



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 79 OF 2016

IN THE MATTER OF THE ESTATE OF MWANGI KIONDO (DECEASED)

KIRENGE GITHENDU.....APPLICANT/PETITIONER

VERSUS

JACINTA WAIRIMU RUGAITA.....RESPONDENT

RULING

A. Introduction

1. This is a ruling on an application dated 20/05/2016 seeking for revocation of grant brought under -9*Section 76 of the Succession Act and Rule 44 of the Probate & Administration Rules.
2. A Grant of Letters of Administration Intestate was issued to **Kirenge Githendu**, the petitioner in Succession Cause No. 36 of 1992 on 20th September 1993 in the estate of **Mwangi Kiondo**.
3. The beneficiaries of the deceased's estate shared **LR. No. KIINE/ SAGANA/107**, where Kirenge Githendu got 2.18 ha. and one Eliud Rugatia W. Murango - 1.22 ha. **LR. KIRINYAGA/ GATHIGIRIRI/220** was bequeathed to the applicant wholly.
4. The applicant states that Eliud Rugatia W. Murango, was his advocate whom he had instructed to conduct the succession cause for him. The respondent herein took over the firm run by the deceased Advocate after he passed away in the year 2004.
5. As part of the instructions, the applicant in a sale agreement that he signed on the 6th February 1993 deposited with the deceased's Advocate firm instructions to carve out 3 acres out of land parcel number KIINE/SAGANA/107 being consideration for instituting and perusing a litany of legal proceedings over the aforementioned parcel of land as well as to institute succession proceedings over the estate of the deceased.
6. Sometime in the year 2010, the applicant herein filed a complaint with the Advocates Complaints Commission against the law firm of the deceased advocate, Rugatia & Company Advocate. On the 26th May 2011, the parties herein entered into a settlement agreement to attempt to settle the matter by themselves. At that time, the respondent herein was running the law firm.
7. This summons for revocation of grant was filed by the applicant on the 13th May 2016 seeking for orders for revocation of the grant on the following grounds: -
 - a) ***THAT the respondent's husband was not a beneficiary of the estate of the deceased.***
 - b) ***THAT the said certificate was obtained fraudulently by making of a false statement or by concealment from court of something material to the case.***
 - c) ***THAT it was also obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.***
8. The Applicant in his supporting affidavit sworn on 13th May 2016 states reiterates the assertions on his summons for revocation and urged this court to award the whole land parcel **No. KIINE/ SAGANA/107** to himself.

B. The Responses

9. The Respondent filed a preliminary objection as well as a replying affidavit dated 29th September 2016 asserting that the summons by the applicant was defective in law and substance as it was improperly before court. It was argued that the respondent was not the administrator of the estate in issue nor a party to the proceedings and finally that the Applicant lacked *locus standi* to file the summons for revocation issued to him and confirmed upon his own application.

10. The parties agreed to canvass both the summons for revocation and the preliminary objection by way of written submissions.

C. Applicant's Case

D. The applicant reiterated his claims as laid down in his aforementioned Summons for revocation and supporting affidavit and further urged court to revoke the grant. He argues that he was the only beneficiary in the deceased's estate and therefore was entitled to the whole parcel of land **Kiine/Sagana/107**.

E. Respondent's Case

11. In response, the Respondent filed two submissions, one dated 22nd May 2017 and the further submissions dated 5th December 2017. In her submissions dated 22nd May 2017, the Respondent submits that the summons by the Applicant was sub-judice and should be struck out. The Respondent relies on section 6 of the civil procedure act insisting that the complaint lodged by the Applicant at the Advocates Complaint Commission was still pending and as such the applicant's summons should be dismissed. The Applicant further testified that he came to learn of this succession cause as a result of a letter from the Embu Land Registrar who wrote to him on the 1st November 2016 to remove an earlier caution he had filed over the suit property.

12. In her further submissions dated the 5th December 2017, the Respondent submits that the applicant never filed any suit against the deceased advocate, during his lifetime concerning allocation of the land now subject of this suit and further emphasizing that the Applicant's application for revocation of grant was lacking in law, substance and facts on the grounds that:

a) The respondent is sued in her personal capacity, not as the administrator of the estate of Eliud Rugaita W. Murango.

b) The respondent was not a party, nor a beneficiary in Succession Cause No. 36 of 1993.

c) The applicant was the administrator, and he cannot legally challenge the grant issued to him.

d) Strangely, the applicant even after seeking the revocation of his own grant, wishes to benefit from the same grant by, under paragraph 13 of his affidavit, he wishes that the whole land parcel number Kiine/Sagana/107 be awarded to him.

13. The respondent concludes by urging the court to dismiss the application by the applicant with costs.

F. The Determination

14. The issues before this court for determination are whether the Respondents' preliminary objections have merit, and if not, whether the applicant summons for revocation of grant should be allowed.

15. The circumstances in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD [1969] EA 696**, as follows:

"a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

16. I wish to state that a preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case OF **ORARO VS MBAJA [2005] 1 KLR 141**, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in **MUKISA BISCUIT COMPANY VS WEST END DISTRIBUTORS LTD (supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

17. In her submissions dated 13th May 2016, the respondent avers that the matter is sub-judice since the applicant lodged a complaint in the Advocates Complaints Commission over the subject matter herein. A glance at the proceedings before the Advocates Complaints Commission reveals that indeed the applicant did lodge the aforementioned Complaint into the conduct of the deceased's advocate in handling the matter.

18. Strictly speaking, these two issues are distinct in my view. The Advocates Complaint Commission would look at the conduct of the advocate in his dealings with his client, in this case the applicant, in an effort to determine whether the advocate breached his obligations to his client and subsequently offer directions to remedy this.

19. The matters before this court is a summons for revocation of grant which is probate in nature. This court's jurisdiction to hear and determine disputes regarding succession to a deceased's person's property is granted by section 47 of the Law of Succession Act which provides that the High Court shall have jurisdiction to entertain any application and determine any dispute under the Act and to pronounce

such decrees and make such orders therein as may be expedient.

20. In this regard it was expounded by **Musyoka J.** as to when a matter is best placed for a succession cause and when it ought to be referred to another Court with concurrent jurisdiction IN **RE ESTATE OF ALICE MUMBUA MUTUA (Deceased) [2017] eKLR** as follows:

“...The Law of Succession Act, and the Rules made there under, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

21. Another point of objection has been taken out by the respondent; that the applicant lacks *locus standi* to file an application for revocation or annulment of grant. **Section 76 of the Law of Succession Act** is very clear that: -

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,

22. It is my humble opinion that the Applicant is an interested party in this action by the very nature that he is the grant holder. Accordingly, at the very least, the Applicant is an interested party for purposes of section 76 of the Law of Succession Act. Therefore, he is within his right to apply for revocation of grant as he has done. As a result of the above it is my opinion that the Respondents preliminary objection fails.

23. I find that the preliminary objection is based on points of facts and is misplaced as regards the jurisdiction of this court. It is therefore dismissed. This court has jurisdiction to hear the summons for revocation of grant.

24. I now proceed to determine the substantive issues in this application. The circumstances in which a grant may be revoked or annulled are set out in **Section 76 of the Law of Succession Act** as follows: -

“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 has ordered or allowed; 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.”

25. After reading the arguments of the parties, this court ought to determine: -

a) Whether 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

b) Whether 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.

26. Applying the test of law in section 76 of the Law of Succession Act, the fact that there was an agreement between the deceased advocate and the Applicant for sale of the suit land is important to these proceedings. It seems also that consideration for the agreement was a share in the deceased's estate. Accordingly, at the very least, the deceased's advocate thus became a creditor to the estate of the deceased by virtue of actions of the Applicant herein.

27. Indeed, this court does not have jurisdiction to determine the validity or enforceability of the said agreement. This is a preserve of the Environment and Land Court that is constitutionally mandated to determine such matters. But of relevance in these proceedings is whether such material facts were ever disclosed to the court during confirmation of the grant so as to enable the court make an informed decision on

distribution of the estate. Needless to state that, in any judicial proceeding, parties must make full disclosures to the court of all material facts to the case including succession cases.

28. This general rule of law emphasizes utmost good faith from parties who take out or are subject of the court proceedings. Accordingly, non-disclosure of material facts undermines justice and introduces festering waters into the pure streams of justice.

29. At no time during the proceedings for grant, confirmation of grant nor the lifetime of the deceased advocate did the applicant challenge the presence of the deceased advocate as a beneficiary of the deceased's estate. Indeed, the sale agreement between himself and the deceased's advocate brings the deceased advocate into the position of beneficiary of the estate. If the Applicant was opposed to the deceased advocate being a beneficiary, he should have brought that action before the estate of the deceased was distributed. That is the very reason why **Rule 41(3) of the Probate and Administration Rules** was enacted so that claims which *prima facie* valid should be determined before confirmation.

41(3) Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71 (2) of the Act, proceed to confirm the grant.

30. The question is "who is to blame for failing to make the necessary disclosures to the court or to take action to remedy the situation in good time?" The applicant was the sole administrator and the sole beneficiary in this cause. He therefore bears the burden of all actions or omissions. He voluntarily gave his advocate a share in the estate and cannot blame any other person.

31. The applicant has admitted that he was represented in the succession cause by the deceased advocate. Neither does he deny that a side agreement was entered into between the parties for payment of the legal fees by the counsel taking a share of the estate to which the applicant was the sole administrator. His only complaint is that the grant was confirmed without his knowledge of the particulars of the distribution.

32. The applicant does not deny that he signed his application and swore the affidavit in support of the application for confirmation of grant. Neither did he intimate that anyone forged it. The practice of courts in succession cases is that a grant will not be confirmed in the absence of the petitioner and the beneficiaries of the estate unless the absent beneficiary has given consent in writing. The applicant does not blame the court that it confirmed the grant in his absence.

33. The mere fact that the respondent who is an advocate witnessed the agreement between the parties in the course of her official duties is no good reason to drag her in these proceedings.

34. The applicant took over 20 years to apply for revocation of grant. The grant was confirmed in 1994 and this application was filed in 2016 which translates to 23 years of delay. If indeed the applicant did not consent and authorise the distribution of the deceased's estate as he claims, he would have sued the deceased advocate at the earliest opportunity. The advocate died ten (10) years after the confirmation of grant.

35. Although this action is not time barred under the law, the principle that litigation must end is applicable herein. A party should not take over two decades a century to pursue his legal rights. The act of suing the personal representative of a person who died 13 years ago is not acceptable unless the death came to his knowledge only recently. Even if it was a suit for recovery of land, it would have been barred under the Limitation of Actions Act.

36. Upon considering the material before me, I reach a conclusion that the applicant has failed to satisfy this court that the respondent or the deceased committed any fraud or failed to disclose any material facts of the case to the court. It was indeed, the administrator who was under an obligation to disclose the existence of the agreement with the deceased advocate to the court.

37. I find that this application failed to satisfy the requirements of Section 76 of the Act and must fail. It is accordingly dismissed with costs to the respondent.

38. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 20TH DAY OF NOVEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Wachira for Respondent

Applicant in person