



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, J.J.A.)

CIVIL APPEAL NO. 74 OF 2018

BETWEEN

ANSAZI GAMBO TINGA.....1ST APPELLANT

SAFARI GAMBO TINGA.....2ND APPELLANT

AND

NICHOLAS PATRICE TABUCHE.....RESPONDENT

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

at Mombasa (Thande J.) delivered on 21st July, 2017

in

High Court Succession Cause No. 140 of 2010)

JUDGMENT OF THE COURT

[1] The main issue for determination in this appeal and from which all the other issues flow; is whether a debtor to the estate of a deceased person has the *locus standi* to seek the revocation of grant of letters of administration to the said estate. A preview of the factual background is that; Ansazi Gambo Tinga (1st appellant) is the widow to Gambo Tinga Mwadzoya (deceased), while Safari Gambo Tinga (2nd appellant) is a son of the deceased. Upon the demise of the deceased, the appellants jointly applied for and were issued with a grant of letters of administration (grant) to the deceased's estate. They have been administering the estate until Nicholas Patrice Tabuche (respondent) surfaced claiming to be a debtor to the estate and seeking to have the said grant annulled.

[2] The respondent contended *inter alia*, that the grant was fraudulently issued to the appellants who failed to disclose his interests in the deceased's estate, and that it was acquired with the aim of frustrating his efforts to recover his debt. It was the respondent's case that the deceased had sold him two parcels of land in 1984 and 1986; measuring 3 acres each at a total consideration of Kshs.48,000 (forty eight thousand). The portions constitute all that parcel of land originally described as Plot No. 393. According to the respondent, there was a re-organization of the Kilifi Land Registry and as a consequence the said land was re-registered as Plot No. R694 Mtwapa Settlement Scheme (suit land). Unfortunately, before the conclusion of the transfer process, the deceased passed away on 9th March, 1991.

[3] The respondent wanted to safeguard his interest over the suit land so he joined hands with the 1st appellant with the aim of helping her secure the letters of administration to the estate and by extension, hopefully have the transfer process of the land finalized and the land registered in his favour. However, that was not to be, for as the respondent alleged he soon realized, the appellants had already deceitfully procured the grant, using a falsified death certificate. In the respondent's view, this was a deliberate plot by the appellants to disenfranchise him of the suit land, given that it is now registered in the appellants' names. The respondent accused the appellants of fraud, he alleged that they were all along aware of his legitimate claim to the land. The respondent added that the grant issued was also premised on material non-disclosure by the appellants for failing to disclose the estate's liabilities to the trial Judge.

[4] The respondent further asserted that the appellants failed to diligently administer the estate of the deceased and for those reasons, he filed the summons for revocation of grant dated 11th October, 2012 in which he sought the following orders:

1. "...

2. That this Honourable court be pleased to revoke/ annul the grant of letters of administration to ANSAZI GAMBO TINGA and SAFARI GAMBO TINGA made on the 15th June, 2010 in the matter of the estate of GAMBO TINGA MWADZOYA (deceased)

3. That this Honourable court be pleased to issue such other orders it deems just and convenient to meet the ends of justice.

4. That costs of this application be provided for."

[5] That application met vigorous opposition by the appellants; in their replying affidavit sworn on 5th December, 2012, they contended that the respondent lacked *locus standi* to seek revocation of their grant which was legitimately issued to them as beneficiaries of the deceased; that the parcel of land purportedly bought by the respondent was distinct from the land in respect of which the grant was issued; that while the respondent claims to have purchased land described as Plot No. 393 Mtwapa Settlement Scheme from the deceased, the grant he applied to revoke was in respect of land described as Plot no. Kilifi/Mtwapa/694. As such, the subject property in the grant is distinct from the land claimed by the respondent and that the deceased had nothing to do with the land claimed by the respondent. Lastly, the appellants argued that in any event, the respondent's application was time barred and unmerited.

[6] Those were the matters which were considered before the trial court and by a ruling delivered on 21st July, 2017, the learned Judge (Thande J.) ordered that summons be issued to the Kilifi District Lands Registrar to attend court on 4th October, 2017 for purposes of confirming the nexus (if any) between Plot no. 393 and Plot no. Kilifi/Mtwapa/694. In the meantime, the operation of the grant was stayed until further orders of the court.

[7] That is the order that precipitated the present appeal which is premised on grounds that the learned trial Judge erred by; failing to appreciate the nature of the application presented before her; failing to appreciate the facts and the law over the matter; misinterpreting and adopting the provisions of Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules (*the Rules*); conferring upon herself jurisdiction against the law; delivering a decision that was not supported by the facts or evidence; delivering a partisan ruling based on speculative facts; delivering an inconclusive ruling and granting orders that were neither pleaded nor in issue.

[8] Urging the appeal, was learned counsel Mr. Onyango for the appellants, who through written and oral submissions stated that the learned Judge erred by failing to find that the respondent lacked *locus standi* to seek revocation of grant; the respondent is not a beneficiary of the deceased and not falling within the order of priority as per **Section 66** of the Law of Succession. According to counsel, the correct legal position regarding the matter is as espoused in the cases of; - **Kennedy Opiche Olela v. William Ogida Ochuodho & Another [2014] eKLR** and **Irene Nyaga v. Karani Ngari & Another [2010] eKLR**. Counsel urged us to find that a grant may only be revoked if it was granted to persons not envisioned under Section 66 of the Act. Citing the High court decision in **Leah Wairimu Muruga & 8 others v. Samuel Mwangi Maina [2016] eKLR** as well as that of the Supreme Court of India in **Anil Behari Ghosh v. SMT Latika Bla Dassi & Others (1955) AIR 566 SCRR (2) 270**, counsel reiterated that it was well established that a mere purchaser of a deceased person's land lacks *locus standi* to seek revocation of grant.

[9] This is because the respondent cannot merely be deemed to be a creditor, his claim against the estate needed to be proved and in any event it was time barred under sections 7, 9 and 17 of the Limitations of Actions Act. Counsel for the appellants further submitted that the application for revocation was unmerited as there was no nexus shown between the land claimed to have been bought by the respondent and the land to which the grant relates; the respondent needed to establish without being aided by the court, this being an adversarial system, that Plot no. 393 Mtwapa Settlement Scheme and Plot no. Kilifi/Mtwapa/694 referred to the same parcel of land. Having failed to do so, he was disentitled to the orders sought. Moreover the orders issued were at variance with those sought by the respondent; that all the respondent had sought was revocation or annulment of grant but instead, the learned Judge ordered stay of the grant and unilaterally instituted a fact finding mission as to the nexus between the two parcels of land.

[10] Counsel for the appellants also faulted the trial Judge for what he termed usurpation of jurisdiction of the Environmental and Land Court whose mandate is to hear disputes over land and to establish the alleged claim of land purchase. As matters stood, the Judge was only seized with a probate and administration matter, to determine the rightful parties who were entitled to the deceased estate and if there were purchasers of the deceased land, they should have sued the appellants before the ELC or as the case may be. A case in point was in the dearth of evidence presented before court that as per the appellants' documents, the registration of Plot no. Kilifi/Mtwapa/694 was initially in favour of a trust known as the Settlement Fund Trustees; which later transferred the land to the deceased's name and eventually the land was transferred to the appellants through succession.

[11] Responding to the respondent's claim that the grant was fraught with irregularities, counsel for appellants submitted that such irregularities if any were curable under sections 47 and 73 of the Law of Succession Act and did not warrant the staying of the grant or its revocation. The appellants termed the stay order issued by the learned Judge as mischievous as it left the estate without any representation, which was risky considering that the respondent had other pending legal proceedings in Malindi, touching on the same subject matter. Counsel thus urged us to allow this appeal and set aside the impugned ruling.

[12] Rising on his feet to oppose the appeal was **Mr Nyongesa**, learned counsel for the respondent. He submitted that by virtue of **Section 76** of the Law of Succession Act and Rule 44 of the P&A Rules, the respondent being a creditor of the deceased, had the *locus standi* to move court as he did. Counsel contended that under Section 76, the respondent qualified as an interested party as a purchaser of the deceased's property. He added that the decision in the **Kennedy Opiche case (supra)** is no longer applicable, as that position was overturned by the Court of Appeal in the case of **Musa Nyaribari Gekone & 2 others v. Peter Miyienda & Another [2015] eKLR**; wherein this Court rejected the notion that an interested party under Section 76 of the Act must fall within the eligible administrators envisioned by Section 66.

[13] Counsel stated that the law regarding who should move the court in probate matters is as stated the case of **Re Estate of Jackson Mugo Maathai [2010] eKLR**; which was relied upon by the learned Judge and supported the respondent's assertion that any person interested in

the administration of the estate has sufficient standing to seek the revocation of grant and that this description includes creditors to the estate of the deceased. Counsel was emphatic that there were sufficient grounds to warrant revocation of grant; it was also within the trial court's jurisdiction to interrogate the nexus between the two parcels of land as that jurisdiction is not exclusively reserved for the Environment and Labour Relations Court especially where there are disputes within a probate matter. In any event, the evidence presented before the trial court was insufficient to warrant the revocation of grant and the Judge ordered for official records to guide the court before determining the matter finally.

[14] Elaborating further, counsel for the respondent pointed out that an application for revocation of grant was primarily pegged on the ground that the appellants failed to disclose the estate's liabilities before the probate court. Counsel argued that the respondent even produced the sale agreement signed between himself and the deceased as proof of the estate's indebtedness. As regards the two parcels of land, counsel submitted that the two descriptions refer to the same parcel of land as evidenced by the sketch map produced in evidence. It was the respondent's case therefore, that the trial court acted within its mandate, since revocation may be ordered whenever it is proven that it was issued based on untrue allegations of fact; the grant herein was issued on the premise that at the time of his death, the deceased owned all that parcel of land that is now known as Kilifi/Mtwapa/694 which presumption is untrue, given the respondent's purchase of the land; the death certificate relied upon by the appellants while procuring the grant was a forgery, because as per the said document, the deceased's age at the time of death is incorrectly stated as 37 years instead of 78 years. On the basis of such falsehoods, the respondent contended, the grant ought to have been annulled and/or revoked. As regards the allegation that the application was time barred, counsel submitted that that was a novel issue being raised for the first time in this appeal and should not be entertained. On that note, he urged the dismissal of the appeal.

[15] This being a first appeal, the duty of this court is as re-stated in the case of **Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**, where it was held in part that:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

Having considered the grounds of appeal as well as the submissions of the parties, three issues arise for determination in this appeal;

- a. whether the respondent had the *locus standi* to seek revocation of the grant and if so;
- b. whether the application was time barred and if not;
- c. whether the application for revocation was merited.

On the first issue, *Locus standi* is defined in ***Black's Law Dictionary, 9th Edition at page 1026*** as-

“The right to bring an action or to be heard in a given forum”.

This Court in **Alfred Njau & 5 others vs. City Council of Nairobi [1983] eKLR** put it in the following terms:-

“The term *locus standi* means a right to appear in Court and, conversely, as is stated in *Jowitt's Dictionary of English Law*, to say that a person has no *locus standi* means that he has no right to appear or be heard in such and such a proceeding.”

[16] In this case, it was contended that the respondent lacks *locus standi* to seek revocation of grant as he is not an eligible administrator of the estate of the deceased. There abounds a host of decisions by the High court in support of this proposition. However, in a departure from that view, this Court in the case of **Musa Nyaribari Gekone & 2 others v. Peter Mijienda & another [2015] eKLR** stated as follows:-

‘The expression “any interested party” as used in that provision, in its plain and ordinary meaning, is in our view wide enough to accommodate any person with a right or expectancy in the estate. We are not persuaded, as Mr. Oguttu urged, that that expression is limited by or should be construed against the provisions of sections 66 and 39 of the Law of Succession Act. Section 66 provides a general guide to the court of the order of preference of the person(s) to whom a grant of letters of administration should be made where the deceased has died intestate.’

The court went on to add that:-

‘There is therefore no merit in the complaint that the learned judge paid undue premium or undue regard to section 76 of the Law of Succession Act when he held that the 1st respondent has the *locus standi* to present the application for revocation of the grant. We agree with the learned Judge that the 1st respondent's interest as a purchaser of the property of the deceased qualifies him as an “interested party” with standing to challenge the grant.’

[17] As stated by this Court above and as rightly pointed out in ***Re Estate of Shongo Omedo* [2018] eKLR**; persons with *locus standi* to seek revocation of grant includes any person with a right or expectancy to the estate. It therefore follows that an ‘interested person’ under Section 76 does not only envision the heirs enumerated under Section 66 of the Act; rather, it includes a person who can show an interest in the estate. Consequently, the allegation that the respondent lacked the *locus standi* to seek revocation of grant herein, fails.

[18] On the second issue, the appellants contended that the matter was time barred and while the respondent claims that the issue of

limitation of time was never raised, the same was duly raised in the appellants' submissions; wherein it was stated as follows:

'Thirdly, and without prejudice to our above submissions, for the objector's application to succeed, he must have a valid and enforceable claim against the deceased's estate. Sadly, he does not have any such claim. His claim relates to recovery of land allegedly purchased between 1984 to 1986. Pursuant to section 7 of the Limitation of Actions Act, his cause of action cannot be sustained. In fact, by virtue of section 17 of the same Act, even if the Objector had any title, right and/or claim (which the Objector did not) it is statutorily deemed extinguished.'

[19] It is thus inaccurate for the respondent to claim that the issue of limitation of time was never raised. As to whether the cause of action was indeed time barred, section 7 of the limitation of actions Act states as follows:

"Actions to recover land

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person" (Emphasis added)

A **cause of action**, in law, is a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party. The term also refers to the legal theory upon which a plaintiff brings suit. In the present case, the respondent's interest revolves around the grant issued to the appellants, which was confirmed on 18th February, 2010. That was the grant whose revocation the respondent sought.

[20] The appellants have argued both before this Court and the High court; that the cause of action herein arose on 8th June, 1986 when the respondent purportedly finalized his purchase of the land. While it is not in doubt when the purchase was finalized, it is imperative to bear in mind that the trial proceedings herein were not for the recovery of the land. Rather, for revocation of grant. Consequently, the summons for revocation of grant presented by the respondent is not an "*action to recover land*" for purposes of **Section 7** of the Limitation of Actions Act (See **Musa Nyaribari Gekone supra**). The application can thus not be deemed to fall under the provisions of section 7 of the Limitation of Actions Act aforesaid.

[21] We are of the humble view that the learned Judge was right in construing the running of time as she did. On the issue, the Judge had this to say:

'The grant was confirmed on 18.2.2010. The application herein was filed on 16.10.12 over 2 1/2 years later. Section 76 of the Law of Succession Act stipulates that

"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 reading of the above provision evidently indicates that an application for revocation of grant may be made at any time before or after confirmation. The action herein is therefore not time barred'

Accordingly, the ground that the application was statute barred under the provisions of Section 7 of the limitation of actions Act also fails.

[22] Where we part company with the learned Judge is in regard to the issue of whether the application for revocation merited the orders issued. Indeed the grant was stayed meaning that the appellants who are widow and son of the deceased cannot undertake any administration of the deceased's estate. It is without doubt that the application was primarily based on two allegations; one, that the grant was procured through fraud, forgery and concealment of material facts; and two that the administrators failed to prudently administer the estate. However, while such bold assertions of fraud were made, no evidence was availed in support of these claims. In fact, the Judge found that while it is apparent that the respondent purchased some land from the deceased, it was unclear whether the land claimed by the respondent was the same as the land which the grant related.

[23] In this regard, the respondent asserted that the land he purchased albeit different in description was the same parcel of land as the one indicated in the confirmed grant. However, no proof of this fact was shown to court. Under Sections 107 - 109 of the Evidence Act, the burden is always upon a party who alleges a fact to prove it. In this case, the respondent alleged on one hand, that the appellants concealed that his land was part of the deceased's estate; yet on the other hand, he purports that the land was duly disclosed but using a different description. Those two assertions are self-contradictory. The land was either disclosed or it was not. Nonetheless whichever the case, the respondent had a duty of proving the veracity of his claim. If the two referred to one and the same parcel, he ought to have proven as much. Having failed to do so, the trial court ought to have dismissed the application the moment it found the application to be devoid of proof.

[24] We are cognizant that a P&A court under Rule 73 of the Rules is given powers to issue orders as it deems fit in the interest of justice. This is why this Court would be cautious to set aside any orders made to that effect but what worried us in this matter is the fact that the grant was issued to the widow and the son of the deceased. The respondent was claiming to be a purchaser of what appeared to be a different parcel of land; should he not first prove his claim and after it is authenticated perhaps by a lawful order that indeed he was a purchaser then he can claim to be a creditor. As matters stood and by the Judge ordering the summoning of the Land Registrar, lends credence to the appellants' contention that the Judge was aiding the respondent to gather evidence to advance his own claim in a Probate court.

We think we have said enough to demonstrate this appeal has merit, and it is allowed with costs to the appellants.

Dated and Delivered at Mombasa, this 4th day of April, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M.K. KOOME

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR