



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 230 OF 2015

**IN THE MATTER OF THE ESTATE OF JOSEPH MBUVI NDUNDA ALIAS MBUBI NDUNDA
(DECEASED)**

ROBERT MUTUA MBUVI.....APPLICANT

VERSUS

DORIS KANINI MBUVI.....PETITIONER

MARBIC COMPANY LTD.....INTERESTED PARTY

RULING

A grant of letters of administration intestate was issued on 23rd October 2014 by the Chief Magistrate's Court at Kitui in Succession Cause No. 170 of 2014 to the Petitioner herein, with respect to the estate of Mbubi Ndunda (hereinafter referred to as "the Deceased"). The said grant was confirmed by the same Court on 3rd December 2014. The Petitioner is a daughter of the Deceased. The Applicant herein who is a son of the Deceased, has filed a summons for revocation of grant in this Court dated 16th April 2015 seeking orders that the grant issued to the Petitioner be revoked.

The grounds for the application are that the proceedings to obtain the grant were defective in substance; the grant was obtained fraudulently by making false statements, by concealment from court or material facts, and by means of untrue allegations of a fact essential in point of law; and the grant is useless and inoperative through subsequent circumstances.

The Applicant in his supporting affidavit and further affidavit sworn on 17th April 2015 and 30th June 2016 respectively, averred that their father died on 6th April 1997 and that the Deceased was at time of his death the registered proprietor of land L.R B2 Yatta/Kangonde/27. He attached a copy of the death Certificate, and of a search certificate of the said parcel of land. Further, that the Deceased is survived by seven children and he is the eldest child. He attached a copy of a letter from their area Chief confirming this position and listing the properties of the Deceased.

However, that one of their sisters, the Petitioner herein, has through fraud obtained letters of administration in Succession Cause No. 170 of 2014 which were later confirmed on 3rd December 2015 without any consent from other beneficiaries, and all the papers filed in the said cause gave false information and failed to disclose material facts, in that the Applicant deposed that she was the sole beneficiary surviving the Deceased. He annexed a copy of the Petitioner's Affidavit in support of the Petition in Succession Cause No. 170 of 2014, and of the grant and certificate of Grant issued therein.

Further, that the documents filed in Succession Cause No. 170 of 2014 alleged the deceased only had one

parcel of land, and yet he was the proprietor of three other parcels of land as shown by the letter from the local Chief. The Applicant contended that upon obtaining the Grant, the Petitioner sold parcel No B2 Yatta/Kangonde/27 and that from the records of the Lands office at Kitui, she was the person who transferred the land to Marbic Company Ltd who are the current registered owners of the said land. He attached a copy of a search certificate dated 30/3/15 showing the land was transferred and Title Deed issued to Marbic Company Ltd on 5/3/2015, as well as a copy of the transfer form.

According to the Applicant, their mother had no land to give away to any one as the property belonged to the Deceased, and that the said Succession was in respect of the Estate of the Deceased and no beneficiary had a preference over the others and none of the other properties has ever been distributed to any one .

The Response

The Petitioner filed a replying affidavit she swore on 2nd June 2016 in response to the Applicant's application. The Petitioner admitted that the deceased left behind seven children as listed in the Chief letter annexed by the Applicant. However, she denied being fraudulent when she processed the grant and letters of administration of her late father, for the reasons that she had the original copy of her father's death certificate and copy of his national identity card that were given to her by their late mother in presence of all the family members before she died; she visited the offices of their area Chief and explained to him about her inheritance namely the property known as Yatta B2 /Kangonde/27; and that the said Chief issued her with a letters relating only to the said property which was given to her by her late mother in presence of her siblings.

Lastly, that she filed the petition No. 170 of 2014 in Court, and the said petition was advertised in the Kenya Gazette No. 2537 on of 19th September 2014 for a period of 30 days, and nobody objected or showed up in court to file their papers from her family because they knew the property belonged to her.

The Petitioner averred that her husband was very sick at the time and she needed to transfer the property to and be paid by Marbic Company Limited to take her husband for treatment in India, but that he died on 23rd February 2015. She annexed his burial permit . Further, that she did not need the consent of the other family members because she was pursuing a property which belonged to her, and not the other properties of the deceased. She further stated that upon processing the confirmed grant she transferred the property to Marbic Company Limited.

The Petitioner also averred that she did not commit any fraud at the lands office when she obtained a discharge of charge of the property known as Yatta B2/Kangode/27 and followed due diligence. She also alleged that the Applicant was distributing the other properties of the Deceased to third parties, and had failed to process the grant and confirmation of the Deceased estate since 1997 to date which is more than 18 years.

Marbic Company Limited applied to be joined as an Interested Party herein, and its Director, Martin Mutisya Muthengi, filed a replying affidavit to the application on 15th March 2016. He stated that the Interested Party is the registered owner of the parcel of land known as Yatta B2/Kangode/27. Further, that the execution of the transfer in relation to the said parcel of land was done by a personal representative of the deceased namely the Petitioner on 29th of January 2015, after the directors of the Interested Party satisfied themselves that a certificate of confirmation of grant had been issued by the court on the 3rd December 2015. The Interested Party detailed out the processes leading to its registration as owner of the said property.

The Issues and Determination

The Court at the hearing on 6th October 2016 directed that the Applicant's summons be heard and disposed of by way of written submissions. M.M. Rungare Advocates, the Advocates for the Applicants filed submissions dated 18th October 2016, Muttisya & Company Advocates for the Respondents filed submissions dated 7th November 2017, while the Advocates for the Interested Party, Mutuku Wambua &

Associates filed submissions dated 8th December 2016.

I have read and carefully considered the pleadings and submissions made by the Applicant, Petitioner and Interested Party. The issues to be decided are whether the confirmed grant issued to the Petitioner should be revoked and whether the Interested Party is entitled to the property known as Yatta B2/ Kangonde/27. The Applicant asks for revocation of the grant on account of fraudulent non-disclosure of the Deceased's beneficiaries and properties in the Petition for grant. The Petitioner admits that she did not include the other beneficiaries in the said petition, as she was given the subject property by her mother.

The Applicant submitted that the law governing the process of applying for grants of representation is Sections 51 the Law of Succession Act and rule 7 of the Probate and Administration Rules which state the information that ought to be disclosed at this stage. Reliance was placed on section 51(2) (g) and rule 7 (1) (e) of the Probate and Administration Rules for an application where the deceased died intestate.

It was further submitted that the fact that the Interested Party herein was willing to have the property transferred at the transmission stage displays dishonesty, and the transfer did not go through the Land Control Board for consent as should be the case if there was any sale. Further, that the Interested Party has not shown by way of documents how and why the land was transferred to them, and no copy of an agreement has been filed in this cause to show they were buyers and nor receipts for stamp duty paid at the transfer. Therefore, that the transmission was illegal as the interested party is not a beneficiary in terms of section 29 of the Succession Act, and this transaction only adds to the fraud committed in this cause.

Lastly, it was submitted by the Applicant that once the grant was obtained through misleading information, whatever came out of it in terms of transactions should also be considered illegal. Further, that the Respondent did not have the legal interest, having obtained the grant through fraud, she therefore had none to pass on to anyone and any transaction subsequently carried out thereafter cannot be validated as the same was void *ab initio*. Reliance was placed on the decisions by the Court of Appeal sitting in Kisumu in **Benson Manani Mahinye vs Waiganagana A. Kendi (2016) e KLR** and **Kenneth Litiswa Asega vs Alice Muhonja (2016) e KLR**.

The Petitioner on her part submitted that the property Yatta B2 / Kangonde/ 27 is not available for distribution among the beneficiaries, since it is a gift *inter vivos*, and relied on the case of **Harrison Kariuki Maina vs Robinson Gathii Maina & Others [2016] eKLR**, where the court held that a gift *inter vivos* does not form part of the estate of the deceased which is available for distribution. The Petitioner claimed that the Deceased had given her part of the estate as a gift during his lifetime.

The Interested Party on its part submitted that owing to the undisputed fact that the Petitioner's husband was unwell and that the Petitioner needed money urgently to pay the hospital bills, the transfer herein was done by way of transmission and no stamp duty was payable as the process would have taken longer if the subject property was transferred to the Petitioner and then to interested party. Further, that the stamp duty in respect to the discharge of charge was the only stamp duty payable and the same was paid.

It was also contended by the Interested Party that the Applicant did not allege any fraud on its part, and it was an innocent purchaser for value with no notice of any defect, and as such the transaction between the Petitioner and the Interested Party is a protected transaction under section 92 and 93 of the Succession Act. Reliance was placed on the decision in **Salim Yusuf Mohamed & Another vs Nabhan Swaleh Salim & 2 Others (2012) e KLR**.

I am guided in my determination by the grounds for revocation of a grant that are 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.”**

It is evident in the present application that the proceedings by the Petitioner did not conform with the procedure required to be followed in applying for grant of representation of the estate of a deceased person. Section 51 of the Law of Succession Act provides as follows in this regard:

- 1) Every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.**
- (2) Every application shall include information as to—**
 - (a) the full names of the deceased;**
 - (b) the date and place of his death;**
 - (c) his last known place of residence;**
 - (d) the relationship (if any) of the applicant to the deceased;**
 - (e) whether or not the deceased left a valid will;**
 - (f) the present addresses of any executors appointed by any such valid will;**
 - (g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;**
 - (h) a full inventory of all the assets and liabilities of the deceased; and**
 - (i) such other matters as may be prescribed.**
- (3) Where it is alleged in an application that the deceased left a valid will—**
 - (a) if it was written, the original will shall be annexed to the application, or if it is**

alleged to have been lost, or destroyed otherwise than by way of revocation, or if for any other reason the original cannot be produced, then either—

(i) an authenticated copy thereof shall be so annexed; or

(ii) the names and addresses of all persons alleged to be able to prove its contents shall be stated in the application;

(b) if it was oral, the names and addresses of all alleged witnesses shall be stated in the application.

(4) No omission of any information from an application shall affect the power of the court to entertain the application.

In addition Rule 7(1) of the Probate and Administration Rules reiterates the procedure to be followed and details to be provided as follows:

(1) Subject to the provisions of subrule (9), where an applicant seeks a grant of representation to the estate of a deceased person to whose estate no grant or no grant other than one under section 49 or a limited grant under section 67 of the Act has been made, the application shall be by petition in the appropriate Form supported by an affidavit in one of Forms 3 to 6 as appropriate containing, so far as they may be within the knowledge of the applicant, the following particulars—

(a) the full names of the deceased;

(b) the date and place of his death, his last known place of residence, and his domicile at date of death;

(c) whether he died testate or intestate and, if testate, whether his last will was written or oral, and the place where and the date upon which it was made;

(d) a full inventory of all his assets and liabilities at the date of his death (including such, if any, as may have arisen or become known since that date) together with an estimate of the value of his assets movable and immovable and his liabilities;

(e) in cases of total or partial intestacy—

(i) the names, addresses, marital state and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving spouse or child, like particulars of such person or persons who would succeed in accordance with section 39(1) of the Act;

(ii) whether any and if so which of those persons is under the age of eighteen years or is suffering from any mental disorder, and, if so, details of it;

(iii) for the purposes of determining the degree of consanguinity reference shall be made to the table set out in the Second Schedule;

(f) the relationship (if any) which the applicant bore to the deceased or the capacity in which he claims;

(g) if the deceased died testate leaving a written will, the names and present addresses of any executors named therein; and

(h) the postal and residential addresses of the applicant.

The requirements as to giving of consent to an application for grant of administration intestate by any Applicant are found in Rule 7(7) of the Probate and Administration Rules as follows:

“(7) Where a person who is not a person in the order of preference set out in section 66 of the Act seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has—

(a) renounced his right generally to apply for a grant; or

(b) consented in writing to the making of the grant to the applicant; or

(c) been issued with a citation calling upon him either to renounce such right or to apply for a grant.”

Rule 26 of the said Rules in addition requires notice to, and consent by all persons entitled to a grant in equality or priority to the Applicant as follows:

“(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

(3) Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree.”

I have perused the Affidavit in support for the Petition for grant which was filed in Succession Cause No. 170 of 2014 in the Kitui Chief Magistrate’s Court on 21st August 2014 and which was attached by the Applicant as an Annexure to his supporting affidavit, and note that the Petitioner indicated that she was sole beneficiary of the Deceased and listed the property known as Yatta B2/ Kangonde/27 as the only asset of the deceased.

The Petitioner in addition did not provide the consent of the other beneficiaries as required by law, and did not provide any evidence of any will or other document in which she was bequeathed the said property or given as a gift by the Deceased. The rules as to intestacy succession therefore applied with respect to the said property which she clearly did not observe. The said grant is therefore subject to revocation in the circumstances pursuant to section 76 of the Law of Succession Act, for reasons of defective proceedings and non-disclosure and misrepresentation as to the Deceased’s beneficiaries and assets.

In addition the issue as to whether the property known as Yatta B2/ Kangonde/27 was gifted to the Petitioner or not, and the ascertainment and identification of the Petitioner’s share in this regard can only be decided upon during confirmation proceedings after all the applicable procedures have been observed, as provided by section 71 of the Law of Succession Act.

As regards whether the Interested Party’s interest in the parcel of land known as Yatta B2/ Kangonde/27 is protected under section 92 and 93 of the Law of Succession Act, I note that the section 92(1) of the Act provide as follows;

(1) Every person making or permitting to be made any payment or disposition in good faith

under a grant of representation shall be indemnified and protected in so doing, notwithstanding any defects or circumstances whatsoever affecting the validity of the grant.

Section 93 on the other hand makes the following provisions as regards the validity of a transfer upon revocation of a grant:

(1) All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.

(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.

However, these provisions must be read in light of the provisions of section 55 of the Law of Succession Act which provides as follows with regard to disposition of capital assets of a deceased person's estate:

“(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.

(2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.”

This position is reinforced by section 82(b)(ii) of the Act which provides that no immovable property shall be sold before confirmation of the grant.

It is not in dispute that the property known as Yatta B2/ Kangonde/27 was registered in the deceased's name as at the time of his death, and evidence of such registration was brought by the Applicant. The confirmed grant dated 3rd December 2014 showed in the schedule of distribution that the property known as Yatta B2/ Kangonde/27 was to be wholly transmitted to Marbic Company Ltd Nairobi, the Interested Party herein.

Such a transmission and distribution in an intestate succession can only happen if the Interested Party was a purchaser or creditor of the deceased, as it was not a dependant as defined by section 29 of the Law of Succession Act. No evidence that the Interested Party was such a purchaser or creditor of the Deceased was availed by the Petitioner. All the evidence provided by the Interested Party as to its acquisition of its interest in Yatta B2/ Kangonde/27 were documents entered into with the Petitioner after the said transmission, and it is my view that they do not legalize the irregular transmission.

Since the grant issued to the Petitioner had not been confirmed at the time of the proposal to transmit the property known Yatta B2/ Kangonde/27 to the Interested Party was made during the confirmation proceedings, I do not find that the transfer to the Interested Party was made in good faith, neither was the Interested Party a purchaser for value without notice. Lastly, I agree with the position stated by the Court of Appeal in in Benson Manani Mahinye vs Waiganagana A. Kendi (2016) e KLR and Kenneth Litiswa Asega vs Alice Muhonja (2016) e KLR that section 93(1) of the Law of Succession Act protects transfer of an interest which is validly acquired, and not one that is acquired by fraud or misrepresentation as was the case by the Petitioner.

The Applicant's summons for revocation of grant dated 16th April 2015 is therefore found to have merit. This Court accordingly orders as follows pursuant to section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules:

1. The grant of letters of administration intestate issued to Doris Kanini Mbuvi on 23rd October 2014 in Succession Cause No. 170 of 2014 at the Chief Magistrate's Court at Kitui with respect to the estate of Mbubi Ndunda (Deceased), be and is hereby revoked.
2. The Certificate of Confirmation of a grant issued to Doris Kanini Mbuvi on 3rd December 2014 in Succession Cause No. 170 of 2014 at the Chief Magistrate's Court at Kitui with respect to the estate of Mbubi Ndunda (Deceased), be and is hereby revoked.
3. Any distribution, transfers and dispositions of any kind to and/or by Doris Kanini Mbuvi of the deceased's Mbubi Ndunda's property known as Yatta B2/ Kangonde/27, and any other subsequent dealings with the said properties be and are hereby declared unlawful and null and void, are revoked and shall be cancelled forthwith.
4. The beneficiaries of the estate of Mbubi Ndunda (Deceased), shall apply afresh for grant of representation with respect to the said estate within 90 days of the date of this ruling, which fresh application shall comply fully section 51 of the Law of Succession Act and Rule 7 of the Probate and Administration Rules.
5. The *status quo* that shall obtain as regards the properties and assets belonging to the estate of Mbubi Ndunda (Deceased), pending the grant of representation shall be that the Applicant, Petitioner and Beneficiaries shall continue to be in possession and occupation of the properties and assets they currently occupy; and that the Applicant, Petitioner 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.
6. There shall be no order as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 6th day of March 2017.

P. NYAMWEYA

JUDGE