



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 104 OF 1996

N THE MATTER OF THE ESTATE OF SAMUEL NDAWA MBILI – DECEASED

BETWEEN

WAYUA NDAWA 1ST OBJECTOR/APPLICANT

MUTUNGA NDAWA 2ND OBJECTOR/APPLICANT

NZIOKI NDAWA 3RD OBJECTOR/APPLICANT

VERSUS

ANDREW NDAWA MBILI 1ST ADMINISTRATOR/RESPONDENT

JOHN MUMO NDAWA 2ND ADMINISTRATOR/RESPONDENT

WAMBUA NDAWA 3RD ADMINISTRATOR/RESPONDENT

RULING

Introduction

1. By a Grant of Letters of Administration Intestate of 6th March, 2017, in respect of the Estate of the late **Samuel Ndawa Mbili** (hereinafter referred to as “the deceased”) this Court issued the same to **Wayua Ndawa, Andrew Ndawa Mbili, John Mumo Ndawa** and **Wambua Ndawa** in respect of a property which had been left out when the Grant was issued earlier on.

2. The same day, 6th March, 2017, the said Grant was confirmed to the said persons in respect of the same property.

3. However by a Chamber Summons dated 10th April, 2017, the Objectors herein sought that the grant of letters of administration issued to **Wayua Ndawa, Andrew Ndawa Mbili, John Mumo Ndawa** and **Wambua Ndawa** by this Court on 6th March, 2017 and the Certificate of Confirmation of Grant issued the same day be revoked or annulled.

4. The grounds upon which the said application was made were as follows:

1) That the proceedings to obtain the grant of letters of administration issued on 9th March 2017 and the Certificate of Confirmation to grant issued on 6th March 2017 by this honourable court were defective and incompetent in substance.

2) That the grant and the certificate of confirmation were obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case.

3) That the grant was obtained by means of untrue allegations of fact essential in point of law to justify the issuance of grant notwithstanding that the allegations was made in ignorance or inadvertently.

Objectors’/Applicants’ Case

5. According to the applicants, the deceased died on 3rd November, 1993 intestate leaving 3 wives and 17 sons surviving him. Thereafter a petition for grant of letters of administration intestate of the deceased was filed in this cause and a grant issued to **Anar Kalau Ndawa,**

Kameme Ndawa and Wayua Ndawa on 2nd August, 1996. That Grant was confirmed vide a Certificate of Confirmation of Grant issued on 5th March, 1997. However on 13th March, 2004 and 23rd January, 2014, **Anar Kalau Ndawa and Kamene Ndawa** respectively passed away and on the September 2016, **Andrew Ndawa Mbili, John Mumo Ndawa and Wambua Ndawa** moved the Court for substitution of the deceased administrators and for the inclusion of parcel number Machakos/Matuu/1101 which had been allegedly left out as forming part of the estate of the deceased.

6. According to the Objectors, on 6th March, 2017, a fresh grant of letters of administration was issued in favour of **Andrew Ndawa Mbili, John Mumo Ndawa, Wambua Ndawa and Wayua Ndawa**, who swore the affidavit in support of the instant application. The same the said Grant was confirmed and the land parcel no. Machakos/Matuu/1101 was ordered to be shared equally between the said administrators.

7. According to the applicants, the said confirmation was obtained fraudulently by concealment from the Court of material facts and in particular, the applicants failed to disclose that the said parcel of land was no longer in the name of the deceased but in the names of **Anar Kalau Ndawa, Kamene Ndawa and Wayua Ndawa**. It was further deposed that the said confirmation was obtained by means of untrue allegations of fact and in particular the applicants misled the Court that the said parcel of land had been left out when indeed the same was properly included in the Certificate of Confirmation dated 5th March, 1997 and was subsequently transferred through transmission to **Anar Kalau Ndawa, Kamene Ndawa and Wayua Ndawa**.

8. It was further averred that the respondents herein were required by law to seek the consent of all the dependants of the deceased being of full age prior to the re-issuance of confirmation of grant. It was the applicants' contention that the purported certification of confirmation of grant seeks to redistribute the estate of the deceased in particular the aforesaid property land parcel no. Machakos/Matuu/1101 amongst **Andrew Ndawa Mbili, John Mumo Ndawa, Wambua Ndawa and Wayua Ndawa** in-equal shares without the consent as to the confirmation or mode of distribution from all the beneficiaries of the deceased including the objectors.

9. The applicants reiterated that the reissued confirmation of grant issued on 6th March, 2017 seeks to re-distribute the property known as Machakos/Matuu/1101 and which no longer forms part of the deceased having been transferred by way of transmission.

Respondents' Case

10. The application was opposed by the Respondents.

11. According to them, the 1st objector was a party to the substitution proceedings which resulted in the issuance of a fresh grant reflecting the Respondents and the 1st objector as the administrators of the deceased, who represent the 4 families of the deceased and thus all the beneficiaries of the estate of the deceased are well represented.

12. According to the Respondents, the grant was not obtained fraudulently or by concealment of anything material to the case as all family members were involved and even a meeting at home was called to deliberate the said issues.

13. As regards the issue of Machakos/Matuu/1101, the Respondents conceded that the title to the land in question has already been transferred to **Anar Kalau Ndawa, Kamene Ndawa and Wayua Ndawa**, the wives of the deceased but since **Anar Kalau Ndawa and Kamene Ndawa** are now deceased, the Respondents thought it prudent to file separate succession proceedings for their respective estates rather than annulling the grant on record since the title in question no longer forms part of the present case. It was therefore the Respondents' position that since the only title in contention by the objectors is Machakos/Matuu/1101, the revocation or annulment of the grant will not be in the interest of justice but rather, it will merely burden the beneficiaries with costs.

14. The Respondents therefore averred that the material presented by the Objectors/Applicants in support of their claim does not call for annulment of the grant on record hence the application is frivolous and/or an abuse of the process of the court and should be struck out with costs.

Determination

15. I have considered the application, the affidavits both in support of and in opposition to the application.

16. Section 76(a), (b) and (c) of the **Law of Succession Act** provides as hereunder:

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;

17. In this case the applicant relied on grounds (a) and (b) and two orders which were made by this Court on herein on 6th March, 2017. The first one was an order for substitution of the deceased administrators while the second order was for the inclusion of parcel number

Machakos/Matuu/1101 as forming part of the estate of the deceased. It is admitted that land parcel number Machakos/Matuu/1101 had in fact been included in the Certificate of Confirmation dated 5th March, 1997 and was subsequently transferred through transmission to **Anar Kalau Ndawa, Kamene Ndawa and Wayua Ndawa**. It therefore follows that the said parcel of land could no longer be termed as being part of the estate of the deceased as to be subject of a further confirmation. I associate myself with the decision of **Musyoka, J** in **In re Estate of Ernest Kerry Komo (Deceased) [2016] eKLR** that:

“Once a grant is confirmed and the property is distributed, as is the case here, the probate court becomes *functus officio*. The property in question is no longer estate property. It no longer vests in the administrators. It is no longer subject to the Law of Succession Act, Cap 160, Laws of Kenya, from which the probate court draws its authority and jurisdiction.”

18. The same Judge in **Re Estate of Mwangi Komo Ruhangi (Deceased) [2015] eKLR** held that:

“An application to redistribute the estate or to vary the distribution is really an application for review of the orders on the confirmation of the grant. It should be handled in much the same way as a confirmation application. The other parties or survivors of the deceased must concur to the redistribution or the changes being proposed. It is not something that can be done *ex parte*.”

19. In this case I agree that the effect of the issue of a fresh Certificate of Confirmation was to re-distribute the estate after the same had been confirmed. There is no evidence that the consent of the beneficiaries was sought towards this end. The Respondents appreciated that the procedure of seeking a confirmation of the grant in these proceedings instead of filing separate succession proceedings for their respective estates was wrong. They however contended that it would not be prudent to annul the grant on record since the title in question no longer forms part of the present estate. In **Re The Estate of the Late Suleman Kusundwa [1965] EA 247**, it was held that:

“The court is...not obliged to revoke the existing grant, and should only exercise its discretion to do so if useful purpose would be thereby achieved or any right of the applicant safeguarded which could not otherwise be safeguarded. In the present case such rights of inheritance as the applicant possesses, outside the will, are sufficiently safeguarded by the assurance given by the Administrator-General. Therefore I decline to revoke the existing grant, a revocation which would entail needless expense; but it is qualified by declaring that the provisions of the annexed will, in which he purported to leave the whole of his property to his nephew, the second respondent, shall be given effect to only in respect of such portion of the deceased’s property as he was entitled to dispose of by will under the applicable law of inheritance.”

20. The procedure which was adopted by the Respondents in this matter no doubt renders the proceedings leading to the confirmation of the grant of 6th March, 2017 defective in substance. I am however unable to find 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. I agree with the holding **In the Matter of the Estate of P. W. M – Deceased [2013] eKLR** that:

“It should be noted that allegations of fraud border on an accusation of commission of a criminal offence. In civil matters, allegations of fraud are treated as more serious than other allegations. Pleadings on fraud are stricter. The allegations should be supported by sufficient particulars. It is said here that the grant was obtained fraudulently; consequently the pleadings on the point ought to be to a higher standard. I note that the particulars of fraud are bare, totally insufficient to support an allegation of fraud.”

21. Similarly, in the matter before me the applicants have simply made allegations of fraud without meeting the threshold for arriving at such a finding.

22. In the premises whereas I find that the proceedings leading to the Confirmation of the Grant of 6th March, 2017 defective in substance, I do not think it proper to nullify the whole proceedings.

23. Consequently I hereby revoke the grant issued on 6th March, 2017 to the extent that it purported to direct that a fresh grant of letters of administration be issued in favour of **Andrew Ndawa Mbili, John Mumo Ndawa, Wambua Ndawa and Wayua Ndawa**, and that a certificate of confirmation be issued in favour the said persons in respect of land parcel no. Machakos/Matuu/1101 to be shared equally between the said administrators.

24. There will be no order as to costs.

25. It is so ordered.

Read, signed and delivered in open Court at Machakos this 19th day of July, 2018.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Musyim for Mr Kingoo for the Objector

