



IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO. 87 OF 2017

BETWEEN

MARY NYACOMBA KINARO.....APPELLANT

VERSUS

ALBERT MUNGANA PHILIP.....RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Malindi

(W. Korir, J.) dated and delivered at Malindi on 28th September 2017

in

H.C. Succ. Cause No. 120 of 2015)

JUDGMENT OF THE COURT

1. In a ruling delivered in High Court Succession Cause No. 120 of 2015 on 28th September, 2017, the High Court at Malindi (Hon. W. Korir, J.) revoked the grant of letters of administration confirmed by the Court on 24th November, 2016 in favour of Mary Nyacomba Kinaro (the appellant), the administratrix to the estate of Johnson Otiaye Wambogo, deceased. The said ruling is the subject of this appeal.
2. By summons dated 25th April, 2017, Albert Mungwana Philip (the respondent) sought a revocation of the grant issued on 16th May, 2016 and confirmed on 24th November, 2016 to the appellant. The application was premised on grounds *inter alia* that the proceedings to obtain the grant were defective and the same was obtained fraudulently as it was based on false statements and concealment from the court of material facts and untrue allegations.
3. In his affidavit in support of the summons, the respondent averred that he is the administrator of the estate of his late father, one Filipo Wambogo Okusimba alias Philip Aboko, having been granted letters of administration vide Mombasa High Court Succession **Cause No. 325 of 2015**. He argued that his late father, who died on 8th March, 1982 was the owner of a house without land on **Plot No. 1389 in Malindi**, (the suit property), which he had purchased from one Omar Bin Abdalla Bin Daghar in 1966 in respect of which an annual rent of Kshs. 2,400 was paid to the proprietor Said Seif Bin Salim or his estate.
4. His case was that the appellant's husband, one John Otiaye Okumu alias Wambogo, had prior to his demise, been one of the tenants in the suit property having entered the premises in 2010. It was his averment that, the appellant moved the court vide Malindi **Succession Cause No. 120 of 2015 in 2015** and obtained letters of administration in respect to the estate of her deceased husband. The properties listed as assets of the deceased in the letters of administration were: a house without land on Plot No.1389 at Malindi and a Bajaj Boxer motorcycle Reg. No. KMDJ 448P. He averred that the house on Plot. No. 1389 Malindi did not belong to the appellant's husband and neither was her deceased husband related to his father in any way; he questioned the manner in which the grant was issued and confirmed without any evidence that her husband was indeed the owner of the suit property and the motorcycle as alleged. Further, that the appellant had no proprietary interest in the house and could not therefore sell the house to a third party as purported. It was therefore his argument that the grant was obtained fraudulently and the same ought to be revoked.
5. The appellant opposed the application vide a replying affidavit sworn by her advocate, Stephen Obaga Muriuki on 8th May, 2017. Her case was that the grant was lawfully issued and that at the time she filed her petition for the grant of letters of administration, the respondent never raised any objection. Further, that the documents the respondent was relying on in support of ownership of the plot were of dubious

authenticity. It was also her case that the respondent's application had been overtaken by events as the plot had already been sold to a third party, one Gabriel vide a Sale Agreement dated 1st December, 2016 indicating that he bought the house for a sum of Kshs 2,500,000/=. She further averred that the respondent's application to revoke the grant was simply a way of frustrating justice in a the Environment and Land Court in Malindi ELC No.9 of 2017 in which the dispute of ownership between the respondent and the purchaser of the suit property was yet to be determined; it was her case that the respondent could only challenge the ownership of the property in the aforementioned case.

6. The learned Judge in his ruling found in favour of the respondent stating that the respondent had met the conditions for revocation or annulment of a grant as the appellant did not exhibit any document in court showing that the suit property belonged to her late husband. On the contrary, the respondent had placed before the court documents that showed that Plot No. 1389 Malindi belonged to a person other than the appellant's husband. The learned Judge found that the grant was issued based on paucity of information and revoked the same.

6. Aggrieved, the appellant has appealed to this Court against the ruling in its entirety on seven grounds contained in the memorandum of appeal dated 24th November, 2017 faulting the learned Judge for delving into issues of fact which he ought not to have considered despite the lack of substantive evidence; failing to consider the matter before the Environment and Land court, ELC No. 9 of 2017 in which ownership of the suit property was an issue for determination before the court; totally disregarding the applicable law and case law hence arriving at the wrong decision; failing to consider distinct issues separately thereby arriving at a wrong decision; shifting the burden of proof to the appellant/petitioner contrary to the law thereby arriving at a wrong decision and failing to appreciate that the alleged issues of fraud as claimed needed to be proved.

7. When the appeal came before us for plenary hearing on 19th of March, 2019, Mr. Obaga learned counsel for the appellant and Mr. Kimani holding brief for Mr. Angima for the respondent informed the Court that they would both rely on the written submissions already filed and they did not do any oral highlighting. In his brief submission, Mr. Obaga urged all the grounds together. Citing **section 76** of the Law of Succession Act, counsel urged that the reason given by the learned Judge for revoking the grant was not one of the seven grounds listed under that section.

8. He further faulted the learned Judge on three limbs i.e, that the learned Judge ought to have revoked the grant partially only in respect of **Plot No. 1389 - Malindi** since the grant covered another asset other than the house; that the learned Judge failed to consider that the respondent had also been issued with a separate grant in respect of the same house following a different petition filed in Mombasa; that the learned Judge ventured into the issue of ownership of the suit property yet this was an issue already before the Environment and Land Court under Malindi ELC No. 9 of 2017 and he ought to have suspended the operation of the grant awaiting determination of the case. He concluded by submitting that the learned Judge shifted the burden of proof to the petitioner on the issue of authenticity of documents. That the authenticity of documents can only be done by an expert witness through oral evidence and not affidavit evidence as was the case. He urged the court to allow the appeal and grant orders as sought.

9. Learned counsel for the respondent on the other hand, through submissions filed in Court on 15th March, 2018 opposed the appeal. Urging for its dismissal, counsel submitted that the appellant obtained a grant of letters of administration intestate to her husband's estate in which she included the suit property, a house without land on **Plot No. 1389 Malindi**, and a motor cycle **Bajaj KMDJ 448P** as indicated in the schedule of the deceased's assets. The appellant had thereafter purported to sell the suit property. He submitted that the respondent had also petitioned the court in Mombasa for a grant of letters of administration intestate in respect of the estate of his late father, one Filipino Wambogo Okusimba alias Philip Aboko through **Succession Cause No.325 of 2015** in the High Court in Mombasa and the grant was issued on 20th June, 2016. Further, that such grant was in respect of the suit property among other assets. He contended that the respondent was at all material times in possession of the suit property through his tenants including the appellant's husband who upon death left his wife, the appellant in occupation.

10. According to counsel, sometime in January, 2017 the respondent discovered that the appellant had sold the suit property when he was denied entry into the premises by the purported purchaser; that the purported purchaser restrained his access in spite of an injunction granted in the respondent's favour by the High Court in an application for injunction in Malindi ELC Civil Suit No. 9 of 2017. He submitted that due to the foregoing the respondent filed an application for revocation of grant in which he annexed the following documents in support of his claim:

Confirmation of grant in his favour dated 20th June 2016 in Mombasa Succession Cause No. 325 of 2015

Document 'To Whom it May Concern issued by Said Seif Bin Salim'

Document written in Arabic dated 5th February 1943

Confirmation of grant issued to the appellant dated 24th November 2016

Sale agreement for house on Plot No. 1389 to Philip s/o Mbogo on 25th March 1966

Ten rent receipts issued to John Othiaye Okumu.

11. He submitted further that in reply to the application for revocation of grant, the appellant through a replying affidavit sworn by her advocate, one Stephen Obaga Muriuki, could only annex an application by the purported purchaser of the suit property to oppose the application and the ground of objection was that the house was already sold and that the application had been overtaken by events. He argued that the learned Judge came to the conclusion that the grant issued to the appellant could not be sustained because it was simply granted without adequate evidence to demonstrate that the suit property belonged to the appellant's husband as alleged. He submitted that the failure to file an objection within the 30-day period before a grant is confirmed is not a bar to any claimant who thereafter finds out about a grant after the fact.

12. Counsel further posited that the grant was rightly revoked in its entirety because there were no records either to show that the only other property, the Bajaj Motorcycle KMDJ 448P, was indeed the property of the appellant's late husband. Further, that parties cannot have the latitude to apply and obtain grants in courts of law without putting in documents to establish the veracity of their claims. He also argued that the respondent had no need of making a cross petition for grant of letters of administration to the estate of one Johnson Otiaye Wambogo at all because he already had a separate grant in respect of the suit property. Placing reliance on the case of **Musa Nyaribari Gekone & 2 Others vs. Peter Miyienda & Another Civil Appeal No. 2 of 2014** where this Court did not only revoke a grant, but also reversed the sale of a suit property, he submitted that the instant case is generally instructive where an administrator has fraudulently dealt with property of the estate of a deceased. He urged the Court to dismiss the appeal for lack of merit.

13. This being a first appeal, the duty of this Court is to consider the evidence, re-evaluate it and make its own conclusion bearing in mind that an appellate court would not ordinarily interfere with a finding of fact by the trial court unless it was based on misapprehension of the evidence or that the Judge was shown demonstrably to have acted on a wrong principle in reaching such conclusion. (See: **Sumaria and Another vs Allied Industries Ltd [2007] eKLR**). To our mind, this appeal is only in respect of one question. Were there sufficient grounds for the learned Judge to revoke the impugned grant? Was there sufficient material placed before the court in support of the application for grant of letters of administration by the appellant before the said grant was issued and confirmed? The learned Judge found there was paucity of evidence to support the appellant's application for the Grant. Did the learned Judge err by revoking the grant or were the grounds, or any of the grounds listed under **section 76** of the Law of succession Act proved.

15. In determining this issue and for purposes of clarity, it is imperative to set out the provisions of **Section 76** of the **Law of Succession Act** which provides as follows:-

“76. Revocation or annulment of grant

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;

(b) 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;

(c) 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.

Did the impugned grant fall within any of the above provisions? A grant of letters of administration is issued to an administrator in respect of the estate of a deceased person. In other words, any property sought to be administered must belong to the deceased. A party who moves the court for a grant of letters of administration must first and foremost establish ownership of the property they seek to administer in order to ensure that the said property belonged to the deceased. That is why courts dealing with succession matters ask for evidence in support of the properties listed in the schedule of properties as belonging to the deceased.

16. Such documents would invariably include copies of Title deeds, Land Certificates, Leases, or even letters of allotment or sale agreements in some cases in respect of Land. Where motor vehicles or other substantive properties are concerned, proof of ownership is also mandatory. This is so because a devious person can list somebody else's property in the schedule of properties purported to belong to the deceased without the knowledge of the owner and after the grant is confirmed proceed to dispose of it.

17. As stated earlier, on a first appeal such as this one, we must look at the material placed before the Judge in support of the application for revocation and establish whether the Judge was right in revoking the grant. From the record, there was no evidence placed before the court by the appellant in support of ownership of the properties in question by her late husband. Even the summons for revocation was not buttressed by any documents to support ownership of the said properties by the appellant's husband. In our own assessment of the evidence presented before the learned Judge, there was no evidence to even *prima facie* support the assertion by the appellant that the said properties belonged to the deceased. We have seen several documents annexed to the respondent's affidavit in support of his application for grant of letters of administration in respect of the suit property. We are alive to the fact that there is a suit pending before the ELC in Malindi where the issue of ownership of the said property is pending determination. We will therefore eschew making any findings with regard to ownership of the same.

18. Going back to **Section 76 Law of succession Act**, we find **section 76(c)** covers the situation herein. We repeat the same here for clarity. It provides:-

(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;

The truth of the matter was that the appellant had no proof that the properties in question belonged to her husband. It does not necessarily mean that she was actuated by fraudulent intention when she listed the same as belonging to the deceased. She could have done so out of ignorance or inadvertence. Our view of the matter is in line with the learned Judge's observation to the effect that:-

“The record shows that at the time of applying for the grant, the Petitioner did not exhibit any document in court showing that the plot belonged to her late husband.”

Further that,

“The grant herein was thus issued based on a paucity of information. Riding on that is the unsupported averment that the property belonged to the deceased husband of the petitioner. The objector has thus established that there is a need to revoke the grant issued to the petitioner.”

19. The Judge's findings were squarely within the provisions of section 76 (supra) and he cannot be faulted. We find no merit in this appeal and dismiss it with costs to the respondent. As correctly advised by the learned Judge the appellant is at liberty to move the appropriate court for any necessary orders she may need to enable her retain locus to defend any interest she may have in Malindi ELC NO.9 of 2017 as the original grant issued to her stands revoked. We so order.

Dated and delivered at Malindi this 19th day of June, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR