



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

SUCCESSION 431 OF 2009

IN THE MATTER OF THE ESTATE OF S O M (DECEASED)

BETWEEN

R A O.....OBJECTOR/RESPONDENT

VERSUS

L A O alias O.....PETITIONER/RESPONDENT

RULING

1. The deceased herein SOM died on 7th June 1999. The deceased had 2 wives namely MAO (hereinafter 1st house) whom divorced and married the applicant herein RA (hereinafter 2nd house). The deceased had 6 children with his said 1st wife namely;

- a) LAO (the respondent herein)
- b) ZA
- c) R A
- d) MA
- e) IA and
- f) VA

2. The applicant on the other hand had 3 children with the deceased namely;

- a) COO
- b) EOO
- c) HOO

3. Grant of representation to his estate was initially made to the applicant herein in Homa Bay SRMCC 112 of 2001 on 30th June 2008 and confirmed on 21st January 2009. The respondent herein however sought the revocation of the said grant and by an order made on 12th March 2010, the said grant was revoked and a fresh grant issued in joint names of the applicant and the respondent after which the court

ordered that both parties were at liberty to commence confirmation of grant proceedings. The respondent subsequently filed for and obtained certificate of confirmation of grant on 6th May 2011. It is the said confirmation of grant that has precipitated the instant application dated 26th January 2017.

Application

4. The application dated 26th January 2017 is brought under **Sections 29, 39, 40, 76 and 82 (d) of the Law of Succession Act and Rules 44, 49, 59 and 63 of the Probate and Administration Rules**. The applicant, RAO seeks the following orders:

a. Spent.

b. Spent.

c. Spent.

d. The Certificate of Confirmation of Grant issued on the 6th day of May 2011, at the instance of the respondent herein, be Revoked and /or annulled.

e. The Honourable court be pleased to rescind, annul and/or revoke the transfer and attendant registration of LR NO. KANYADA/KANYABALA/[particulars withheld] and LR NO. KAKSINGRI/KAGUTU/WAREGI/[particulars withheld] in the name of the Respondent and the Respondent's siblings, respectively.

f. The Register in respect of LR NO. KANYADA/KANYABALA/[particulars withheld] and LR NO. KAKSINGRI/KAGUTU/WAREGI/[particulars withheld], be rectified and the names of the Respondent and the Respondent's siblings, be rescinded and/or deleted therefrom and same do revert to the names of SOM.

g. The Respondent herein, do tender accounts in respect of the state of the Estate of SOM, the Deceased person herein, more particularly, the obtaining extent of the Administration so far taken.

h. Costs of the Application be borne by the Respondent.

5. The application is supported by the applicant's affidavit dated 26th January 2017, she deposes that the respondent did not notify her and the other beneficiaries of the estate of the deceased of the said confirmation of grant with a view to obtaining their consent to the proposed mode of distribution. She states that the respondent presented a slanted scheme of distribution which did not capture or address all the assets of the estate of the deceased, and further that the respondent proceeded to distribute **LR. NO. KANYADA/KANYABALA/[particulars withheld]** which had already been transferred to a third party pursuant to the earlier certificate of confirmation of grant issued on 21st January 2009. She attached a certificate of official search marked "**RAO6**" to her affidavit to show that the said property no longer formed part of the estate of the deceased.

6. She avers that the respondent presented a skewed mode of distribution that excluded some of the beneficiaries from benefitting from the deceased's death gratuity thereby disinheriting them from their rightful entitlement. She accuses the respondent of fraud and conspiracy with the provincial administration in a bid to process the death gratuity to the exclusion of herself and her children. She further avers that the confirmation proceedings and the subsequent issuance of the certificate of confirmation of grant on 6th May 2011 were substantially defective, unlawful, illegal and otherwise void *ab initio* thereby necessitating the issuance of the orders sought in this application.

7. The application was not opposed by the respondent herein despite proper service and when it came up for hearing ex parte on 27th January 2017, this court, differently constituted, granted the following interim

orders:

2. There be and is hereby granted an interim inhibition, restraining the Respondent from selling, leasing, charging, sub-dividing, alienating and/or in other way whatsoever and/or howsoever, dealing with LR NO. KANYADA/KANYABALA/[particulars withheld], LR NO. KANYADA/KANYABALA/[particulars withheld], LR NO. KANYADA/KANYABALA/[particulars withheld] and LR NO. KAKSINGRI/KAGUTU/WAREGI/[particulars withheld], respectively, which parcels of land formed and/or constitute the Estate of SOM, now deceased, pending the hearing and determination of the summons herein.

3. There be and is hereby granted an interim prohibitory order of injunction and/or Conservatory Order, restraining the respondent from alienating, charging, disposing of, selling and/or Appropriating the Assets of SOM, the Deceased herein, more particularly, LR NO. KANYADA/KANYABALA/[particulars withheld], LR NO. KANYADA/KANYABALA/[particulars withheld], LR NO. KANYADA/KANYABALA/[particulars withheld] and LR NO. KAKSINGRI/KAGUTU/WAREGI/[particulars withheld], respectively, as well as the Death Gratuity due and payable to the Estate of the Deceased from the Office of the President, in any manner whatsoever and/or howsoever, pending the hearing and determination of the Summons herein.

8. When the application came up for interpartes hearing before me on 8th February 2017, the respondent had not filed any replying affidavit or grounds of opposition and neither did the respondent, nor her advocates on record attend court on the said date despite proper service, thereby prompting the applicant to proceed with the hearing of the application in their absence.

9. At the hearing of the said application, Mr. Oguttu, advocate for the applicant, submitted that the summons for confirmation of grant filed by the respondent on 6th April 2011 was not served on the applicant or her counsel or other beneficiaries to the estate of the deceased and that as a result of the non-service, the applicant was denied the opportunity to react to the proposed mode of distribution in line with **Rule 41 (1) of the Probate and Administration Rules.**

10. It was the applicant's case that the instant application should be allowed so that the beneficiaries can go back to the drawing board and have a consensual mode of distribution or that an equitable mode of distribution be made by the court.

Determination

11. I have considered the instant application, and the submissions made by the applicant's counsel. I have noted that the application was not opposed by the respondent despite proper service. Rule 44, (1) and (2) of the Probate and Administration Rules provide as follows:

-“44. Revocation or annulment of grant

(1)-Where any person interested in the estate of the deceased seeks pursuant to the provisions of [section 76](#) of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that resident magistrate's registry.

(2)-There shall be filed with the summons an affidavit of the applicant in Form 14 for revocation or annulment identifying the cause and the grant and containing the following particulars so far as they are known to him—

(a)-whether the applicant seeks to have the grant revoked or annulled and the grounds and facts upon which the application is based; and

(b)-the extent to which the estate of the deceased has been or is believed to have been administered or to remain unadministered, together with any other material information.-

12. Section 76 of the Law of Succession Act on the other hand stipulates as follows on revocation of grant.

“76. Revocation or annulment of grant

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 order or allow; 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.”

13. In the instant case, the applicant contends that she was excluded from the confirmation of grant proceedings that led to the issuance of the certificate of confirmation of grant on 6th May 2011 that is the subject of this revocation application. This court is not satisfied that the applicant has made out a good case for revocation of the certificate of confirmation of grant issued on 6th May 2011, even though the respondent did not file any objection to the instant application for the following reasons:

14. Firstly, this court is at a loss as to where the respondent has been since 12th March 2010 when the court granted her and the respondent, joint letters of administration intestate. It would appear that the applicant herein, went to sleep as soon as she was appointed a co-administrator with the respondent only to wake up 7 years later to the realization that the grant had already been confirmed way back on 6th May 2011. The indolence and inactivity by the applicant in this case raises more questions than answers considering that she had previously also sought and obtained the confirmation of grant on 21st January 2009 before the same was revoked by the court on 12th March 2010. In effect therefore, this will be the second time that an application to revoke a certificate of confirmation of grant is being made in the same succession cause. The court takes a dim view and a great exception of the back and forth conduct of the parties in this case as it goes contrary to the well-hackneyed adage that litigation must come to an end.

15. Turning to the main gist of the applicant's application, she contends that that her house was totally excluded from the confirmation of grant proceedings thereby leading to a skewed mode of distribution which excluded some of the beneficiaries from benefitting from the estate of the deceased. The issues that arise from this application can therefore be broken down into two follows:

a) Whether the applicant and her children were excluded from the confirmation of grant proceedings.

b) Whether the mode of distribution was skewed and excluded some of the beneficiaries.

16. On the first issue, I have carefully perused the court file and record of the proceedings of 6th May 2011 when the grant was confirmed and I note that both the applicant and respondent were represented by their respective advocates at the time the grant was confirmed. To be specific, Mr. Ochoki advocate held a brief for Mr. Masese for the 1st administrator (applicant herein) while Miss Akunja appeared for the 2nd administrator (the respondent herein). The said confirmation of grant was done by consent of both advocates who appended their signatures to the consent order. I therefore find it to be an act of dishonesty on the part of the applicant turn around, almost 6 years after the grant was confirmed, and claim that she was not made aware of the application for confirmation of grant.

17. Furthermore a perusal of the impugned certificate of confirmation of grant shows that all the beneficiaries, including the applicant herein, have been catered for contrary to the applicant's contention that some beneficiaries had been left out of the distribution. The applicant's allegation that there was concealment of material facts or that some heirs were disinherited does not therefore hold any water in the face of proof that the confirmation was done by consent of both parties. As can be seen from the certificate of confirmation of grant, one can say that the said distribution was skewed in favour of the applicant's house and she should be the last person to complain since her house received the lion's share of the estate which was distributed as follows:

<u>Name Share</u>	<u>Description of Property</u>
1. RAO withheld] 0.63 Ha	L.P No. KAKSINGRI/KAGUTU WAREGI/[particulars (Jointly)
2. EOO (Minor) withheld] 0.63 Ha	L. P. No. KAKSINGRI/KAGUTU WAREGI/[particulars (Jointly- RAO to hold in trust)
3. MA withheld] 0.09 Ha	L. P. No. KANYADA/KANYABALA/[particulars (jointly tenants in common)
IA VA	
4. LAO withheld] 0.05Ha	L. P. No. KANYADA/KANYABALA/[particulars (Jointly- tenants in common)
RA ZA	

5. MA
Each 1/6

Death Gratuity from the Office of the President

IA

(R A. O to hold in trust for the minors)

COO

VA

EOO (minor)

HOO (Minor)

18. The circumstances under which the revocation of grant can be made are clearly set out in under **Section 76 Law of Succession Act which stipulates that** a grant can be revoked where there is evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law. A grant may also be revoked if the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate. See - **Matheka and Another v Matheka [2005] 1 KLR pg 456**. It may also be revoked if it can be shown to the Court that the person to whom the grant has been issued has failed to produce to the Court such inventory or account of administration as may be required.

19. In the instant case I find that the application dated 26th January 2017 does not satisfy the requirements of **Section 76 Law of Succession Act** to warrant the revocation of the grant herein. It is my considered opinion that allowing the application will not further the interests of this Estate but will instead scuttle and reverse the gains made by all the other beneficiaries including the respondent who have already set in motion efforts to actualise the realization of the mode of distribution that was agreed upon by both parties and are in the process of settling the deceased's estate.

20. **The applicant alleged that applications for registration in respect to LR. NO. KANYADA/KANYABALA/[particulars withheld] had been made to the land registrar as shown in annexure "DAO9". The applicant did not however prove that the said property had already been transferred to the new owners so as to warrant the granting of orders for the revocation or annulment of transfer and attendant registration sought in respect of LR.NO. [particulars withheld] or the rectification of the names of the respondent and her siblings so that the same can revert back to the name of the deceased. In any event, having found that the grant in question was confirmed by consent way back in 2011, I find that there is nothing wrong with each of the beneficiaries taking steps in secure the registration of the respective parcels of land allocated to them during the confirmation of grant.**

21. **In regard to the applicant's prayer that the respondent tenders accounts in respect to the deceased's estate, I find that no basis has been laid for the tendering of such accounts. No material has been placed before this court on which it can make orders for the tendering of accounts. Similarly, I find that the allegation that the respondent has embarked on partaking the entire death gratuity was farfetched because, as can be seen from the certificate of confirmation of grant, the respondent does not have any share in the death gratuity so as to entitle her to partake in the whole or part thereof. If anything, the death gratuity was shared equally between three children of each of the deceased's wives.**

22. **The respondent alleged that LR. NO. KANYADA/KANYABALA/[particulars withheld] belongs to a third party and therefore not part of the deceased's estate as shown in the certificate of official search marked "RAO6". A perusal of the said certificate shows that one JOO got the registration on 7th July 2011, long after the certificate of confirmation of grant issued to the applicant was revoked on 12th March 2010. In effect therefore, the transfer of the said parcel of land to the third party is itself questionable in view of the fact that the grant had then been revoked which means**

that the ownership of the land had then reverted back to the name of the deceased. It is my finding that the applicant is, under the above circumstances, not truthful with her claims before this court and can be said to be deliberately trying to mislead this court into ratifying an illegal transfer of the deceased person's property to a third party. I find that the transfer of LR. No. Kanyada/Kanyabala/[particulars withheld] to the third party is therefore null and void.

23. Having found that the confirmation of grant was on 6th May 2011 conducted in court by consent of both the applicant and respondent herein who were the joint administrators representing the two houses, and having found that no basis has been made for the granting of the prayers sought in the application dated 26th January, 2017, the order that commends itself to me is the order to dismiss the said application with no orders as to costs since the parties to this case are members of the same family. In the same vein, the interim orders issued on 27th January 2017 are hereby vacated.

24. It is so ordered.

25. Dated, signed and delivered in open court this 5th day of April, 2017

HON. W. A OKWANY

JUDGE

In the presence of:

- Mr. Nyamweya for the Applicant
- N/A for the Respondent
- Omwoyo: Court Clerk