



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 135 OF 2002

IN THE MATTER OF THE ESTATE OF SAMUEL MWANGI MUCHIRI (DECEASED)

JOHN MWAI MWANGI

JULIUS MUCHIRI MWANGI

PHYLIS MUMBI MWANGI

NANCY NJOKI MWANGI.....APPLICANTS

-VERSUS-

ANNE KABURA MWANGI.....RESPONDENT

RULING

The summons for revocation of grant before me is dated eighth June 2016, and is supported by the affidavit of John Mwai Mwangi the first applicant. It is brought under section 76 of the law of succession act and rule 44 of the probate and administration rules.

The grounds for the for the revocation of the grant are that;

i. The certificate of confirmation of grant was obtained through defective proceedings as all the properties of the deceased especially parcel number LOC II/MARAGI/1379 and LOC EIGHT/GATARA/DOUBLE EIGHT 4 were not distributed in accordance with section 40(1) of the law of succession act and in accordance with the order of the judge dated 5 March 2015 which states in paragraph 13

'in view of the reasons stated herein and therefore another the protest and order distribution as by the affidavit of protest filed on 13 April 2012'

ii. *Other names have been fraudulently introduced in the certificate of confirmation of grant respect of L.R LOC II/MARAGI/1379 that were not in the affidavit of confirmation of grant or the protest that was allowed by the Judge namely Kelvin Muchiri Mwangi and Ernest Mui Mwangi*

iii. *The grant was obtained by concealment from the court of something material to the case as Ernest Mui was a minor at the time the application for confirmation was filed*

iv. *The certificate of confirmation of grant issued contains the name of Lucy Wanjiku Mwangi who passed away before it was issued having passed on 22nd of August 2011*

v. *That pending the hearing and determination of this application an order of prohibition be issued prohibiting all dealings in respect of L.R LOC II/MARAGI /1379*

The applicant added another ground in his affidavit at paragraph 7

vi. *Besides one family is bound to benefit more than the other as L.R no. LOC II/MARAGI/1379 is a town property and developed while LOC EIGHT /GATARA/DOUBLE EIGHT 4 is a rule of property in the for the children not have had the property shared equally. We shall crave leave of the court to find a valuation report on the two properties.*

Annexed to the affidavit of John Mwai Mwangi is the certificate of confirmation of grant of the estate of Samuel Mwangi Muchiri issued to

Ann Kabura Mwangi on 19 March 2015, the judgement of justice Wakiaga delivered on 19 March 2015 the affidavit of protest the applicant herein dated 20 March 2012, the petitioner summons for confirmation of grant dated 27 February 2012, and the affidavit's support of the summons for confirmation of grant sworn on the 27th day of February 2012.

The application is opposed vide a replying affidavit the petitioner respondent sworn on 9 January 2017.

The main ground is that the issues raised are res judicata the application is incompetent and by law.

That with regard to the distribution of LOC II/MARAGI/1379 AND LOC EIGHT /GATARA /DOUBLE EIGHT 4, the same was dealt with by a ruling dated 25th of October 2016 attached the affidavit.

The learned the name of Lucy Wanjiku Mwangi, that the same was added in the grant by the court following complaints by the applicants that the name of the deceased mother as a beneficiary. That this is reflected in the judgement delivered on 19 March 2015.

Thereafter each party filed submissions to the Counsel.

For the applicants it was argued that the estate had not been distributed in accordance with the orders of the learned judge in the ratio of 3:5.

Secondly that the issues raised were not res judicata is the ruling delivered on the 25th October 2016 was regard to an application dated 16 June 2016 an application for review.

I have carefully considered the application before me, the rival affidavits, and the annexures therewith.

The issue is whether the matter is before me are res judicata, whether the summons for revocation of the grant fulfils the criteria required under section 76 of the law of succession act.

It appears to me that the applicants have chosen a specific line in the judgement delivered on 19th of March 2015 as a basis for this summons for the revocation of the grant.

In my view that the judgement has to be read as a whole.

The relevant sections of the judgement;

11. The question therefore for the court to answer is whether Lucy Wanjiku Mwangi survived the deceased? My answer to this question is that she is about the and therefore in the distribution of the estate of the deceased to be added as a unit and I am therefore not persuaded by the submission by the petitioner herein

12. I will therefore be with the protest hearing that as regards the distribution of the estate of the deceased in compliance with section 40(1) of the law of succession. The distribution of the deceased herein ratio of 3:5 in respect of property named paragraph 4(c) the affidavit in support of the summons for confirmation of grant

13. In view of the reasons stated herein that there were no the protest and order distribution as by the affidavit of practice filed on 13 April 2012.

It appears to me that the issue before the judge whether the estate of the deceased should be distributed in accordance with section 40 of the law of succession act.

A reading of the affidavit of protest at paragraph 3 clearly indicates that that was what the protest was about, *'that the proper distribution of the deceased estate is governed by section 40(1) of the law of succession act chapter 160 of the laws of Kenya'*

In allowing the protest the judgement further not only to determine that that was the proper position but also the ratio in which the state was to be distributed between the two houses.

I have looked at the certificate of confirmation of grant. All that property listed at paragraph 4(c) the summons confirmation of grant has been shared in accordance with the ratio given by the judge in his judgement. In my view, the judge appears to have left out the other two properties LOC II/ MARAGI/1379and LOC EIGHT/GATARA/DOUBLE EIGHT 4, out of the said ratio. If he had intended to change that I am certain he would have mentioned the same specifically, as he did with others.

On the issue of the mission of Lucy Wanjiku Mwangi, paragraph 11 of the judgement speaks for itself.

With regard to the inclusion of strangers who were not in the summons confirmation of grant the names Kelvin Muchiri Mwangi and Ernest Mui Mwangi appear very clearly in the Affidavit in Support of Summons for confirmation of the grant, on among others, page 1 of the Judgment, and are mentioned as sons of the respondent. They are the basis upon which the Judge made the determination of the ratio of 3:5 with regard to the distribution of the estate.

Regarding the issue of the respondent concealed from the court that Ernest was a minor, is an issue; due to the fact that this matter has dragged through this court for 16 years, the said beneficiary has since attained the age of majority, and does not stand to suffer any prejudice.

The last issue regarding the value of the two properties herein is an issue the applicants must have been aware of all the time this matter was going on in court and could have raised those issues at the point of review or distribution. In my humble view this is the wrong forum for that issue. Litigation must come to an end.

A perusal of the record clearly indicates that the issues that the applicant is raising now have been raised on various occasions throughout the proceedings in this matter, some of them specifically in the ruling of the honourable Justice Mativo delivered on the 25th October 2016. I will not go into the details.

I am wont to agree with the respondent that this application is frivolous, an abuse of the process of court and brought in bad faith.

How can a party persuade the court to include his deceased mother as a unit of distribution of the estate of his father and then turn around and use the same fact to seek the revocation of the grant when by so doing his mother's house increased by one unit? Mala fides. Why would a party who has failed to get review of the orders of the judgment, come again to seek revocation of the same grant, the basis of his application for review? Abuse of the process of the court. And why raise issues that are non-existent- claiming that the children of the respondent are strangers to the cause? That is being frivolous and vexatious especially when the record speaks very loudly for itself.

This application is dismissed with costs to the respondent.

The prohibition order is vacated.

The orders issued by Mativo J on the 25th October 2016 remain in force.

Dated, delivered and signed this 3rd May 2018 at Nyeri

Mumbua T. Matheka

Judge

In the presence of:

Ms Muriithi for Wahome Gikonyo

Ms. Kimotho for Magee for petitioner

Protester present

Phylis Mwangi

Anne Kabura Mwangi