



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OKWENGU, SICHALE & KANTAL, J.J.A.)

CIVIL APPEAL NO. 13 OF 2017

BETWEEN

MORAA NDEGE.....APPELLANT

AND

EZEKIEL MAINDA..... RESPONDENT

(Being an appeal arising from the Ruling and order of the High Court of Kenya

at Kisii (**J.R. Karanja, J**) delivered on 22nd November, 2016

in

Succession Cause No. 416 of 2008)

JUDGMENT OF THE COURT

[1] This is an appeal lodged by **Moraa Ndege** (appellant) against the Ruling of the High Court (**J.R. Karanja, J**), in which the learned Judge partly allowed an application filed by **Ezekiel Mainda** (respondent), for revocation under section 76 of the Law of Succession Act, of a grant issued to the appellant. The appellant had applied for and was issued with letters of administration for the estate of her late husband, **Ndege Nyamora Obanyi** (deceased), which letters were subsequently confirmed on 12th February, 2010. According to the confirmation, the estate of the deceased comprising LR No. West Mugirango/Siamani/2226 (**Siamani/2226**) and LR. No. West Mugirango/Bonyamatuta/526 (**Bonyamatuta/526**) was distributed equally between the deceased's sons and the appellant.

[2] By summons dated 15th February, 2011, the respondent sought to have the letters of administration issued to the appellant on 25th June, 2009 revoked or annulled, on the ground that the grant was obtained fraudulently by making of a false statement and concealment of material facts.

[3] In his affidavit sworn in support of the summons for revocation, the respondent who is a nephew to the deceased, swore that Bonyamatuta/526 and Siamani/2226 originally belonged to the father of the deceased, who was his late grandfather. The grandfather who had several sons from his three wives, including the respondent's father, shared out Siamani/2226 between the three houses, excluding the deceased whom he gave Bonyamatuta/526. At the material time, the respondent's father was away in Tanzania and his share was left in the care of the deceased.

[4] The respondent added that when his father came back to Kenya in 1994, the appellant promised to have his father's share which was registered in the deceased's name, transferred to his father. She did not however do so. Following discussions, the respondent's father agreed to share the land with the deceased's son Manani Ndege in consideration of the developments that the deceased had done on the land. Consequently, the land was divided equally between the respondent's father and Manani Ndege. This did not satisfy the appellant who instituted proceedings in a civil suit at the Resident Magistrate's

court in Kisii.

[5] Subsequently the respondent's father died and there was a burial dispute as the appellant objected to his being buried on his share of Siamani/2226. The appellant also filed a suit **HCCC No. 196 of 2010** wherein she sought to have the respondent and his family evicted from Siamani/2226. The respondent maintained that in obtaining the grant, the appellant failed to disclose a material fact which was that, Siamani/2226 was being held by the deceased in trust for the respondent's father, and that the respondent had been in actual occupation of the land since 1995.

[6] The appellant filed a replying affidavit in which she maintained that the letters of administration for the estate of the deceased, who was her husband, was properly issued to her, and that the issues raised by the respondent were subject of litigation in **Kisii HCCC No. 196 of 2010**, and that **Kisii CMCC No. 254 of 1990** which she had filed against the respondent's father abated following his death. [7] Both the advocates for the appellant and the respondent filed written submissions which were duly considered by the learned Judge.

[8] In his Ruling, the learned Judge noted that although the parties had a dispute anchored on the ownership of Siamani/2226, the motion before him was concerned with the validity of the grant obtained by the appellant on 25th June, 2009, and confirmed on 16th February, 2010 (this date is not correct as though the certificate of confirmation is dated 16th February 2010, it indicates that the confirmation was done on 12th February 2010). The motion was therefore not the right forum to deal with the issue of ownership. The learned Judge found that the letters of administration were properly issued to the appellant as the certificate of search dated 28th October 2008 indicated the deceased as the owner of Siamani/2226, and the appellant did not have to indicate in the application for grant that, that land was subject of a civil suit. However, the learned Judge noted that the certificate of confirmation of the grant and the distribution of the property ought not to have been issued as the status of Siamani/2226 would be drastically affected if the pending suit was to be decided against the appellant. The learned Judge therefore issued an order for revocation of the certificate of confirmation of the grant.

[9] The appellant has faulted this judgment on three grounds. First, that the trial Judge erred in making an order revoking the confirmation of grant, a relief which was not sought in the summons for revocation of grant dated 15th February 2011. Secondly, that the trial judge misdirecting himself in making an order for revocation of grant on grounds not set out under section 76 of the Law of Succession Act; and thirdly that the trial Judge erred in revoking the certificate of confirmation having disallowed the revocation of grant, which was the relief sought in the summons before court.

[10] **Section 76 of the Law of Succession Act** that deals with revocation or annulment of grant 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) that the proceedings to obtain the grant were defective in substance;

(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;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

[11] The respondent in seeking revocation of the grant, relied on section 76(b) &(c) contending that the grant was obtained fraudulently by making a false statement and concealment from the court of material facts and by means of an untrue allegations of fact. It was the respondent's contention that the appellant failed to disclose to the court that Siamani/2226 was being held in trust for the respondent's father and the respondent had been in actual occupation of that land since 1995.

[12] In his judgment, the learned Judge found that there was a dispute concerning the ownership of Siamani/2226, but that there was nothing precluding the appellant from listing the property as belonging to the deceased since there was certificate of search indicating him as the owner, and that it was not necessary to indicate in her application for the grant that the property was the subject of a civil suit since it was registered in the name of the deceased as the absolute proprietor. The learned Judge concluded that the allegation that the appellant fraudulently obtained the grant or concealed material facts in obtaining the grant or made false statements could not hold

[13] We are in agreement with the above finding of the learned Judge. The deceased was registered as the absolute proprietor of Siamani/2226, and this property *prima facie* formed part of the deceased's estate. Any person having a claim on the land had a right to sue the estate of the deceased and the issuance of the letters of administration was not prejudicial to the respondent but was appropriate to facilitate resolution of any dispute by joining the administrators in any such suit.

[14] The appellant has faulted the learned Judge for revoking the certificate of confirmation of the grant when there was no application for such revocation. As is apparent from the above quoted section 76 of the Law of Succession Act, the court can revoke a grant "**whether confirmed or not**", and this can be done either "**on application or on the court's own motion.**" Under the Law of Succession Act a grant is issued in two stages. The first part is where a grant of representation applied for under section 67 of the Law of Succession Act is issued under section 69 of that Act appointing a particular person or persons as administrators of the deceased's estate for the purpose of administration and preservation of the estate. The second part is where the grant of representation that was issued earlier is confirmed and distribution of the estate is approved by the court under section 71 of the Law of Succession Act. A certificate of confirmation is simply evidence that the grant has been confirmed. In this case, the court rejected the application for revocation of the grant that was issued appointing the appellant as administrator but acted on its motion in revoking the confirmation of the grant by revoking the certificate of confirmation of the grant. In other words, it is the second stage of confirmation of the grant that was nullified and we are satisfied that the court had powers so to do.

[15] The final issue is whether there was a basis for the court to revoke the certificate of confirmation of the grant. It is evident that although Siamani/2226 was registered in the name of the deceased, there has been an acrimonious dispute regarding the ownership of Siamani/2226, and a certificate of search showed that there was a caution registered against the title. The facts also reveal that the respondent and his family have been in occupation of the property hence the suit by the appellant in an effort to have them evicted. It cannot therefore be said that Siamani/2226 was free property that could be disposed of. We agree with the learned Judge that there was need to stop the confirmation of the grant so that the issue of the share of respondent's father is determined before the estate of the deceased is distributed. This is consistent with Rule 41(3) of the Probate and Administration Rules that requires such determination before confirmation of the grant. That Rule states as follows:

"Where a question arises as to the identity, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant, but subject to the provisions of section 82 of the Act, by order

appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules and may thereupon, subject to the proviso to section 71(2) of the Act, proceed to confirm the grant.”

[16] We find no merit in this appeal and therefore uphold the judgment of the learned Judge revoking the confirmation of the grant. The appeal is accordingly dismissed. In light of the relationship between the parties, we do not find it appropriate to award any costs. Each party shall therefore bear their own costs.

Dated and delivered at Nairobi this 19th day of February, 2021.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR