



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 231 OF 2016

(Formerly Nairobi Succession Cause No. 2810 of 2016)

IN THE MATTER OF THE ESTATE OF VINCENT AGOSTINHO RAPHAEL LUIS (DECEASED)

PETER MUCHIRI MWANGI.....APPLICANT

VERSUS

TAHIRA BEGIUM LUIS.....RESPONDENT

RULING

1. The deceased died testate at Nairobi on 19th June 2012. By his will dated 3rd April, 2007 he appointed the Respondent as the Executrix and trustee of his estate. Upon his death the Respondent petitioned the High Court at Nairobi vide Succession Cause Number 2810 of 2012 for a Grant of Probate. The same was issued to her on 7th November, 2012, confirmed on 18th November, 2013 and rectified on 4th June, 2014.
2. The application dated 17th November, 2014 now before Court is a summons for revocation of the grant of probate. The Applicant Peter Muchiri Mwangi, has asked the Court to revoke the confirmed grant on the ground that the proceedings through which the grant was issued were defective in substance. He has also asked the Court to order that the property Title Number NAKURU/PIAVE SETTLEMENT SCHEME/1057 be excluded from the assets of the deceased because this property was not the free property of the deceased and therefore, it does not form part of his estate.
3. The application is supported by the supporting affidavit sworn on 17th November, 2017, the supplementary affidavit sworn on 29th December, 2015, the further supplementary affidavit sworn on 9th March, 2016 and the further, further supplementary affidavit, sworn on 9th March 2016, 13th September, 2016, the submissions dated 9th March, 2016 and the supplementary submissions dated 23rd January, 2017.
4. The Applicant is not a beneficiary or a dependant of the estate. He claims that he is rightful registered owner of the property Title Number NAKURU/PIAVE SETTLEMENT SCHEM/1057 pursuant to a Green Card that was issued to him on 16th July, 1987. He alleged that there has been a long standing dispute over the ownership of this property between the deceased, the Applicant and third parties. This property was the subject of High Court Case Number 580 of 1995 and Environment and Land Case No. 185 of 2016. The latter case was filed by the Respondent and is still pending.
5. It was his argument that the deceased did not include this property in his will, and it was introduced in these proceedings vide the application for rectification of grant dated 4th April, 2014. Therefore it cannot be the subject of an application for grant of probate with will annexed. For the latter position, the Applicant relied on the ruling by *Musyoka J*, who when dealing with an objection in this proceedings, held vide his ruling delivered on 18th December, 2015 that because the will does not dispose this property it does not vest in the executrix and cannot be dealt with in these proceedings. It cannot be listed in the schedule of assets distributed in the certificate of confirmation of the grant.
6. The Applicant called attention to the fact that the Respondent did not produce any documents to prove that the deceased was the owner of the property and that it is the Applicant who has been registered as the owner in the title that has been relied on by the Respondent.
7. The Respondent opposed the application vide the replying affidavit sworn on 27th February, 2017 and her further affidavit sworn on 27th October, 2016. Her submissions are dated 26th October, 2016. The executrix admitted that there is a dispute of ownership of the property between the deceased and third parties. She submitted that this Court has no jurisdiction to consider the Applicant's claim to title and further it cannot grant any substantive orders touching on registration or cancellation of title in favour of or against the Respondent. She was of the view that the Environment and Land Court is best suited to determine the dispute over ownership and for this reason has filed the case in that

Court.

8. Against the assertion that this property cannot be dealt with because the deceased did not deal with it in his will, the Respondent argued that this notwithstanding, it still formed part of his estate which was rightly included in these proceedings. The Respondent argued that by his will the deceased granted the Respondent the powers to deal with his residuary property. The residuary property means all property that remains after the estate's outgoings have been settled. The Respondent further argued that **there are no valid grounds to warrant the revocation of the grant.** She followed the procedure prescribed by the Law of Succession Act and the Rules made thereunder. The Applicant has not proved any of the grounds set out under **Section 76** of the **Law of Succession Act** or that the Respondent is unsuited to administer the estate of the deceased. It was the submission of the Respondent that this application has no merit. The Applicant's true intention is to dispossess the estate of the property under the guise of applying for revocation of the grant.

ANALYSIS AND DETERMINATION

9. The core of the dispute between the Applicant and Respondent is the ownership of the suit property. The three issues that follow for determination is whether this Court has jurisdiction to determine the question of ownership between the Applicant and the Respondent, whether the impugned property should be excluded from these proceedings and thirdly whether the confirmed grant should be revoked.

10. The duty of the probate court is to oversee the transmission of the estate of the deceased to his beneficiaries. Its jurisdiction is over the net estate of the deceased being that which he was free to deal with during his lifetime and its purpose is to ascertain the assets, liabilities, if any, the beneficiaries and the mode of distribution of the estate. (See **MURIUKI MUSA HASSAN Vs. ROSE KANYUA MUSA & 4 OTHERS**). I agree with the sentiments of *Musyoka J* in his ruling delivered on 18th December, 2015 that the claim of the applicant is ill suited for probate proceedings. Such claims ought to be determined in separate proceedings brought against the estate. In **ALEXANDER MBAKA Vs. ROYFORD MURIUKI RAUNI & 7 OTHERS [2016] eKLR** the Court held that:-

“It is only where one has established claim against the estate that has already crystallised that he can litigate it before a Family Court. The claim is to be considered as a liability to the estate. This Court, in my view, cannot be called upon to ascertain whether or not one has a right to an estate of the deceased where such right has not yet crystallised. The right must be shown to have crystallised before the Family Court can entertain it.”

11. I agree that the Applicant's claim against the estate ought to be litigated in separate proceedings and the Respondent has already taken steps by filing in the Environment and Land Court, ELC No. 185 of 2016.

12. It follows that this property should be removed from the confirmed grant because at the moment it cannot be deemed to constitute the net estate of the deceased, that is, that which he was free to deal with during his lifetime. It is only after the Environment and Land Court has concluded determining the issue of ownership that this Court can then oversee its transmission to the beneficiaries. I however do not think the inclusion of the property warrants revocation of the grant. Under **Section 27** the Court has discretion when considering an application for revocation of a grant. It can make any orders it deems fit in the circumstances to serve the ends of justice.

13. The only defect in the confirmed grant is that it includes property that is the subject of a dispute with the Applicant. This defect can easily be remedied by removing the same, and allowing the grant to be confirmed partially on the undisputed properties. Once the case in the Land Court is determined, then the Respondent may move to have the same administered accordingly.

14. For the above reasons the summons for revocation of the grant is hereby allowed in part. The certificate of confirmation of grant issued on 18th November, 2013 and rectified on 4th June, 2014 is hereby amended to remove the property known as property Title Number **NAKURU/PIAVE SETTLEMENT SCHEME/1057**. The grant issued to the Respondent shall not be revoked. She is free to continue administering the remainder of the estate. The Applicant shall have the costs of the application.

Dated and Signed at Nakuru this 9th day of May, 2018.

A. K. NDUNG'U

JUDGE