



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION CAUSE NO. 438 OF 2012

IN THE MATTER OF THE ESTATE OF JAYANTIBHAI RAMBHAJI PATEL (DECEASED)

ASHOK KUMAR RAMBHAJI PATEL OBJECTOR/APPLICANT

VERSUS

SACHINKUMAR JAYANTIBHAI PATEL

ANUPKUMAR JAYANTIBHAI PATEL PETITIONERS/RESPONDENTS

JUDGMENT

The deceased to whose estate these proceedings relate is Jayantibhai Rambhai Patel who died on 29th October 2011 at Central Middlesex Hospital Park Royal Action Lane London. A Grant of Probate of written will were on 2nd October 2012 issued to his two sons Sachinkumar Jayantibhai Patel and Anupkumar Jayantibhai Patel both of Kisumu.

That Grant was confirmed on 16th July 2014 and the estate of the deceased bequeathed to the two sons in equal shares as follows:-

NAME	DESCRIPTION OF PROPERTY	SHARE OF HEIRS
SACHINKUMAR JAYANTIBHAI PATEL	KISUMU/MUNICIPALITY BLOCK 10/498	EQUAL SHARES
ANUPKUMAR JAYANTIBHAI PATEL	KISUMU/MUNICIPALITY BLOCK 10/499	EQUAL SHARES
	KISUMU/ MUNICIPALITY BLOCK 8/102	EQUAL SHARES
	MONEY HELD AT PRIME BANK (KISUMU	

		EQUAL SHARES
	BRANCH) A/C NO. 601272	
	MONEY HELD AT BANK OF BARODA (KISUMU BRANCH) A/C NO.95850200000074	EQUAL SHARES
	TAX REFUND BENEFITS FROM FOAMAT SUPERMARKET LIMITED PIN NO. P000627116P	
	TAX REFUND BENEFITS PERSONAL PIN NO. A000202836D	EQUAL SHARES
		EQUAL SHARES

This according to the two sons who are also named as executors and trustees in the will was in accordance with their father's will. A certificate of confirmation was issued.

By summons dated 9th October 2014 Ashok Kumar Rambhai Patel applied for revocation of the grant on the following grounds:-

a) The grant was obtained fraudulently by making of a false statement and concealment of material facts that the applicant has a share in the deceased properties.

b) The grant was obtained by means of untrue allegations of fact essential on point of law to justify the grant.

c) The Objector's share was fraudulently taken away by the deceased.

In his supporting affidavit sworn on 9th October 2014 the applicant deposed that the deceased herein was his brother and that together they were the registered proprietors in common of two plots **Kisumu Municipality/Block 8/498** and **499** whose certificates of lease were at all material times in the custody of the deceased, as he himself had immigrated to Perth in Western Austria. That he was surprised while he was in Kenya for the deceased's funeral to learn that there were documents indicating that he had surrendered and transferred his share of those properties to the deceased and that the deceased had then purported to bequeath the two properties to his two sons in equal shares and the properties were now registered in their names. That to protect his interest he filed 2 suits in the Land Court being **Kisumu ELC No. 14 of 2012** and **Kisumu ELC No. 14 of 2014** which are still pending.

He further deposed that he also owns one third share in **Kisumu Municipality/Block 8/102** whose other proprietors are the deceased and their elder brother Suryakant R. Patel yet the whole parcel

has now been given to the

respondents in equal shares which would not have happened had this been brought to the attention of the Court. He has annexed several documents to support his depositions and has urged this Court to revoke the grant.

Through a replying affidavit sworn on 25th May 2015 by Anupkumar Jayantibhai Patel, 2nd Respondent, the Respondents state:- that the objection proceedings are misconceived and premised on wrong interpretation of the law and only intended to vex them; that they together with their mother are the only survivors of the deceased hence his true dependants and were rightly given letters of administration; that their father had in his will dated 26th November 2010 clearly expressed his wishes and the Objector who is their uncle is not a beneficiary therein; that **Kisumu Municipality Block 10/498 and 499** were long registered in their names and that of their mother on 22nd March 2007 even before the deceased died; That the two properties were among properties held in common by the Objector and the deceased who operated a business in partnership and that they had mutually agreed to share the properties so that the deceased got **Block 10/498 and 10/499** wherein his matrimonial home was situate while the Objector took **Block 8/222** where he had his matrimonial home. They also state that upon their father's death their uncle (the Objector) illegally and using unorthodox means had some of the properties registered in his own name and this is the subject of **ELC Case NO. 14 of 2012**; that the Objector also filed **ELC No. 220 of 2014** and as such this is the third forum where the Objector is raising the issue of **Block 10/498 and 10/499**. At paragraph 18 they reiterate that as at the time the deceased died the only properties the deceased held jointly with the Objector were **Kisumu Municipality Block 8/102 and 7/387**. At paragraph 21 they state that in respect of **Block 8/102** they do acknowledge that the deceased only owned one third share and at paragraph 22 they declare that their only interest in that property is the one third share owned by their father, the deceased. At paragraph

23 they contend that the confirmed grant only bequeathed to them the share due to their father. They dispute that they made any fraudulent statements or concealed any material fact and accused the Objector of selfishly trying to grab his brother's estate and leave them destitute. They urge this Court to strike out the summons with costs.

The summons were canvassed by way of written submissions. Those submissions have been considered fully alongside the affidavits and annexures thereto.

The grounds upon which a grant, whether or not confirmed, can be revoked are set out under Section 76 of the Law of Succession Act which states:-

"76. 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."

The respondents dispute that any of those grounds were proved and indeed I agree. The deceased herein died testate and the two respondents are his executors named in his will dated 26th November 2010. None of them renounced the executorship and were therefore the proper persons to be issued with the letters of administration. There is therefore no reasonable ground upon which to revoke the grant of probate of written will issued by this Court on 3rd October 2012. Be that as it may I do find that there are sufficient grounds to interfere and/or revoke the resultant certificate of confirmation issued on 13th August 2013 and rectified on 16th July 2014. Certain facts have been laid bare by the respondents. First; that **Kisumu Municipality/Block 498** and **Kisumu Municipality/Block 499** were not wholly in the name of the deceased by the time he died. It is their contention and they have annexed certificates of leases as proof that those two properties were registered in the names of their father, their mother and themselves as tenants in common and that on 21st March 2007. Section 3(1) of the Law of Succession Act defines "**estate**" as the "**free property**" of a deceased person. "Free property" is then defined as:-

"In relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death."

Going by these definition of estate and free property and even were we to assume they were lawfully transferred to the deceased, his wife and the two respondents which we are not the correct forum to determine, it becomes clear that they did not entirely form the estate of the deceased. Section 91(5) of the Land Registration Act provides that a tenancy in common entitles one only to his undivided share and further that upon their death that share shall be treated as part of their estate. Nevertheless the two Administrators did not in their affidavit in support of the summons for confirmation of the grant bring this common proprietorship to the attention of the Court and it ended up bequeathing the two properties entirely to the two respondents in equal shares which means that even their mother who they claim was a tenant in common together with themselves and the deceased was also excluded. Why did they include these two properties without indicating that what was in issue was only the share of their father with who they were tenants in common? The other shares were "already theirs" and there was no necessity for succession proceedings in respect of those. The certificate of confirmation shows they succeeded the entire property in equal shares which should not have been the case.

It is also clear from their own annexures (see annexure "APS5a") and paragraph 14 of the replying affidavit that even before filing this cause these two properties were the subject of litigation between them and the Objector and they ought to have brought this to the attention of the Court that confirmed the grant. The application to amend/rectify the grant to which they refer in their affidavit was only in regard to monies that had been left out but not to clarify the proportion of the estate for which they were seeking confirmation. The amended certificate therefore gave a description of the property as one which can only be discerned as the whole which means that the two respondents

inherited the whole of those two properties in equal shares. As I have stated that was an error as even going by their own testimony they could only bring to Court that portion that was due to their father and should not have disposed their mother of her share. Secondly the two parcels of land was

already the subject of litigation in the land Court and the Court's decision thereon ought to have been awaited before including them in the summons for confirmation of the grant which as I have stated was rightfully issued to the administrators.

As for **Kisumu Municipality Block 8/102** they admit they were only entitled to inherit the one

third share due to their father. This again was not reflected in their summons for confirmation yet it is legally the position. Accordingly I find that the certificate of confirmation must be rectified so as to reflect that the two Administrators are to inherit only a one third share of **Kisumu/Municipality Block 8/102** in equal shares and secondly that confirmation in respect of **Kisumu/Municipality Block 10/498** and **Kisumu/Municipality Block 10/499** shall be held in abeyance pending the hearing and determination of the two cases before the Environment and Land Court.

Regarding costs this Court finds that as this is a family matter each party shall bear their own costs. It is so ordered.

Signed, dated and delivered at Kisumu this ...3rd.. day of ...February.. 2016

E. N. MAINA

JUDGE

In the presence of:-

Mr. Odeny for Objector/Applicant

Mr. Olel for Petitioners/Respondents

Sachinkumar Jayantibhai Patel

CC: Felix Magutu