



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISCELLANEOUS APPLICATION NO. 32 OF 2003

(IN THE MATTER OF THE ESTATE OF NJANJA KARITHE (DECEASED))

EVAN NGINYA.....1ST APPLICANT

JOSEPH KARIUKI.....2ND APPLICANT

VERSUS

ESTHER MUTHONI.....1ST RESPONDENT

ALFRED MUGANE.....2ND RESPONDENT

JOSEPHAT GACHOKI.....3RD RESPONDENT

RULING

The applicants filed a summons dated 30th day of January, 2003, for revocation or annulment of grant; it was filed in court on 19th February, 2003. According to the affidavit sworn by the first applicant in support of the summons, the grant which they sought to have revoked or annulled was in respect of the estate of the late Njanja Karithe who died in 1974. The grant was issued to the respondents on 22nd May, 1981, in Kerugoya Magistrates' Court Succession Cause No. 97 of 1978.

It is the applicant's contention that the succession cause was filed without their knowledge though they are the deceased's children and therefore had a stake in his estate.

When they learnt of the succession cause, they lodged a case at the Land Disputes Tribunal in the then Kirinyaga district, apparently to challenge the issue or confirmation of grant. It would appear that dispute was dismissed but that they appealed to the Provincial Land Disputes Appeals Committee which ruled that they could challenge the decision of the magistrates' court in the High Court. It is not clear from a copy of the ruling of the appeals committee when the decision was given but as noted they subsequently filed the summons for revocation of grant on 19th February, 2003.

In their summons, the applicants alleged that the grant was obtained fraudulently by the concealment from court of something material to the case, in particular, that the applicants were the deceased's sons and his survivors. They also contended that the proceedings to obtain the letters of administration were defective in substance in that the court did not satisfy itself as to the respective identities and shares of all persons beneficially entitled to the estate of the deceased.

The applicants also alleged that the certificate issued to the respondents did not specify all the persons beneficially entitled to the estate of the deceased and their respective shares. It was also their contention that the grant issued could not be made to the respondents because, as I understand them, they ranked first in priority of the persons to whom the grant could be made.

The record shows that on 3rd November, 2003 this court, Khamoni, J (as he then was) issued directions under Rule 44 of the Probate and Administration Rules to the effect that:

1. The summons together with the supporting affidavit and the annexures thereto be served upon the administrators or respondents as well as each adult beneficiary to the estate;
2. The applicants to serve Form 68 upon each of the people referred to in clause (1) above;
3. Each person so served to file his or her affidavit to demonstrate whether they were supporting the summons for revocation of grant or not;
4. Kerugoya magistrates court case file in Succession Cause No. 99/78 be brought to this court and to be filed in this application.
5. The deputy registrar to ensure that a proper Probate and Administration succession cause file is opened instead of using this Miscellaneous Application case file.

Only the third respondent filed a replying affidavit to the applicant's summons. In that affidavit he swore that the first two respondents were deceased and in support of this fact he attached their death certificates to his affidavit.

The respondent also attached a copy of the green card showing that the land comprising the deceased's estate and which was the subject of the succession cause in the magistrates' court had been transferred to his beneficiaries apparently in execution of the certificate of confirmation of grant; in other words, the administration of the estate had been completed.

Considering that the first and second respondents had not been substituted and also taking into account that the deceased's estate no longer existed, the respondent swore that the summons for revocation of grant was misconceived and improperly before court. These contentions were also captured in his grounds of objection (which I reckon was the appropriate place for them rather than in the affidavit) and a notice of preliminary objection in which he incorporated these grounds as well.

The notice of preliminary objection is dated 24th September, 2014 and it is the subject of this ruling. Both counsel for the applicants and the respondent agreed to have it resolved by way of written submissions.

Counsel for the respondents reiterated the depositions in the replying affidavit and submitted that the estate was distributed and transferred to the deceased's beneficiaries in 1981; having been so distributed and transferred in the names of the beneficiaries, the estate which comprised **Land Parcel No. INOI/KARIKO/558** was no longer in existence.

Counsel also submitted that in the wake of the death of the first two respondents, no suit could be instituted against them and to the extent that they have been sued the application is incompetent.

Finally, counsel submitted the applicants have not disclosed any specific defects in Kerugoya magistrates' court **Succession Cause No. 97 of 1978**.

In response, counsel for the applicants submitted that under section 76 of the Law of Succession Act, the grant can be revoked at any time and it does not matter that the grant herein was issued, and confirmed in 1981. As for the death of the respondents, counsel submitted that this issue should have been brought up at the time directions were given on the applicant's summons; and, in any event if there was any need for substitution of parties it was upon the respondents to apply for such substitution.

Counsel submitted that the apparent delay in filing the application for revocation of grant was because the applicants sought to challenge the grant in the Land Disputes Tribunal and thereafter went to the Appeals Committee before they came back to this Court and filed their current application.

Without appearing to venture into the merits or lack thereof of the applicant's summons for revocation or annulment of grant, there is some force in the arguments by the learned counsel for the respondent. While I agree that, under section 76 of the Law of Succession Act, any interested party may apply to have a grant revoked or annulled at any time, such an application must be made within a reasonable time. I noted that the certificate of confirmation of grant was not exhibited in this application but if the grant was confirmed in 1981, as both parties appear to agree, then a delay of 12 years before the application of revocation or annulment of grant was by is by any standard unreasonable.

If the factual basis of the submissions by the learned counsel for the respondents is correct, then the reason for filing such applications timeously or within a reasonable time becomes obvious. Consider this; of the three administrators to whom the grant was made only one is left, the other two are now deceased. That in itself may not be a sufficient reason to refuse an otherwise meritorious application for revocation or annulment of grant because **section 81 of the Law of Succession Act** vests in the surviving administrator, in this case the third respondent herein, all the powers and duties of the deceased administrators. It is only by a tinge of luck that the grant was made to three joint administrators and that one of them is still alive today.

However, it is apparent in this matter that apart from the effluxion of time and the death of some of the administrators, the estate has been distributed and if the arguments by the counsel for the respondents is anything to go by, the administration of the estate was completed 12 years before the current application was filed; the transfer of the estate to the beneficiaries of the deceased means that the subject matter of the succession cause has dissipated.

Although the learned counsel for the applicants submitted that the applicants first went to the Land Disputes Tribunal and thereafter to the Appeals Committee before coming back to this Court, hence the delay, there is no legal basis for the rather long and winding route they opted to take; at any rate, it is not provided for anywhere in the Law of Succession Act.

If counsel's preliminary objection, had been brought as an application to strike out the summons for revocation annulment of grant I would have been less hesitant in taking that action unless the applicants provided evidence that would controvert the applicant's assertions.

I am unable to take such an action on the basis of a preliminary objection because I am compelled to make references to affidavit evidence which may end up being contested. It has been held that a preliminary objection must only be resolved as a point of law and which is argued on the presumption that the facts are not in dispute. The locus classicus case in this regard is **Mukisa Biscuit Manufacturing Company Ltd versus West End Distributors Ltd (1969) E.A 696 at page 700** where the Court of Appeal for East Africa sitting at Nairobi said:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which are arises by clear implication out of pleadings, and which if I argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.” (Per Law, J.A at page 700)

Sir Charles Newbold, J.A. was more explicit on this; he said:

“The first matter relates to the increasing practice of raising points, we should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.” (See page 701).

It follows that to the extent that the preliminary objection makes references to matters of fact I will not allow it and the respondent's preliminary objection dated 24th September, 2014 is hereby overruled. The costs will be in the cause.

I need to say something about the directions given in respect of this matter by my learned brother Khamoni, J (as he then was) on 3rd November 2003. The learned judge ordered that the deputy registrar does open a proper probate and administration succession cause, which no doubt, was consistent with the form prescribed by the rules. The judge also ordered that the original file in which the grant was issued in the magistrates Court at Kerugoya be availed and be filed in this succession cause which was hitherto styled as a miscellaneous application. Upon perusal of this file I have noted that none of these actions has been taken.

I note, however, that the directions were given before the establishment of a High Court station at Kerugoya where the cause originated from. Now that there is High Court in that station I hereby direct that this file be transferred to the High Court at Kerugoya for the disposal of the dispute herein or for such other orders that my brother judge sitting in that court may issue. It is so ordered.

Dated signed and delivered by this Honourable Court on 4th November, 2016

Ngaah Jairus

JUDGE