



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

SUCCESSION CAUSE NO. 1197 OF 1994

IN THE MATTER OF THE ESTATE OF THOMAS MUTUA MUKUMBU – (DECEASED)

JUDGMENT

1. The application for determination is dated 23rd November 2011. In the main it seeks the revocation of the confirmed grant issued on 6th October 2006. The grounds on face of the application show that the applicant is complaining about the process of the confirmation of the grant. She alleges that the consents used to have the grant confirmed were not signed by her. She alleges specifically that the affidavits sworn on 8th June 2005 and 25th March 2006 were not signed by her and that the alleged signatures on the said documents were forgeries.
2. The application is supported by an affidavit sworn on 23rd November 2011 by the applicant, Jolly Mwende Mutua. She alleges that she had not been aware that the grant had been confirmed on 6th October 2006 until recently. She avers that she did not sign the affidavits in support of the confirmation application, and alleges that the said affidavits were forgeries. The impugned allegedly sworn on 28th March 2005 and 8th June 2005.
3. The respondent has replied to this application through his affidavit sworn on 12th March 2012. He denies that the confirmation of the grant was obtained fraudulently as the same was done with the involvement of the applicant. He asserts that the applicant lies when she says she did not sign the affidavits sworn on 8th June 2005 and 25th March 2005. He avers that the applicant was in court on 6th October 2006 when she confirmed to Rawal J. that she had signed the consent of 28th March 2005 and that she did not intend to take a share in the estate of the deceased. The grant was then confirmed and the estate property granted to the applicant.
4. It was directed on 23rd January 2012 that the application be disposed of orally. A hearing was conducted on 11th July 2012 before Njagi J. It proceeded *ex parte*, in the presence of the applicant and her counsel and in the absence of the applicant and his counsel. The date for hearing had been obtained *ex parte*, but a hearing notice had been served on counsel for the respondent on 19th June 2012, and was received under protest. There is an affidavit of service on record, sworn on 10th July 2012 and filed in court on 11th July 2012.
5. The applicant gave evidence that basically gave vent to her affidavit sworn on 23rd November 2011. It was a rehash of the contents of that affidavit. She stated that her alleged signature in the affidavits sworn on 27th March 2005 and 8th June 2005 were forgeries and that she never appeared before the advocates who commissioned the said affidavits.
6. The law governing applications for revocation of grants is **Section 76** of the Law of Succession Act.

The application before me is grounded on **Section 76 (b) and (c)** of the Law of Succession Act. The said provisions states as follows:-

“76. A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

(a) ...

(b) That 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;

(c) That 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...”

7. The wording of **Section 76(b) and (c)** of the Act is plainly clear that it talks about the process of the making of a grant of representation. Where a grant of representation is obtained fraudulently or by means of untrue allegations the same becomes liable to revocation. This provision does not cover the process of confirmation of the grant. It does not deal with setting aside or cancellation of orders made at the confirmation stage. Legally, there is only one grant; its confirmation does not amount to making a second or other grant. Where there are challenges in the process of the confirmation of the grant, the proper course of action should be to move for the cancellation of the certificate of confirmation of the grant or the setting aside of the confirmation orders.

8. In this case the applicant seeks revocation of the confirmed grant issued on 6th October 2006 allegedly because it was obtained fraudulently. No grant was made on 6th October 2006, as the record before me indicates that the only grant was made on 2nd September 1994. It is this grant of 1994 that should be available for revocation under **Section 76** of the Law of Succession Act and not its confirmation on 6th October 2006. I cannot in the circumstances grant orders under **Section 76** of the Act in the terms proposed in the application dated 23rd November 2011.

9. The applicant alleges that the respondent forged her signatures in the affidavits which supported his application for confirmation. She also asserts that the respondent acted fraudulently. These are very serious allegations. Forgery and fraud amount to criminality. The applicant is literally accusing the respondent of acting criminally. The standard of proof required to establish forgery and fraud is very high. Even in civil cases it is higher than balance of probability. The Court of Appeal had occasion to address its mind on this in *Elizabeth Kamene Ndolo –vs- George Matata Ndolo* (1995) LLR 390, albeit in a matter on forgery with respect to wills, when it stated that the charge of forgery or fraud is a serious one, and that the standard of proof required of the allegor is higher than that in ordinary civil cases, although not beyond reasonable doubt. The applicant in this case ought to have subjected her alleged signature in the two impugned affidavits to testing by a handwriting expert or a document examiner. It is not enough for her to deny the signature, she should have sought to demonstrate that the signatures in those two documents could not possibly be hers. I am not an expert in such matters, for I do not have a trained eye in that regard, and I cannot possibly pass judgment as to whether the signatures on the two affidavits were have genuine or not.

10. I note from the record that my predecessors in the matter appeared to have had a less than flattering view of the respondent. On 27th June 2006, Rawal J., for example made two orders in succession – one confirming the grant and shortly thereafter another stating that the respondent herein ought not take further action on the confirmation orders on account of his “behaviour.” The offending behaviour was not described and one could draw an inference that it would not be beyond the respondent to act in the manner mentioned by the applicant. However, I shy from drawing such inference on account of the proceedings before Rawal J. on 6th October 2006. Her Ladyship had on 27th June 2006 directed that sufficient proof be provided that the applicant herein signed the two affidavits or in the alternative that

she attend court personally. The record shows that the applicant herein was in court on 6th October 2006 in person. The Judge presiding recorded her full name – Jolly Mwendu Mutua – and her national identity card number - 10174314. It is recorded that the applicant herein confirmed to the judge that she had signed the consent comprised in the affidavit of 28th March 2005. She is recorded as having further confirmed or stated that she did not intend to ask for a share in her father’s estate. It was on the basis of these confirmations by the applicant herein that the grant was confirmed on 6th October 2006.

11. The respondent herein has alluded to these events in his replying affidavit sworn on 12th March 2012. The applicant has not sworn a further affidavit to controvert what the respondent says in the said affidavit. Indeed, she has not at all addressed herself to the events of 6th October 2006 – by way of affidavit or in her oral evidence before Njagi J. on 11th July 2012. She has not denied that she did not attend court on 6th October 2006, nor the confirmations made by her in court on that day. She has therefore not denied the record of 6th October 2006. This was a record made by a Judge of this Honourable Court. I have no reason, in the absence of evidence, to held that the said record is not accurate. Consequently, the applicant’s allegation that she only got to know of the confirmation of the grant on 6th October 2006 recently and her disclaimer of the signature in the affidavit of 28th March 2005 should be taken with a pinch of salt.

12. I need not say more. The application dated 23rd November 2011 is without merit. I hereby dismiss it with costs to the respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 14th DAY OF March, 2014.

W. M. MUSYOKA

JUDGE