



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
SUCCESSION CAUSE NO. 36 OF 2011
IN THE MATTER OF THE ESTATE OF GIBSON MULWA KINAI (DECEASED)

MAUMI WAYUA MULWA alias

NAUM WAYUA MULWAADMINISTRATOR

VERSUS

DAVI MUTHAMA MULWA.....OBJECTOR

RULING

A grant of letters of administration intestate was issued on 11th April 2011 to the Administrator herein with respect to the estate of Gibson Mulwa Kinai (hereinafter referred to as “the Deceased”), and confirmed on 20th July 2012. The Administrator is the widow of the Deceased. The Objector herein who is the first born son of the Administrator and the Deceased, has filed a summons for revocation of grant dated 6th August 2014. He is seeking orders therein that the grant issued to the Administrator be revoked, as the Petition was presented without his knowledge and it was obtained fraudulently by making false statements, or by the concealment from court or something material and by means of untrue allegations of a fact essential in point of law.

The main ground for the application is that the Objector was left out of the consent to the Petition for the grant of representation, and that the Administrator has obtained a title deed to the deceased land and disposed of properties of the estate to third parties without taking into account the interests of the beneficiaries, and has further threatened him with eviction. Further, that it took the Objector’s citation filed in Machakos High Court Succession Cause No 717 of 2012, for the Administrator to disclose that succession proceedings had been filed

These averments are found in the said summons and in a supporting and supplementary affidavit sworn by the Objector on 6th August 2014 and 20th April 2016 respectively, as well as in submissions dated 14th November 2016 filed by Mulwa Isika & Mutia Advocates, the Objector’s legal counsel. Reliance was placed on section 76 of the Law of Succession Act as applied in the decisions in **Lucy Wangui Kabaiko & Another vs Jane Wangari Kabaiko & 3 Others (2014) e KLR** and **In Re the Estate of Soti Kigen Kiprotich vs Samson Kigen (2003) e KLR**.

The Response

The Administrator filed a replying affidavit she swore on 7th April 2015 in response to the Objector’s application. The Administrator’s learned counsel, J.A. Makau & Company also filed submissions dated 30th February 2016. The Administrator stated that the Objector was aware of the application for letters of

administration, and chose of his own volition not to participate in the proceedings. Therefore, that the rest of the beneficiaries proceeded with the application. and the Administrator attached their consent. The Administrator denied that she had sold or disposed of any property belonging to the deceased, and stated that there is only one parcel of land belonging to the deceased on which the family lives. She annexed a copy of the title deed to the said parcel of land being Machakos/Ulu/195.

It was submitted that the Court has discretion under section 76 to make such orders as it considers fit in the circumstances, where a defect is of such a nature as it does not affect the regularity and correctness of previous proceedings, as held in **Re the Estate of the late Joseph Mwangi Maina, (2016) e KLR**. It was also averred that the Objector's application was brought in bad faith, as he had failed to disclose that he had been cited and called by the Administrator to take part in the succession proceedings.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the Petitioner. The issue to be decided is whether the confirmed grant issued to the Administrator should be revoked. The Objector asks for revocation of the grant on account of his consent not having been given to the Petition for grant. Revocation of a grant is provided in section 76 of the Law of Succession 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.”

I have perused the consent to the Petition for grant filed herein and note that indeed the Objector was not included in the list of beneficiaries, neither was his consent given. However, despite this defect, it is my view that revocation of grant is not the appropriate remedy in the circumstances, as the Administrator, being the widow of the deceased, has priority over the Objector under section 66 of the Law of Succession Act,.

Section 66 provides as follows in this regard:

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the

best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will. “

In addition, the other beneficiaries have consented to the grant being issued to the Administrator save for the Objector, and therefore even if the grant of administration were to be revoked, he would not be a suitable candidate for the same. Lastly, it is also notable that the Objector had filed citation proceedings for the Administrator to take out a grant of letters of Administration, and therefore impliedly recognised the Administrator's superior claim in this regard, and also admitted therein to the lack of consent to his application by the other beneficiaries.

The concerns raised by the Objector as regards his interest in the deceased's estate can in my view be more appropriately and adequately addressed in confirmation proceedings by way of an affidavit of protest, as provided for by Rule 40 (6) and (7) of the Probate and Administration Rules, which is the appropriate procedure when one is contesting distribution proposals made in a summons for confirmation of grant. Rule 40(6) (7) and (8) of the Probate and Administration Rules provide as follows in this respect:

“(6) Any person wishing to object to the proposed confirmation of a grant shall file in the cause in duplicate at the principal registry an affidavit of protest in Form 10 against such confirmation stating the grounds of his objection.

(7) The registrar shall without delay forward to the applicant a copy of each protest filed in the cause under subrule (5) or (6).

(8) Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit.”

The Court will therefore only revoke the confirmation of the grant, so as to give the Objector the opportunity to canvass and prove his claims and interest over the deceased's estate. I also note that the file herein was reconstructed and is missing the original summons for confirmation of grant. There is thus need for the Administrator to file fresh summons for confirmation of grant, which will also provide an opportunity to take on board the Objector's concerns if agreeable.

The prayers sought in the Objector's summons for revocation of grant dated summons for revocation of grant dated 6th August 2014 are accordingly allowed only to the extent of the following orders:

1. The Certificate of confirmation of the grant issued to Maumi Wayua Mulwa alias Naum Wayua Mulwa on 20th July 2012 with respect to the estate of Gibson Mulwa Kinai (Deceased) be and is hereby revoked.

2. The Administrator herein shall file and serve the Objector with a fresh Summons for Confirmation of Grant within 30 days of the date of this Ruling.

3. The Objector shall file and serve his Affidavit of Protest, if need be, to the said Summons for Confirmation of Grant within 30 days of service of the said Summons, failing which the Summons for Confirmation of Grant shall proceed to hearing..

4. The *status quo* that shall obtain as regards the properties and assets belonging to the estate of Gibson Mulwa Kinai (Deceased) pending the confirmation of grant of administration shall be that the Administrator, Objector and Beneficiaries shall continue to be in possession and occupation of the properties and assets they currently occupy; and that the Administrator, Objector and Beneficiaries of the estate of the deceased shall not sell, transfer, lease, undertake any further developments on, or in any manner dispose of or waste the said properties and assets, nor in any manner interfere with the current occupation and possession of the same by any party.

5. There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 21st day of February 2017.

P. NYAMWEYA

JUDGE