



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1679 OF 2006

IN THE MATTER OF THE ESTATE OF JOSEPHINE MAGDALENA MOTION (DECEASED)

RULING

1. The application dated 8th October 2015 is brought at the instance of Heidi Jane Bird Judy. She would like the grant on record revoked, and orders made relating to Mombasa/Mainland South/Block 1/340, that it does not form part of the estate of the deceased and a declaration that it had devolved to the applicant by the principle of *jus accrescendi*. The respondent did not respond to the application on its merits, instead he raised a preliminary point of law, which I overruled on 26th October 2016. It had been directed on 19th November 2014 that the application would be disposed of on the basis of written submissions. The applicant complied with those directions by filing written submissions. I have perused through them and noted the arguments advanced.

2. Revocation of grants is provided for in section 76 of the Law of Succession Act, Cap 160, Laws of Kenya. A grant is liable for revocation on three general grounds. The first being that the process of obtaining the grant was defective, or founded on fraud or misrepresentation, or important matter had been concealed from the court. The second general ground relates to the process of administration of the estate. A grant would be revoked where the personal representative fails to apply for confirmation of grant within the time stipulated in the law, or fails to proceed diligently with the administration of the estate or fails to render accounts as and when ordered to by the court. The last ground would be where the grant has become useless and inoperative on account of changed circumstances, such as the death of a sole personal representative.

3. The application before me seeks revocation of the certificate of confirmation of grant issued to the administrator. My reading of section 76 is that the provision is only meant to deal with grants of representation. What is sought to be revoked is not a grant of representation, and therefore there is no jurisdiction in section 76 of the Law of Succession Act for me to revoke a certificate of confirmation of grant. A certificate of confirmation of grant is a formal order extracted from the orders made by the court at the confirmation of the grant. The certificate is not a grant of representation. It is not available for revocation under section 76 of the Act. A party aggrieved by the orders made by the court at confirmation should not mount an application for revocation of a certificate issued by the court confirming the grant, instead they should seek review or setting aside of the confirmation orders and the amendment or cancellation of the confirmation orders.

4. The applicant in the instant case appears to base her claim on two of the grounds. She appears to say that the personal representative obtained the grant while relying on false statements, to wit that Mombasa/Mainland South/Block 1/340 formed part of the estate of the deceased, while, in her view, it did not so form part of the estate. She also says that the administrator has neglected the same property by exposing it to wastage by disrepair.

5. Regarding the listing of an asset in the petition which does not form part of the estate, I should begin by stating that the mere listing of such a property cannot form a basis for revocation of a grant. It is not an allegation serious enough, in my view, to warrant revocation of the grant. In any event, in this case whether it forms part of the estate or not has not been determined. It is a moot point. It is a contested fact which the subject for determination in this application. In any case, the deceased died in 2007 and representation was granted in 2009. I wonder why the issue should arise so belatedly. I have noted from the record that the applicant filed another application in 2009 seeking revocation of the same grant, where she did not raise the issue of the listing of Mombasa/Mainland South/Block 1/340 as an asset in the estate. The problem of the listing can be addressed by simply having the property removed from the schedule of assets.

6. On the question of the administrator lacking diligence in administration, I note that the administrator is being accused of failing to take care of the same asset that she argues is not part of the estate. In my opinion, the applicant is blowing both hot and cold.

7. The applicant has invited me to declare that Mombasa/Mainland South/Block 1/340 does not form part of the estate of the deceased and that it devolved to the applicant by dint of the principle of *jus accrescendi*.

8. The declarations sought are an invitation to me to determine the ownership of the said property as between the estate and the applicant. I doubt whether I have the jurisdiction to make the declarations sought. I am being mindful of the provisions of Articles 162(2) and 165(5) of the Constitution, which state as follows:-

'162(2). Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to ... (b) the environment and occupation of, and title to, land.

165(5). The High Court shall not have jurisdiction in respect of matters ... (b) falling within the jurisdiction of the courts contemplated in Article 162(2).'

9. To my understanding, the declarations sought in the application before point to an issue of title to land. The applicant argues that Mombasa/Mainland South/Block 1/340 does not belong to the estate, but to her, the same having passed to her by the principle of *jus accrescendi*. Whether that is the case is not a matter that falls within my jurisdiction as a Judge sitting in the High Court. By virtue of Article 162(2) of the Constitution that is a matter for determination by the Environment and Land Court, and by virtue of Article 165(5) of the Constitution the High Court has no jurisdiction whatsoever over any matter that falls within the jurisdiction of the Environment and Land Court. I therefore have no jurisdiction to make the declarations sought.

10. The only order that I can make at this stage to give comfort to the applicant, is order that the said property be removed, temporarily, from the schedule of the assets of the estate to await determination by the Environment and Land Court of the question that the applicant has raised in the instant application. I note that the grant was confirmed on 17th May 2010, Mombasa/Mainland South/Block 1/340 is to be shared equally between the applicant and another. The said property should ideally be removed from the schedule in the certificate of confirmation of grant dated 17th May 2010.

11. The orders that I am persuaded to make in the end are: -

(a) That prayer 1 of the application dated 8th October 2013 is hereby disallowed and dismissed;

(b) That I declare that this court has no jurisdiction to grant the orders sought in prayers 2 and 3 of the application;

(c) That the applicant is hereby granted 366 days to file and prosecute a suit at the Environment and Land Court for the declarations sought in prayers 2 and 3 of the instant

application and, should she obtain favourable orders from that court, move this court for review of the confirmation orders and amendment of the certificate of the confirmation of grant herein; and

(d) That in the meantime, the certificate of confirmation of grant dated 17th May 2010 shall be amended to remove Mombasa/Mainland South/Block 1/340 from schedule of assets for distribution.

DATED and SIGNED at NAIROBI this 3RD DAY OF MAY, 2017.

W. MUSYOKA

JUDGE

DELIVERED and SIGNED this 5TH DAY OF MAY, 2017.

M. MUIGAI

JUDGE