



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE NO. 789 OF 2012

(IN THE MATTER OF THE ESTATE OF BILDAD KIHURIA (DECEASED))

AGNES MUTHONI MWAI.....1ST APPLICANT

JANETRUDE GATHIGIA KIHURIA.....2ND APPLICANT

VERSUS

GLADYS WAMBUI WACHIRA.....1ST RESPONDENT

CHARLES MWANGI NJOGU.....2ND RESPONDENT

JUDGMENT

By a summons for revocation of grant brought to court under **section 76 (e)** of the **Law of Succession Act (Chapter 160)** and **rule 44** of the **Probate and Administration Rules**, the applicants sought to have “*the certificate of grant issued on 11th May, 2000...*” revoked on the grounds that the elders award apparently adopted as the judgment of the court in the resolution of the confirmation proceedings was null and void and that the grant was obtained by means of untrue allegation of fact.

The succession cause in which this summons has been filed and in which the impugned grant was made relates to the estate of Bildad Kihuria (deceased) who died in 1971.

I take it that since the applicants have invoked **section 76** of the **Act**, and **rule 44** of the **Probate and Administration Rules**, they are seeking for revocation of the grant of letters of administration itself and are not separately targeting the certificate of grant issued after the confirmation proceedings. In any event, if the grant is revoked, it goes with the certificate of confirmation of grant.

The summons was supported by the applicants’ affidavit sworn in that behalf by the first applicant. From the depositions made in that affidavit, the applicants are incidentally, the administratrixes of the deceased’s estate and that the grant made to them was confirmed on 11th May, 2000.

The applicants’ case is that the elders’ award which was adopted as the judgment of the court in confirmation proceedings was null and void and therefore, the proceedings through which the grant was made were equally defective. In the applicants’ view, the award ought not to have been adopted for the additional reasons that it was filed out of time and that it was not signed.

The applicants have also taken issue with the certificate of grant for the reason that either there was misspelling of names or there were inclusions of names that ought not to have been in the certificate. I hasten to state here that such errors, if at all they exist, can be corrected or rectified under **section 74** of

the Act and **rule 43** of the **Probate and Administration Rules** and cannot be a basis for nullification or revocation of grant.

The respondents opposed the application and in their replying affidavit sworn by the second respondent they did not dispute that indeed there was an arbitration whose award was read out in court without any objection and consequently, judgment was entered in its terms. The respondents have deposed that following the judgment, they have surveyed the land comprising the estate, subjected it to distribution and new title deeds have since been issued; in other words, they have executed the judgment and distributed the estate.

Parties took directions on the manner of disposal of the summons on 14th December, 2012; they agreed that the applicants' summons be disposed of by way of written submissions. When they appeared before me on 14th November, 2011, they had filed those submissions which I have duly considered in this judgment.

As noted earlier, the late Bildad Kihuria died on 16th February, 1971. The record shows that there was initially a dispute over the administration of his estate; however, by a consent order recorded before Githinji, J (as he then was) on 28th April, 1993, the grant of letters of administration was made to the applicants as joint administratrixes. Following this appointment, the court directed that the dispute on the distribution of the estate be heard by way of oral evidence on a date that was to be fixed at the registry.

Accordingly, after several adjournments, the dispute on the distribution of the estate came up for hearing on 21st January, 1999 before Kuloba, J (as he then was). Rather than proceed with the hearing as scheduled, parties agreed to refer the dispute to arbitration before the District Officer of Mathira Division of the then Nyeri District. Each of the parties was required to appoint two elders to the arbitration panel that was to be chaired by the District Officer. The court made an order in that regard and further directed that the arbitration award be filed in court within ninety days from the date of service of the order to the District Officer. The award was eventually filed and read to the parties on 28th June, 1999.

By a chamber summons dated 22nd October, 1999, the respondents, through their counsel, applied to have the award adopted as the judgment of the Court. The application was opposed by counsel for the first applicant. In his ruling which was delivered on the same date the application came up for hearing on 11th May, 2000, Visram J (as he then was), allowed the application and, crucially, the learned judge noted that no appeal had been preferred against the arbitral award. Judgment was accordingly entered in accordance with the award.

In 2003, and more specifically on 13th March, 2003, the applicants filed a summons for revocation of confirmation of grant of the even date on the grounds that the respondents ought not to have initiated the confirmation proceedings and secondly, the arbitral award which had been adopted as the judgment of the court was inequitable and unjust, and was in any event not supported by evidence.

This summons was dismissed for want of prosecution on 3rd September, 2008. While dismissing the application, Kubo J (as he then was) noted applicants were not interested in pursuing their summons. He directed that the caution or restriction they had placed on the suit property be removed. It would appear that nothing much happened since the dismissal order until 11th June, 2009 when the present summons of revocation of grant was filed.

From this chronology of events, it is clear that the grant of letters of administration intestate in respect of the estate of Bildad Kihuria was made to the applicants themselves; it is also clear that since the distribution of the estate appears to have been in dispute, confirmation proceedings in which the applicants participated were duly taken and subsequently, a judgment resolving the dispute was delivered. It is apparent also, that the present summons is not the first of its nature that the applicants have filed. An earlier one, which was based on more or less similar grounds as the current one was dismissed for want of prosecution.

The fact that there was a summons for revocation of grant similar to the current one would in my view raise preliminary question whose answer I could not find either in the applicant's pleadings or their submissions. The question is simply this, having had their summons for revocation of grant dismissed for want of prosecution, was it open to the applicants to file a fresh summons without any reference to the dismissal order dismissing the previous summons?

My answer to this question is in the negative for the simple reason that the order made on 3rd September, 2008 is still in force and has neither been varied, set aside or appealed against. Like any other court order, that order was not issued in vain and as long as it stands the applicants' move to lodge a fresh summons rather seek to reinstate the one that was dismissed is nothing more than an abuse of the process of the court. Entertaining this summons would only be perpetuating the abuse and no court will want to be an accessory in any scheme that is orchestrated to demean its orders or abuse its process; the only option open to court is to dismiss the applicants' summons.

Even if the question of an earlier summons having been dismissed didn't arise, a question would be asked, and legitimately so, whether the summons was properly conceived. For instance, it is on record that the applicants are the recipients of the grant and it was made to them with their consent yet the second ground upon which the summons is said to be based states that the grant '*was obtained by means of untrue allegation in point of law to justify the grant...*' One would want to assume that the applicants were fully aware and had the necessary background information relating to the deceased's estate before they accepted the grant of the letters of his administration. The contention that the grant made to them was obtained by means of an untrue allegation of fact essential in point of law smacks of dishonesty and it is, in the premises, self-defeatist.

Again the applicants are, in their summons, questioning the legality of award that was subsequently adopted as the judgment of the court in resolution of the confirmation proceedings; the applicants are in essence questioning not only the award but the judgment in which it was adopted. I doubt this is the appropriate time and forum to question the award or the judgment.

While adopting the impugned award as the judgment of the court, the court noted that the award had not been appealed against; indeed it had not been challenged in any manner whatsoever. In my humble view, once the award had been adopted, it became the judgment of the court so that if the applicants, for any reason were aggrieved, all they could challenge was not the award but the judgment itself by way of an appeal. This court cannot purport to exercise an appellate jurisdiction and interrogate a judgment coordinate jurisdiction in an application masked as a summons for revocation of grant. Lord Diplock addressed such an issue in the case of **Saif Ali versus Sydney Mitchell & Co. (1980) AC 198 at 222 to 223** where he said:

Under the English system of administration for Justice, the appropriate method of correcting a wrong decision of a court of justice reached after a contested hearing is by appeal against the judgment to a superior court. This is not based solely on technical doctrines of res judicata but upon principles of public policy, which also discourage collateral attack on the correctness of subsisting judgment of a court of coordinate jurisdiction.

I would conclude that to the extent that this summons has attempted to move the court to depart from the English system of administration of justice which we have locally embraced, it is thereby misconceived and is also an abuse of the process of the court.

I would also agree with counsel for the respondents that the issues raised in the applicant's summons were either raised or ought to have been raised in the confirmation proceedings; in that event, they are res judicata. I would, in this respect, adopt the words of Sir James Wigram V.C. in **Henderson versus Henderson (1843) 3Hare 100** at 114 where he said:

In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires parties to that litigation to bring forward their whole case, and

will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

I find the applicants' summons dated 4th June, 2009 incompetent, misconceived and in any event, deficient of any merit; it is hereby dismissed with costs.

Signed, dated and delivered in open court at Nyeri this 2nd day of February, 2015.

Ngaah Jairus

JUDGE