



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
SUCCESSION CAUSE NO.158 OF 2000

IN THE MATTER OF THE ESTATE OF KISIGWA ASUGA ASUGA-DECEASED

ALBERT IMBUGA KISIGWAPETITIONER

VERSUS

RECHO KAVAI KISIGWAOBJECTOR

RULING

1. **Recho Kawai Kisigwa** (the applicant) took out summons dated 30th May, 2012 and filed in court on 13th June, 2012 seeking revocation of Grant of representation made to **Albert Imbuga Kisigwa** on the grounds that the administrator has failed after due Notice to proceed diligently with the administration of the estate, that the administrator has engaged in fraudulent conduct aimed at disinheriting beneficiaries of the estate and that the administrator has forged a beneficiary's signature to aid in procuring a portion of **Parcel Number Maragoli/Kisatiru/924**.

2. The summons is supported by an affidavit sworn by the applicant on 31st May, 2012. The applicant deposed that during confirmation of grant, shares of all beneficiaries were ascertained to be equal. The applicant deposed that in 2009, she requested the administrator to show her her share on the ground but he declined. However, after intervention by other relatives she was shown a portion of 0.5 HA of an acre being **Parcel Number North Maragoli/Kitisuru/1861**. According to the applicant, although she paid surveyor's fees, subdivisions to the land were unequal. Later the administrator demanded that the applicant vacates the portion on which she had settled, something the applicant said was harassment and an indication that the administrator has failed to act diligently.

3. The petitioner/respondent, 2013, **Albert Imbuga Kisigwa** denied the objector's allegations and held the position that he had acted diligently as the administrator of the deceased's estate and had committed no wrong to warrant revocation of the grant.

4. Directions were given that the summons be disposed of by way of oral evidence. PW1, **Recho Kawai Kisigwa** told the court that she is widow to John, a son to the deceased, that her husband died on 22nd August, 1993, and thus she is a daughter-in-law to the deceased herein. According to the witness, her husband built a house where he had been shown by the deceased and that the land was to be sub-divided equally. The witness further told the court that everyone was to take where they occupy.

5. PW2, **Evans Mudoyo Chogo**, Assitant Chief of **Solong** sub-location told the court that he knew the deceased **Kisigwa Asuge**, and all his beneficiaries. The witness told the court that **Recho** (PW1) was wife

to late **John Kanyangi**, a son of the deceased, and that the two lived together at **Kavue** village. **Recho**, according to the witness, built a house after her husband's death. The witness told the court that **Recho** is a beneficiary of the deceased estate and that the deceased had shown his children where to build their homes before he died, although the land had not been sub-divided. The witness told the court that many of the deceased's children including **Recho**, put up houses following the deceased's act of showing them where to build.

The witness further testified that Albert prepared the mutation and now wants **Recho** to move away but has not shown her an alternative place.

6. PW3, **Arthur Saruya**, a grandson to the deceased told the court that his father **Philimon Kisigwa** died on 29th October, 2007. The witness testified that his late father's name was on the mutation form dated 23rd April, 2011. He however told the court that by the time the mutation was prepared his father was long dead and therefore could not have signed the mutation form. According to the witness, they were not involved in the succession case yet their father was deceased. He told the court that their father was buried where he had built a home. He therefore pleaded that the grant be revoked so that two administrators can be appointed to deal with the issue of distribution.

In cross examination, the witness admitted that the document (searches) shown to him had equal distribution of the land (0.18 HA each). He also admitted that during succession proceedings, his father was alive but did not know whether he raised any objections. He also admitted that no one had asked them to move from where they are staying.

7. DW1, **Albert Kisigwa** on his port told the court that the objector is his sister-in-law, that he obtained a grant of representation for the deceased's estate and had it confirmed and that he distributed the estate equally among all beneficiaries. The witness testified that the land was divided into six equal portions of 0.18 HA each after survey had been done. The witness denied that he had failed to diligently carry out his duties as the administrator. He further denied the objector's claim that she had been disinherited. The witness told the court that the objector was given **Parcel Number North Maragoli/Kisaliro/1863** measuring 0.18 HA. He denied allegations that he had forged the objector's signature during confirmation of Grant and distribution of the estates. The petitioner maintained that the surveyor performed his work subsequent to which titles came out for individual plots in the beneficiaries names. He further denied that he had attempted to evict the objector, only stating that the objector has infringed on **Edna Aguta's Parcel Number/1861**. According to the witness, the objector started construction while survey process was on. He maintained that he had no intention of evicting the objector and therefore did not know why he was in court.

8. In cross examination, the witness told the court that he gave the surveyor names of the beneficiaries as they were in the certificate of confirmation and it was the surveyor who entered them in the mutation forms and each beneficiary was allocated a portion of land. He in particular told the court that the objector owns **Parcel Number/1863**. He denied that the objector is living where her husband was buried and maintained that the subdivisions affected three beneficiaries who have to move. He denied any wrong doing saying that all other beneficiaries are satisfied except the objector who is the only person complaining.

9. Parties then filed written submissions which the court has considered. The objector's primary complaint is that the petitioner has failed to diligently administer the deceased's estate after due Notice. From the objector's evidence, I find her complaint to be that she has been allocated a parcel of land elsewhere than where she is residing. She is also aggrieved that her names on the title deed are misspelt. She has also alleged that her signature was forged in that she did not sign the mutation. For those reasons, she seeks to have the grant revoked and new administrators appointed by the court to complete the administration of the deceased's estate.

10. The petitioner has however maintained that he performed his duties diligently and distributed the estate as he was bound to by the certificate of confirmation. According to him, the objector started constructing the house while the process of sub-division was ongoing thus she finds herself on another

beneficiary's of parcel of land. The petitioner has held the position that according to the sub-divisions, three beneficiaries will be affected, the objection being one of them. However, only the objector is complaining. The petitioner denied forging signatures but admitted that some beneficiaries are dead but portions of land were registered in their names.

11. The power of the court to revoke a grant of representation whether confirmed or not is donated by **section 76** of the law of Succession Act The Act). Duties of an administrator are enumerated at **section 83** of the Act and one of the duties is to complete administration of the deceased's estate within six months from the date of confirmation of grant.

12. The deceased's estate herein involved a parcel of land which the personal representative was required to distribute. Distribution should be done in accordance with the certificate of confirmation of Grant which must contain identifies of beneficiaries and their respective shares in accordance with **section 71** of the Act.

13. Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not a discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke **section 76** and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice.

14. The objector has cited **section 76(d)(ii)** which provides that the court can revoke a grant where the person to whom the grant was made has failed, after due notice and without reasonable cause to proceed diligently with the administration of the estate. The objector has not indicated when notice was given to the petitioner requiring him to proceed diligently with the administration of the estate. The objector has admitted that the land was sub-divided but her complaint is that her name was mis-spelt and that she got a portion other than where she resides. She raises other complaints including where a name of a deceased beneficiary is appearing on the title deed.

15. I have perused the record and particularly the certificate of confirmation of Grant dated 7th August, 2007, which shows that the land was to be shared equally amongst all beneficiaries. The certificate of confirmation, has the name **Rachel Kanyangi**, which the objector says was mis-spelt. According to the petitioner, that is the objector's name. There is also PEx1'd', a search for **Parcel Number North Maragoli/Kisajiro/1863**, dated 4th October, 2012, which shows that the parcel is in the name of **Rachel Kanyangi**. The parcel measure 0.18 HA.

16. The certificate of confirmation has names of six (6) beneficiaries. There are also six (6) searches which show that all portions measure 0.18 HA. They are equal in size. I am therefore satisfied that the land was shared equally as per the certificate of confirmation and to that extent, the personal representative has lived up to his obligation under the certificate of confirmation.

17. It is also important to point out that a deceased's estate has to be shared to those named in the certificate of confirmation. In this case, the name in the certificate of confirmation is that of **Rachel Kanyangi**. There is also the name of **Philimona Sagala Kisigwa** who is said to be deceased. If indeed **Philimona** be deceased, it is upto the family of that particular deceased beneficiary to take a grant of representation of the beneficiary's estate and on being confirmed, approach the petitioner to seek a rectification of the grant, and give that share to the beneficiaries of the deceased beneficiary, otherwise, the share of that deceased beneficiary will remain in his name.

18. **Rachel Kanyangi** or **Recho Kavai Kasinga**, whichever is correct, can equally approach the petitioner to apply for rectification of the grant so that her name is corrected. In my respectful view, I do not think there is a reasonable ground under **section 76** to warrant a revocation of the grant, an act that will pull parties back in terms of concluding administration of the deceased's estate. The issues being raised can be delt without necessarily interfering with the grant of representation. Rectification would be the appropriate remedy.

19. The other concern raised by the objector is that she is threatened with eviction by the petitioner. She told the court that whereas she is settled on Parcel Number 1861, she is required to move to Parcel Number 1863 which is registered in the name of **Rachel Kanyangi**. The petitioner's answer is that there is no threat for eviction. He however told the court that the objector started constructing on the parcel of land when the process of subdivision was on going, and ended up finding herself on a parcel belonging to another beneficiary. Three people will be affected and have to relocate.

20. Whereas the objector has maintained that her family was shown where to construct and did actually construct on the portion shown to them, I note that this was not based on any measurement or precision, it was haphazard. Upon survey being done, obviously some people may have had to be affected on the ground if the parcels were to be equal in size. This does not, in my view, mean the objector is targeted as an individual. According to the petitioner, other beneficiaries are affected and for that reason, it is not the objector alone who finds herself in this situation..

21. If the objector feels she has some sentimental attachment to the place she has settled on and does not want to move, she could very well approach the other beneficiary and mutually agree to swap their parcels. This is something only the two of them can agree on and resolve. I do not think it can be blamed on the petitioner. Neither can the court force parties to swap parcels of land. It is a matter for them to mutually agree or decide what to do. It cannot in itself form a basis for revoking a grant of representation or cancellation of a certificate of confirmation of Grant where the administrator has complied with **section 71** of the Law of Succession Act by ascertaining beneficiaries and their respective shares in the estate.

22. The other point worth mentioning is the procedure adopted. The summons for revocation has been brought under **order 40 rules 1,2,3 and 4** of the Civil Procedure Rules and **sections 1A(1), 1B(1) and 3** of the court Procedure Act. **Order 40** deals with injunctions, while **sections 1A and 1B** deal with expeditious disposal of suits, otherwise known as the **Oxygen Rule**. Section 3 is on the inherent powers of the court.

23. Revocation of Grant is provided for under **section 76** of the Law of Succession Act and **rule 44** of the Probate and Administration Rules. Inherent powers of the court is found in **section 73** of the Act. The law of Succession Act and Rules made thereunder is a distinct legal regime governing succession matters. **Rule 63** of the Rules excludes application of Civil Procedure Act and Rules in succession matters except where the orders and rules are expressly allowed under **rule 63**. The sections and order cited by the objector are inapplicable in succession matters. This is a violation of **rule 63** of the Rules under the law of Succession Act.

However, that notwithstanding, my view of the matter is that there is no basis for revoking the grant. It is upto the applicant and other beneficiaries to seek rectification of the certificate of confirmation of Grant to correct any anomaly that there may be. This is not a case for revocation of Grant. Consequently, summons for revocation of Grant dated 30th May, 2012 is declined and dismissed. Each party do bear their own costs.

Dated and delivered at Kakamega this 15th day of November, 2016.

E.C. MWITA

JUDGE