



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 611 OF 2015

IN THE MATTER OF THE ESTATE OF JULIUS NGUNZU KIAMBA – (DECEASED)

AND

PATRICK NDAMBUKI NGUNZU.....1ST APPLICANT

MOSES KIEMA NGUNZU2ND APPLICANT

ANTHONY MULINGE NGUNZU ALIAS

WAMBUA NGUNZU.....3RD APPLICANT

VERSUS

BONIFACE KIAMBA NGUNZURESPONDENT

RULING OF THE COURT

Introduction

1. The application before the court is Summons for Revocation of Grant dated 7th October, 2015 filed pursuant to **Section 76 (b) and (c) and 47 of the Law of Succession Act and Rules 44 and 73 of the Probate and Administration Rules**. The application prays for the following orders;

- a. That this application be certified as urgent, and be heard ex parte at the first instance.
- b. That pending inter-partes hearing and determination of this application, interim restraining orders do issue restraining the respondent or in any other way disposing off the deceased's land parcel No. **Kiteta/Ngiluni/1279**.
- c. That pending hearing and determination of this application, an order do issue staying proceedings in Tawa SRM's Court Civil Suit No. 107 of 2014, in which the subject matter is the deceased's land parcel No. **Kiteta/Ngiluni/1279**.
- d. That the grant of Letters of Administration Intestate made to Boniface Kiamba Ngunzu on 21st January, 2013 and confirmed on 16th October, 2013 be revoked.
- e. That costs of this application be paid by Boniface Kiamba Ngunzu, the respondent.

The application

2. The application is supported by affidavit of the 1st applicant **Patrick Ndambuki Ngunzu** sworn on **7th December, 2015** on his own behalf and on the behalf of the 2nd and 3rd applicant. The applicants are brothers while the respondent is their elder brother and the administrator of the estate of their late father **Julius Ngunzu Kiamba** (deceased).

3. The Grant herein was made and confirmed to the respondent on **16th October, 2013**. It is the applicants' case that the said grant was obtained fraudulently by the making of false statement and by concealment from the court of crucial material facts and by the making of untrue allegations. The applicants all allege that they were never consulted before the granting of the letters in Makueni Senior Resident Magistrate Court. Neither did they sign any consents to the application for grant. The applicants became aware of the aforesaid succession proceedings when the respondent filed Tawa Senior Resident Magistrate's Court Civil Case No. 107 of 2014 against some individuals whom the applicants had authorized to cultivate their respective portions of their father's/deceased's land parcel No. **Kiteta/Ngiluni/1279**. The applicants have since obtained copies of documents filed by the respondent in Makueni Principal Magistrate's Court Succession Cause No. 75 of 2012 (*In the matter of Estate of Julius Ngunzu Kiamba – deceased*), and they noted that among the documents filed by the respondent in the said succession proceeding's is a purported consent to the making of a grant (form P&A 38), which is purported to have been signed by all the three (3) applicants, among others. The applicants deny signing the said document (form P&A 38), and the mark thereon purported to be their signature is a forgery, and that they were never in any way consulted on any mode of distribution of the deceased's estate, and were never summonsed to attend court, either at the time of confirmation of the grant in issue or at all. The applicants state that it is amazing that the respondent, who is their elder brother, has annexed copies of identity cards of the 2nd and 3rd applicants to the documents filed by him in court. The applicants do not know how the respondent secured the said copies of identity cards. In a move aimed at disinheriting the applicants as well as all the other beneficiaries of the deceased's estate, the respondent has obtained a certificate of confirmation of grant directing that the only mentioned asset of the deceased's estate, land parcel No. **Kiteta/Ngiluni/1279**, be registered in his name wholly, yet the said land, which is over 10 acres is occupied by all the beneficiaries including the applicants. Further, the applicants' case is that the respondent herein has vide Tawa SRMCC No. 107 of 2014, sued some individuals whom the applicants have allowed and authorized to cultivate their respective portions of the deceased's aforesaid parcel of land. The respondent is vide the said suit, indirectly and cunningly seeking to injunct both the applicants from using their portion of their father's land. The applicants pray that the aforesaid court case (Tawa SRMCC No. 107 of 2014), which is fixed for submissions on 13th October, 2015, be stayed pending hearing and determination of the application herein. The respondent has severally threatened to dispose off the deceased's aforesaid parcel of land, which he now refers to as his property.

The Response

4. The application is opposed by the respondent vide a Replying affidavit sworn by the respondent on **10th December, 2015**. The Respondent denies the applicants claim in toto and states that the averments in the supporting affidavit are fabricated falsehood. The respondent's case is that he followed the right procedure in filing the Succession Cause No. 75 of 2012 before the Principal Magistrate's court at Makueni without any fraud and/or concealment of any material facts from the court. The respondent blames the applicants for coming before this court with dirty hands as they were not only consulted but they actively participated fully in the filling of the Succession Cause No. 75 of 2012 at Makueni. The applicants and the other beneficiaries of the estate of Julius Ngunzu Kiamba, signed the consent for filing the succession cause and also the consent of confirmation of grant and distribution of property of the said estate in the Succession Cause No. 75 of 2012 before Principal Magistrate's court at Makueni willingly, freely and without any undue influence from the respondent or any other person. The respondent states that the applicants are lying to this court that they became aware of the Succession Cause No. 75 of 2012 proceedings at the Principal Magistrate's Court at Makueni when the respondent filed Civil Suit No. 107 of 2014 at Tawa because they truly consented to the respondent being the sole administrator of the estate of the late Julius Ngunzu Kiamba, and that the public notice of Succession Cause No. 75 of 2012 was

gazetted on 14th December, 2012 thus it was not a secret at all.

5. The respondent's case is that on 16th October, 2013 during the confirmation of the grant in Succession Cause No. 75 of 2012 at Makueni, all the beneficiaries of the estate of the late Julius Ngunzu Kiamba were present in court hence the grant was confirmed. The respondent stated that it would be proper for the Judge to direct that the lower court file Succession Cause No. 75 of 2012 at Makueni be brought to this court before this application proceeds for hearing for further and more accurate information. The respondent states that none of the applicants or any other beneficiary of the estate of the late Julius Ngunzu Kiamba occupies the parcel of land No. **Kiteta/Ngiluni/1279**. The applicants purported to have sold portions of the above said parcel of land no. **Kiteta/Ngiluni/1279** to some individuals sued in the SRMCC No. 107 of 2014 at Tawa yet they had no capacity to sell the same to anyone. In the process of saving the estate, and in particular land parcel No. **Kiteta/Ngiluni/1279**, the respondent was forced to refund the money to the people whom the applicants had collected the purported purchase price from. The respondent refunded the above amounts after the resolution of a lengthy family meeting. The applicants were warned and/or prevented by the Clan Elders of Eombe Nthoka Katemi Association on 21st November, 2011 from further disposal of unauthorized properties of the estate of the late Julius Ngunzu Kiamba. The clan elders resolved that if anyone had issues about any property of the estate, the issues should be dealt with by the family committee that comprises of the respondent herein, Chairman of the clan, Area chief and the survey office. The respondent states that the family members had several meetings which came up with several agreements showing that no property belonging to the estate of the late Julius Ngunzu Kiamba should be sold to non family members unless with the authority of the family committee. The respondent's case is that the estate of the late Julius Ngunzu Kiamba had other unsurveyed parcels of land which were harmoniously sub-divided among the beneficiaries of the estate of the late Julius Ngunzu Kiamba.

6. The respondent states that during the survey process the parcels were registered as follows as per the family agreement.

- a. Boniface Kiamba Ngunzu Plot Nos. 763 and 2709
- b. Patrick Ndambuki Ngunzu Plot Nos. 2705 and 2706
- c. Daniel Musyoki Ngunzu Plot Nos. 2708 and 2709
- d. Moses Kiema Ngunzu Plot Nos. 407 and 107
- e. Anthony Mulinge Ngunzu Plot Nos. 2704 and 2537

7. The respondent states that its only land parcel no. **Kiteta/Ngiluni/1279** that remained in the name of the late Julius Ngunzu Kiamba because it had a title deed and a restriction for there is a pending dispute as shown in the official search. Further, the appeal case before the Minister of Lands over Land Parcel No. **Kiteta/Ngiluni/1279** is still pending for hearing and determination at the Chief Land Registrar's office, and if the letters of administration were revoked by this court, there would be no representative from the family of the late Julius Ngunzu Kiamba in the appeal case before the Minister of Lands thus giving advantage to the appellant. The respondent states that he has never at any given moment threatened to dispose the applicants of their own portions of land in the estate of the deceased. The respondent prays that the application for revocation of the grant be dismissed.

Submissions

8. There are documents filed in court in support and in opposition of the application. Counsel also made oral submissions in court. It was also submitted by all parties that the 1st and 2nd applicant have since withdrawn from the application. **M/S Nzei** for the applicant submitted that although the 1st and 2nd applicant have withdrawn, the supporting affidavit was sworn by the 1st applicant on behalf of all the parties and should remain valid. **M/s Nzei** further submitted that the grant sought to be revoked is already

confirmed. From the schedule of assets, it is clear there is only one property of the estate whose description is given. From the schedule the property is to be registered in the name of the Petitioner wholly. The said schedule does not show that the petitioner is to hold the property in trust for his siblings. Counsel submitted that **Section 38 of the Law of Succession Act** provides for equal sharing of the property of the deceased among beneficiaries. In this case the Petitioner has taken everything. The applicant is a child of the deceased and is entitled to an equal share of the deceased's estate. Since the grant is already confirmed, the same should be revoked.

9. **M/S Nzau** for the respondent submitted that when the Petition for Letters of administration was made and the grant confirmed, nothing was hidden. All the beneficiaries appeared during the confirmation of grant. Even the applicant was present. The estate of the deceased had several other properties except that some parcels of land were not registered. Those pieces of land were given to all the beneficiaries. The only asset of the estate is in the petitioner's name because the applicants had already sold part of the land and was stopped by a family resolution. The petitioner then had to pay the buyers from his own money, in effect, buying off the applicants and other beneficiaries. The grant was obtained openly and legally, and it should not be revoked. The applicants filed this application only after the petitioners sued some people in Tawa Law Courts, who are now using the applicant to have the grant revoked. Counsel submitted that revocation of the grant would cause a lot of injustice to the petitioner.

10. **M/S Nzei** submitted that **Section 76(b) and (c)** gives circumstances in which a grant can be revoked. The applicant has stated on oath that he did not sign the consent leading to the confirmation of grant. Even if he signed, does a consent signed by the parties supercede the law? The answer is not. Counsel submitted that the property should be subdivided among the ten (10) beneficiaries, not just between the petitioner and the applicants. The documents filed on the purported refunds by the applicant are not relevant to the matter before the court, and there are no sale agreements, attached to the replying affidavit.

Determination

11. I have carefully considered the application and submissions of the parties. The issues I raise for determination is whether the court can revoke the grant, considering that this court is satisfied that the Letters of Administration and the subsequent confirmation of the grant was done procedurally, openly, and legally.

12. In order to consider the issue, the court's attention is drawn to the fact that there are many beneficiaries in this matter, and all of them, except the 3rd applicant, are satisfied to have the respondent as sole administrator herein. Indeed even this application was initially filed by the 1st to 3rd applicants. However, the 1st and 2nd applicants have withdrawn from the application and now recognize the respondent as sole administrator of the estate. However, the mere fact that the other applicants have withdrawn does not dilute the 3rd applicant's rights to equal sharing of the estate of the deceased under **Section 38 of the Law of Succession Act**.

13. However, the law is never not be considered in a vacuum. The beneficiaries of the estate should be praised for having distributed the entire estate among themselves amicably, except for the suit property. There is evidence that the family has severally tried to negotiate and sort out issues of distributing the said estate. There is also evidence that the applicant had sold or attempted to sell part of his share to third parties now being parties to SRMCC NO. 107 OF 2014 in Tawa court. I have carefully considered the replying affidavit of the respondent, and I am satisfied that the respondent is telling the truth, and that the 3rd applicant's application is an afterthought and mainly intended to aid the case of the people to whom he purported to have sold his share of the suit property. I am also satisfied that the 3rd applicant had consented to the letters of grant and subsequent confirmation, and he cannot now purport to disown the same. There is no suggestion to this court that the 3rd applicant will be denied his share of the estate property. In that regard the proceedings in SRM's Court Civil Suit No. 107 of 2014 will not be stopped. The same shall proceed to their logical conclusion and once finalized, the respondent as the sole administrator of the estate will distribute the remains of that estate as per the order that shall emerge from the court. I have also taken notice that there are current proceedings before the Minister of Lands over the

suit property, and the respondent must be given the chance to attend them as family representative.

14. In the upshot, the Summons for Revocation of Grant dated 7th October, 2015 is dismissed with costs to the Respondent.

Orders accordingly.

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E.K.O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 16TH DAY OF FEBRUARY, 2017

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DAVID KEMEI

JUDGE

In the presence of:

Kisini – for Nzei for Applicant

Gitonga – for Nzau for Respondent