



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. H.C. 121 OF 2010

IN THE MATTER OF THE ESTATE ON NANCY NJERI KANYORO (DECEASED)

Martin Maina Ndegwa.....Applicant

versus

Charles Thiongo Kanyoro.....1<sup>ST</sup> Respondent/ Petitioner

Stephen Mwangi Kanyoro.....2<sup>nd</sup> Respondent

Cecilia Waithegeni Kanyoro.....3<sup>rd</sup> Respondent

Charles Maina Kanyina.....4<sup>th</sup> Respondent

**RULING**

By way of a summons dated 7<sup>th</sup> January 2016 expressed under the provisions of Section 76 of the Law of Succession Act, [1] and Rule 44 of the Probate and Administration Rules, **Martin Maina Ndegwa** (hereinafter referred to as the applicant) moved this court seeking orders *inter alia* that:-

- i. *That this honourable court be pleased to issue an order of preservation of the estate of Nancy Neri Kanyoro (deceased) comprising of Land Parcel number **Thengenge/Karia/1712** pending hearing and determination of the Summons for Revocation of Grant dated 7<sup>th</sup> January 2016.*
- ii. *That this honourable court be pleased to grant a stay of execution of the orders issued on 14<sup>th</sup> December 2015 pending hearing and determination of the summons for revocation of grant dated 7<sup>th</sup> January 2016.*
- iii. *That this honourable court be pleased to set aside the orders of 14<sup>th</sup> December 2015.*

The application is grounded on the annexed affidavit of the applicant sworn on 7<sup>th</sup> January 2016 whereby the applicant avers *inter alia* as follows:-

- i. *That his mother now deceased a one **Priscilla Wangechi Ndegwa** is a daughter to the deceased and a sister to **Charles Thiongo Kanyoro, Stephen Mwangi Kanyoro and Cecilia Waithegeni Kanyoro** the first, second and third Respondents in this application.*
- ii. *That the applicant has filed summons for the revocation of grant issued in this cause on grounds that his foresaid mothers signature was forged in the petition for letters of administration, that his mother was excluded in the distribution of the deceased's estate, and that a one **Charles Kanyina Maina**, the fourth respondent to this application a stranger to the family was included in the distribution yet he is not a child of the deceased or a beneficiary as envisaged under the law.*
- iii. *That neither himself or his siblings were included in the proceedings after his mothers demise to enable them benefit from their mothers share/interest in the estate of the deceased.*

- iv. That the grant of letters of administration in this cause was made to the first and second respondents **Charles Thiongo Kanyoro** and **Stephen Mwangi Kanyoro** and confirmed on 22<sup>nd</sup> July 2015.
- v. That the orders granted herein on 14<sup>th</sup> December 2015 be set aside because the application for revocation has high chances of success and if the orders sought herein are not granted the said application will be rendered nugatory because the estate will be transmitted to the beneficiaries.
- vi. That at the time the grant was confirmed, the petitioner **Charles Thiongo Kanyoro** was not in court having been admitted in hospital, and that **Cecilia Waithigeni** was also not in court.
- vii. That the administrators including one of the beneficiaries had filed a consent dated seeking to take the application dated 15<sup>th</sup> September 2015 out of the days list but the said consent was not considered by the court.
- viii. That it would be in the interests of justice to allow the application.

In opposition to the application, **Charles Maina Kanyina** the fourth respondent herein filed a replying affidavit dated 20<sup>th</sup> January 2016 the crux of which is *inter alia* as follows:-

- i. That he is one of the beneficiaries in the certificate of confirmation of the grant dated 22<sup>nd</sup> July 2015 and that he came into this matter by virtue of the fact that one of the administrators', namely, **Charles Thiongo Kanyoro** sold to him a portion of land measuring 0.50 of an acre out of his entitlement in the said estate.
- ii. That the said co-administrator was a co-owner with the deceased and was within his right to sell the land since he owned half of the land with the deceased.
- iii. That the said **Charles Thiongo Kanyoro** appears to have ganged up with the rest of the family to deny him the said land.
- iv. That the applicant in this application is a mere proxy of the administrators who are bent on abusing the process to deprive him the said portion.
- v. That the applicants mother consented to the confirmation of the grant, that the applicant knew the existence of these proceedings at all material time, that there is open conspiracy by family members to defeat his rights, that he has been threatened by the protestor and asked to accept the money he paid, and that they have since repossessed the land and harvested his crops since November last year, that the clan recognized his interests way back on 2<sup>nd</sup> December 2012.
- vi. That there was no concealment of material facts and that he was present when **Priscilla Wangechi** the applicants mother denounced here interests to the estate and allowed the estate to be distributed as proposed by the administrator.

The first, second and third respondent did not file any replying affidavit or grounds of objection. The first respondent did not attend court though served and upon being satisfied that he was properly served, I allowed the application to proceed in his absence notwithstanding. The second and third respondents attended court and informed the court that they were not opposing the application now under consideration.

Counsel for the applicant adopted the applicants affidavit referred to above and further submitted as follows:-

- i. that the summons for revocation of grant have high chances of success, hence the need for orders of stay to preserve the estate and that the grant was obtained using forged documents.

- ii. *that the applicants mother died before the confirmation and this fact was not disclosed to the court, hence there was material non-disclosure.*
- iii. *that the fourth respondent **Charles Maina Kanyina** was not a beneficiary and that he claims to have obtained an interest by purchasing but the alleged transaction was a nullity and offends the provisions of Section 82 (b) (2) of the Law of Succession Act.[2]*
- iv. *that the deceased died in 2000 yet the alleged sale was in 2010, hence the impugned orders were obtained irregularly.*
- v. *that on the issue of the alleged joint ownership, counsel submitted that the deceased share had not been determined.*
- vi. *That the applicants mother was excluded from the grant and that the grant was confirmed pursuant to forged documents.*

Counsel for the fourth Respondent Mr. Theuri vehemently opposed the application describing it as a conspiracy to abuse court process and urged the court to examine the history of this case. That his client was a genuine purchaser having purchased 0.50 acres being part of the estate and that the land was registered in the joint names of the first respondent and the deceased and that the grant was confirmed properly and that the orders being stayed were granted pursuant to an application by the first respondent. The orders in question were seeking execution of the documents because the second respondent had refused to execute. That it was Stephen who attended court on the date the orders were granted and informed the court that the applicant was sick but nevertheless the court allowed the application. Having failed in the said application, Stephen now is using the present applicant in the present application to frustrate the process. Counsel further submitted that the application is geared to deny him the said parcel of land. Counsel insisted that the entire family was aware of the succession proceedings. Counsel insisted that in any event the first respondent in this application sold a portion of his share to the estate.

In reply, applicants counsel **Njeri Mukururi** submitted that the share of the land was undivided and therefore it had not been determined at the time the said share took place.

The main issue for determination is whether or not the applicant has established a good case to warrant the court to stay the orders made on 14<sup>th</sup> December 2015 pending the hearing and determination of the summons for revocation of grant now pending before this court.

Section 47 of the Law of Succession Act[3] enjoins the High Court to entertain any application and determine any dispute under the Law of Succession Act[4] and pronounce such decrees and make such orders therein as may be expedient. **Hayanga J** captured it well *in the mater of the estate of Mohamed Saleh Said Suleiman alias Mohamed Swaleh Sherman*[5] when he said that *"under Section 47 of the Law of Succession Act,[6] the court can make restraining orders with a view of protecting the estate from depletion."*

Further Rule 73 of the Probate and Administration Rules provides:-

*"73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."*

Rule 49 of the Probate and Administration Rules provides that:-

*"A person desiring to make an application to court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit"*

Rule 59 (1) provides that *"save where otherwise provided in these rules every application to the court or to a registry shall be brought in the form of a petition, caveat or summons as may be appropriate."*

Administration of estates is supervised by the courts. The design is to protect the interests of all persons who have a claim. The administrators' stand in a fiduciary position to the property and the persons entitled from the estate. They have to account for their activities.<sup>[7]</sup>

The fourth Respondent insists that he is a genuine purchaser for value having properly purchased the parcel of land in question from the first respondent and that he only purchased what belonged to the first respondent. Assuming for a moment that position is correct, Attached to the affidavit in support of the summons for the revocation of grant is a letter marked as exhibit two written by the first respondent addressed to the fourth respondent. The letter is entitled "*Revocation of Sale Agreement for Thegenge/Karia/1712*". Even though none of the advocates addressed the court on this key development, in my view, this is a crucial issue in that it amounts to cancellation of the agreement, the ground upon which the fourth respondent is standing in these proceedings. Certainly the said development raises pertinent legal issues as to the consequences of the said letter to the contract of sale. The said issues can only be answered effectively in a legal proceeding relating to the contractual obligations of the parties and not in these proceedings.

It is also said that the first Respondent co-owned the suit premises jointly with the deceased and that he sold to the fourth respondent a portion of his share. Counsel for the applicant insists that the respective shares of the said joint holding had not been determined and that the said persons held the land in undivided shares. Section 91 of the Land Registration Act<sup>[8]</sup> provides as follows:-

### **91. Meaning and incidents of co-tenancies**

(1) *In this Act, co-tenancy means the ownership of land by two or more persons in undivided shares and includes joint tenancy or tenancy in common.*

(2) *Except as otherwise provided in this Act, if two or more persons, not forming an association of persons under this Act or any other way which specifies the nature and content of the rights of the persons forming that association, own land together under a right specified by this section, they may be either joint tenants or tenants in common.*

(3)....

(4)...

(5) *If any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and on the death of a tenant, the deceased's share shall be treated as part of their estate.*

Upon the death of the deceased, her share was to be treated as part of her estate. There is nothing before the court to show that the deceased's share had been determined by the time of the alleged sale or even now. This raises the question whether or not anyone could legally sell, transfer or cause the property to be transferred or alienated before the grant was confirmed. The answer to this question lies in Section 45 of the Law of Succession Act which provides that:-

*45(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under the Act no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person"*

The section is clear that the *status quo* as at the time of the deceased's death ought to be maintained. The law requires that the deceased's persons' estate ought to be preserved as at the time of death. In the matter of the estate of *M'mugambi M'guoko alia Mugambi Gwoko alia Mugambi Guoko- Deceased*<sup>[9]</sup> **Makau J** held that the Petitioners acts in the said case of attempting to sell or selling the deceased's property to anyone was illegal, null and void for contravening section 45(1) cited above.

Even if we were to accept that the fourth Respondents purchased the said land, Section **82 (b) (ii)** of the Law of Succession Act provides that:-

*'No immovable property shall be sold before confirmation of Grant'*

Thus, the transaction offends both Section **45(1)** and Section **82 (b) (ii)** cited above. These are points of law which go to the root of the validity or otherwise of the said sale. Further, the above sections prohibit selling, disposing or otherwise intermeddling with a deceased estate.

Interpreting the section **45 (1)** cited above **Musyoka Jin the Estate of Veronica Njoki Wakagoto-Deceased**[\[10\]](#) had this to say:-

*"The effect of this is that the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation, and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence."*

As a general rule, an order for stay is a discretionary order and can only issue when the court seized of the matter has satisfied itself, on the basis of the evidence adduced, that the applicant stands to suffer irreparable loss and that the application is made without unreasonable delay. Stay of court orders or proceedings is a matter of judicial discretion to be exercised in the interests of justice. Such a discretion is unlimited save that by virtue of its character as a judicial discretion, it should be exercised rationally and not capriciously or whimsically.[\[11\]](#) The sole question is whether it is in the interest of justice to order stay of proceedings. The court is required to weigh the pros and cons of granting or not such an order.

The court must also be satisfied that the application for stay as filed within a reasonable time and without undue delay. In *Turbo Transporters Ltd vs Absalom Dova Lumbasi*, **Gikony J** emphasised the relevance of the duration between the impugned decision and the filing of the application for stay. On the other hand, the court must also consider the timing of the application in the broader context of the history of the case, and more particularly in light of the objective sought by the applicant in asking for stay. The advantages and disadvantages likely to follow upon the granting of the order must be weighed. If overall, and with regard to the divergent interests and considerations of convenience affecting the parties, it appears that the advantage would outweigh the disadvantages, then the court would normally grant the application.

The obligation of this court is to ensure that fairness and justice prevails, a view that was expressed by **Musinga J** in *Equity Bank Ltd vs West Link MBO Ltd*[\[12\]](#) when he observed as follows:-

*"Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure the ends of justice are met."*

I have also looked at the summons for revocation of grant and I am persuaded that it raises serious issues which need to be resolved by the court and in the event of the orders in question being enforced, the said application may be rendered nugatory. The applicant in the said application has alleged fraud and concealment of material facts. These are issues which need to be resolved at the hearing of the said application.

**E. A. Francis** in his book discussing[\[13\]](#) fraud observes *inter alia* as follows:-

*i. No definition is given, either by statute or judicial decision of what constitutes fraud, nor, it seems, is any such decision possible.*

*ii. Fraud, for the purposes of these provisions, must be actual and not constructive or equitable*

*fraud.*

*iii. Fraud must involve an element of dishonesty or moral Turpitude.*

In the case of *Assets Co Ltd vs Mere Roihi*<sup>[14]</sup> **Lord Lindley** stated as follows:-

*".....that by fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or equitable fraud-an unfortunate expression and one very apt misled, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud."*

After carefully examining the application for revocation of grant and the application before me, and upon analysing the law, authorities and submissions made by both parties, I find that the applicant has established sufficient grounds for the court to allow the application before me for the interests of justice. Accordingly I order as follows:-

1. *That an order of preservation of the estate of **Nancy Neri Kanyoro (deceased)** comprising of Land Parcel number **Thengenge/Karia/1712** be and is hereby issued and that the same shall remain in force pending hearing and determination of the Summons for Revocation of Grant dated 7<sup>th</sup> January 2016.*
2. *That the order of this court issued on 14<sup>th</sup> December 2015 be and is hereby stayed pending the hearing and determination of the summons for revocation of grant dated 7<sup>th</sup> January 2016.*
3. *That no orders as to costs.*

Right of appeal **30** days

Dated at Nyeri this **11<sup>th</sup>** day of **February** 2016

**John M. Mativo**

**Judge**

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[1] Cap 160, Laws of Kenya

[2] Ibid

[3] Cap 160 Laws of Kenya

[4] Ibid

[5] High Court Succ Cause No. 145 of 1998-Mombasa

[6] Supra

[7] See W. M. Musyoka, A casebook on the Law of Succession, Law Africa Publishing (K) Ltd

[8] Act No. 3 OF 2012

[9]{2011}eKLR

[10]High Court Succession Cause No. 1974 of 2008

[\[11\]](#) Global Tours Travel Ltd, Winding Up Cuse No. 43 of 2000

[\[12\]](#) Civil Appeal No. 78 of 2011

[\[13\]](#) "*The Law and Practice relating to Torrens Title in Australasia*" Volume 1, page 620

[\[14\]](#) {1905}A.C. 176 at Page 210