



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO 337 OF 2011

IN THE MATTER OF THE ESTATE OF NICHOLAS MWIRIGIMURIUNGI (DECEASED)

ALEX MWENDA MWIRIGI.....APPLICANT

Versus

RODAH KARIMI JADIEL.....RESPONDENT

RULING

Setting aside confirmation

[1] The application dated 21st July 2014 is seeking for revocation of Grant issued to the Applicant and the Respondent. The application is expressed to be brought under section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules. It is supported by the affidavits of the Applicant and Martin Muriungi Muthara, who are son and father of the deceased, respectively.

[2] By way of directions given by the court on 14th October, 2014, this application was to be determined by way of viva voce evidence of the parties. The case was scheduled for hearing on several occasions but in all those occasions, the Respondent deliberately absented herself and sought for adjournment through her counsel. The court noted these tendencies and registered strong deprecation of the conduct. The matter was then set down for hearing on 30th August 2016; again the Respondent was absent and sought an adjournment through her counsel Mr B. G. Kariuki; after careful consideration the court declined the adjournment and ordered the case to be heard at 11.45am on the same day.

[3] Two witnesses testified; the Applicant and Ashford Kinoti Muriungi. Their evidence is already part of record and I will not rehash it except the important facts shall be discussed here. The Applicant reiterated that he is the son of the deceased and emphasized that the grant herein should be revoked and issued to him and his grandfather for reasons that;

- (1) He was not aware of the filing of this Petition;
- (2) He did not sign any of the papers purportedly signed by him and filed in the petition;
- (3) The Respondent left out some of the estate property; and
- (4) He had not fairly provided for in the distribution as he was given nothing.

Ashford who stated to be the brother of the deceased testified that:

- (1) The Applicant is the son of the deceased;
- (2) The Applicant's signature was forged by the Respondent;
- (3) The Respondent forged the Certificate of Death for the late mother of the Applicant and used it to collect the Kshs. 1,000,000 from the Pensions Department;
- (4) The Respondent did not pay fees for the Applicant but his grandfather did; and
- (5) The Respondent cannot be trusted as the administrator of the estate of the deceased.

For those reasons, he supported the revocation of the grant and prayed that a grant be made to the Applicant and the father of the deceased as joint administrators.

Respondent's replying affidavit

[4] Although the Respondent did not adduce oral evidence, she filed a Replying Affidavit sworn by her on 18th September, 2014. In the Affidavit, she denied all the accusations levelled against her by the Applicant and more specifically urged that:

- (1) The Applicant and the father of the deceased were aware of the filing of and these proceedings; indeed the father of the deceased was present when the letter by the chief was issued and he signed it;
- (2) The plots at Ruaraka namely L.R Plot NO 31/4/230 and Plot No 31/4/229 was her own and did not form part of the estate property;
- (3) The estate was fairly distributed to all the beneficiaries- including the Applicant- taking into consideration the needs of each beneficiary some of whom are minors;
- (4) The Respondent paid school fees for the Applicant;
- (5) She has not sold or threatened to sell any of the estate assets as alleged;
- (6) She is holding the assets in trust for her minor children;
- (7) She did not forge the signature of the Applicant as alleged; and
- (8) The Applicant is motivated by third parties to apply so that they can get a share in the estate property.

On those reasons, she asked the court not to revoke the grant herein or interfere with the distribution of the estate.

DETERMINATION

[5] I will not re-invent the wheel. This is an application for revocation of under Section 76 of the Law of Succession Act CAP 160 of the laws of Kenya and I only need to ask whether it satisfies the threshold provided in law? Given the arguments being presented, the most apt grounds to be met are, whether:

- (a) The proceedings to obtain the grant were defective in substance;*
- (b) 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; and*
- (c) 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.

[6] Upon consideration of all the facts of the case, the affidavit, oral and documentary evidence before me, I see three major arguments emerging, namely; (1) the Respondent forged the signatures of the Applicant in applying for grant of letters of administration; (2) the Applicant was not provided for at all; and (3) the Respondent concealed some of the assets of the deceased. The Respondent argued that the Applicant and his grandfather were aware of these proceedings and she gave the example of the presence of the father in law at the issuance of and signed the letter by the chief. Here, I must state that forgery is a very serious allegation and would require strict proof based on quite preponderant amount of evidence. But, none was adduced in this case. I expected some report to the police or investigation to have been afoot on that allegation. I will not, therefore, rely or make any finding on the allegation of forgery at this stage. That matter ends there for now.

[7] I move to the other grounds. The Applicant testified that he was not given anything in the distribution of the estate. But, simple perusal of the confirmed grant reveals that the Applicant and the Respondent were to share equally L.R NO NTIRIMITI SETTLEMENT SCHEME/832. It is not, therefore, true that he was not provided for completely. Perhaps the complaint would be that he was not adequately provided for. But, that will be for another day as shall become apparent in due course. The more robust grounds are two; that some estate properties were left out; and that she did not disclose receipt of dues from public trustee and pension from the pension department. I have perused the record and I see two agreements in respect of Ruaraka Plot No 229 and 230 dated 25th April, 2009 and 22nd April, 2009, respectively which were filed together with the Petition; both agreements are in the name of the deceased as the purchaser. But, for unknown reasons, the said plots were not listed as estate properties in paragraph 6 of form P & A 5 filed in support of the Petition. Also, there was no mention of the Pension or other death benefits due to the deceased. There is, however, every indication that death benefits and pension was paid to the Respondent; the basis of the payments was not disclosed and is still obscure to the court. On this fact, one thing is clear in law, that some death benefits may be subject to statutory nomination and are ordinarily paid to the nominee of the deceased and do not form part of the estate of the deceased. There is no direct information that these death benefits and pension were subject to statutory nomination. However, it is important to note that evidence was led by Ashford to the effect that the Respondent forged the death certificate of the late mother of the Applicant and used it to receive death benefits due upon the death of the deceased. Again, in the absence of such nomination, the more reason the court should be keen to know the status of the said benefits and whether they form part of the estate of deceased in this cause. In any case, such allegations as the ones I have heard are more critical if they are made against an administrator of the estate of the deceased; because, and needless to state that an administrator stands a special relationship with the beneficiaries and must always act in complete honesty and good faith. All the foregoing are robust grounds for revocation of a grant.

[8] I have said enough and I do not wish to say much about the above allegations in view of the orders I am about to make which will afford the court to carry out a more intense evaluation of the allegations in plenary trial. Upon my analysis above, placing the facts of this case on the legal scale, and for purposes of this application, I conclude that;

(a) The proceedings to obtain the grant were defective in substance;

(b) 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; and

(c) 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.

[9] Accordingly, and I stated this earlier, this case would have been a perfect candidate for revocation of the grant. However, I will take into account the unique circumstances of this case, to wit; (1) there are minors involved; (2) the Respondents and the Applicant are entitled to apply for a grant of representation; and (3) despite the allegations of forgery and other improprieties- which have not been proven- there is nothing substantial which would impeach the Respondent from becoming an administrator of the estate.

Therefore, I will not revoke the grant issued to both of them, instead in the exercise of my final discretion under section 66 of the Law of Succession Act, I shall retain the Applicant and the Respondent as joint administrators of the estate of the deceased, except that I hereby set aside the distribution of the estate for the reasons that there are legitimate allegations on schewed distribution as well as concealment of some properties of the estate which merit re-evaluation inter partes. Those matters will be unravelled in the hearing on distribution. As such, I also direct the Applicant within 30 days from today to file and serve his protest to distribution as stated in the application for confirmation dated 4th October, 2012. Upon such service, the Respondent shall file and serve her replies within 30 days thereof. By these orders the application dated 21st July 2014 is allowed to the extent I have specifically stated in my above orders. In the light of the orders I have issued, I will assign this case a date for directions.

Of costs

[10 As this case involves close family members, each party shall bear own costs of the application. It is so ordered.

Dated, signed and delivered in open court at Meru this 2nd day of November, 2016

F. GIKONYO

JUDGE

In the presence of:

Mr. Gikunda for applicant

Applicant- present

Respondent – absent

F. GIKONYO

JUDGE