*. The Applicants relied on the facts in the affidavit in support of the Application.

6. The law relating to revocation of grants is found in Section 76 of the Law of Succession Act which provides:

“ 76 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.

6. The law provides that a grant of representation may be revoked or annulled if the proceedings to obtain the same were defective in substance. The procedure for applying for a grant of representation is well set out in the Act and the Probate and Administration Rules. The Applicants claim that the Deceased disappeared in 1997 and has never been heard of to date. Given the circumstances, the Respondent ought to have filed an application for an order presuming his death of the Deceased as required by Rule 10 of the Probate and Administration Rules which provides:

“10. Application for order presuming death An application for an order presuming the death of a person of whose death there is no sufficient written evidence and to whose estate a grant is sought shall be made by summons to the court and shall be supported by an affidavit setting out the grounds of the application.”

7. Further, Rule 7(2) of the Probate and Administration Rules provides:

There shall be exhibited in the affidavit a certificate or a photocopy of a certificate of the death of the deceased or such other written evidence of the death as may be available.

8. Neither the death certificate nor other document showing the death of the deceased was exhibited in the affidavit in support of the petition for grant. The reason for this omission is obviously that there was no written or other evidence of the death of the Deceased. As stated earlier, no response to the Application was filed by the Respondent. The claim by the Applicants therefore remain uncontroverted. To the extent that the Respondent filed the application for grant without first obtaining an order of presumption of the death of the Deceased, proceedings to obtain the grant were defective in substance.

9. Section 51(2) of the Act provides:

“51. Application for grant

1. ...

2. Every application shall include information as to—

(a) the full names of *the deceased*;

b. the date and place of *his death*;

c. ...”

10. From the foregoing, it is clear that the date and place of death of the deceased is information that shall be included in an application for a grant of representation. The date of death must be provided in the petition and affidavit in support thereof. The petition herein filed on 5.9.11 indicates that the deceased died on 27.7.00. The affidavit in support of the petition does not contain the date of death of the deceased though it indicates that he died in Mtwapa.

11. A grant may be revoked if the same was obtained fraudulently by the making of a false statement and concealment of from the court of something material to the case. In the instant case, the Respondent made a false statement in his application that the deceased died in Mtwapa on 27.7.00 and further concealed from the Court something material to the case *to wit* that the Deceased disappeared without a trace in 1997.

12. The Applicants further claim that the deceased was survived by 19 beneficiaries namely 4 widows 8 daughters and 7 sons whereas the Respondent stated that the deceased was survived by 3 widows 2 daughters and 6 sons. Rule 26(2) of the Rules provides:

“An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”

13. The record shows that only 11 beneficiaries signed the consent at the making of the Grant and confirmation. This is contrary to the clear stipulation of the foregoing provisions that all persons entitled in equality or priority with the Respondent. The Respondent being a son of the deceased required the consent of all the widows of the Deceased who rank in higher priority to him and his siblings who are entitled in equality to him. In view of the foregoing this Court finds that the proceedings to obtain the Grant herein were defective in substance.

14. Further, this Court notes that Respondent made a false statement and concealed from the Court something material to the case *to wit* that the deceased was survived by only 11 beneficiaries leaving out 8 beneficiaries. As per the certificate of confirmation of grant issued on 19.2.13, the estate was to be distributed amongst the stated beneficiaries to the exclusion of the beneficiaries omitted.

15. In view of the foregoing, the Court is satisfied that the statutory grounds for revocation of grant have been established.

16. The Applicants have prayed that they be appointed as administrators in place of the Respondent. I have already stated that an application for an order presuming the death of the Deceased must be made before a grant of representation is issued in respect of the estate of the deceased.

17. In the result I come to the conclusion that the Application has merit and the same partially succeeds. I do make the following orders:

- i. The Grant of Letters of Administration issued to Donald Charo Nguma on 21.9.12 be and is hereby annulled.
- ii. Status quo ante be restored and Title No. Kilifi/Mtwapa/558 do revert to the deceased Charo Nguma Kalama.
- iii. This being a family matter, each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 6th day of April 2018

M. THANDE

JUDGE

In the presence of: -

.....**for the Applicants**

.....**for the Respondent**

.....**Court Assistant**