



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 45 OF 2003

(IN THE MATTER OF THE ESTATE OF THE LATE ALEXANDER MUCHIRI)

NORMAN KAIRU MURIITHI.....PETITIONER/RESPONDENT

VERSUS

JANE WANDIA WACHIRA.....1ST APPLICANT

JOSHUA N. MURIITHI.....2ND APPLICANT

JUDGMENT

Two summonses for revocation or annulment of grant dated 17th April, 2009 and 30th June, 2009 were filed by the 1st and the 2nd applicants respectively; the grant in issue had been made to the petitioner on 15th April, 2003 and confirmed 10th March, 2009. This cause in which the grant was made is in respect of the estate of Alexander Wachira Muriithi (the deceased) who died on 15th September, 1989. At the time of his demise, the deceased was domiciled in Kenya and his last known place of residence was at Thegenge-Karia in Nyeri.

The record indicates that the two summonses were consolidated on 24th July, 2009; on the same date, the court directed that the previous directions issued under **rule 44(3)** of the **Probate and Administration Rules** on service of one of the two summonses applied to both the summonses as consolidated. On 3rd October, 2011, further directions were taken on the consolidated summonses to the effect that they were to be disposed of by way of written submissions.

The background against which the summonses were filed is this. After the demise of the deceased the petitioner petitioned for grant of letters of administration intestate of his estate; he described himself in the affidavit in support of the petition as a brother to the deceased and it is in that capacity that he lodged the petition.

The deceased's survivors were named in the same affidavit as follows:

1. Norman Kairu Muriithi (brother)
2. Samuel Muriithi Wachira (son)
3. Jane Wandia Wachira (wife)

4. Benson Kariuki Muriithi (brother)
5. Joshua Ndiritu Muriithi (brother)
6. David Mukundi Muriithi (brother)
7. Tabitha Wahiga (Mother)

The deceased's estate is said to have comprised land parcel **Thegenge/Karia/954**. According to the petitioner's affidavit in support of the summons for confirmation of grant, he proposed to distribute this land amongst Samuel Muriithi and Benson Kariuki Muriuki in shares of 0.35 ha each and to retain 0.6 ha for himself.

By an affidavit filed in court on 19th September, 2007, the 1st applicant protested against the proposed distribution. Another affidavit of protest against the confirmation of grant had earlier been filed by one Njoki Nderitu, more particularly on 2nd July 2004. None of these protests was heard though; the 1st applicant's affidavit was withdrawn on 10th March, 2009 when it became apparent that she had consented to the confirmation of the grant of letters of administration in the manner proposed by the petitioner while that of Njoki Nderitu was struck out on the same date for want of prosecution. In the absence of any other protest the court proceeded to confirm the grant.

On 17th April, 2009, just a month after the confirmation of grant, the first applicant filed a summons of even date seeking to revoke or annul the grant on the grounds that part of the deceased's estate had been omitted; that some of the deceased's heirs had also not been catered for in the distribution but instead strangers to the deceased had been allocated his estate. She also lamented that she had also been left out of the distribution yet she was the deceased's widow.

The 2nd applicant followed suit and filed a similar summons on 30th June, 2009 except that his grounds for the prayer for revocation or annulment of grant were that the grant was obtained fraudulently by making false statements and concealing from the court material facts, in particular, failure to disclose that the applicant was one of the deceased's dependant's and hence a beneficiary of his estate; that the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant; that the proceedings to obtain the grant were defective in substance; that the applicant was not provided for in the distribution of the estate; and, the petitioner did not inform the applicant about the petition.

The second applicant swore in the affidavit in support of the summons for revocation or annulment of grant that he was the deceased's brother and the parcel of land comprising his estate was a 'family land' which was held by the deceased in trust for himself and for the rest of the deceased's family members. According to him, the suit land ought to have been shared between himself, his mother Tabitha Wahiga Kairu and the 1st applicant. He also swore that it was not until the 22nd May, 2009 when the 1st applicant asked him to accompany her to court for directions on her application that he became aware of this cause.

The grounds upon which the 1st appellant's summons is based do not appear to mirror the statutory grounds which the Act recognises, under **section 76** thereof, as the only grounds upon which a grant can be revoked or annulled. The grounds revolve around the distribution of the deceased's estate. The conclusion that one can make from this application is that the applicant's summons has no legal basis.

But even assuming that the applicant was to cite all or any of the grounds prescribed in **section 76** of the Act, his application would still be self-defeating for the simple reason that she had all along been part of the succession proceedings and to cap it all, she had consented to the confirmation of the grant prior to her application to revoke or annul it; the inescapable conclusion is that her consent to the confirmation of the grant was an acknowledgment of the validity of the grant. It would be in bad faith for her to turn around and seek to impugn the same grant on which she has stamped her seal of approval.

As far as the 2nd applicant's summons is concerned, I gather from his affidavit in support of the summons

that he thinks he ought to have been incorporated in the succession cause because he was a cestui qui trust or a beneficial owner of the property that now forms the deceased's estate; however, his interest was pegged on a trust that has not been proved to exist. The available evidence is that the deceased was the registered absolute owner of the suit land; there is no evidence that he held it in trust for himself and for some other person or persons, including the 2nd applicant.

More importantly, apart from reproducing the grounds for revocation or annulment of grant enumerated in **section 76** of the Act, in particular, parts (a), (b) and (c) thereof, I did not find anything in the supporting affidavit in support of the summons that substantiated those grounds. For instance, it has not been demonstrated in what respects the proceedings to obtain the grant were defective in substance or how the grant was obtained fraudulently by the making of a false statement or concealment from the court of something material to the case. Neither has it been demonstrated to my satisfaction that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant.

My appreciation of the applicants' case is that they are more concerned with the distribution of the estate than with the validity of the grant. Granted, the applicants may as well be aggrieved by the manner the deceased's estate was distributed; however, if my assumption in that respect is correct, the appropriate course would not be to seek to revoke or annul a grant when, as noted, neither of the grounds for such revocation or nullification as set out in **section 76** of the Act has been proved to exist. If they think they have legitimate concerns about the distribution of the deceased's estate, their target, in my humble view, should have been the confirmation proceedings and the subsequent confirmation order and not the grant.

I find the timing of the filing of the summonses not to have been coincidental; they were conveniently filed soon after the withdrawal and the dismissal of the protests and after the grant had been confirmed. The summonses were conveniently filed to achieve what the protests couldn't. There is therefore a tinge of bad faith and an abuse of the process of the court in the applicants' summonses. Again, considering that **section 76** of the Act was not properly invoked I have to come to the conclusion that the applicants' consolidated summonses are also misconceived. I hereby dismiss them but make no orders as to costs.

Dated, signed and delivered in open court this 10th day of February, 2017

Ngaah Jairus

JUDGE