



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CIVIL APPEAL NO. 10 OF 2012

BETWEEN

COSIMO POLCINOAPPELLANT

AND

1. TONY KENT

2. ANNA WAUSI POLCINORESPONDENTS

(Being an appeal from the ruling and order of the High Court of Kenya at Mombasa (Muriithi, J.) dated 22nd February, 2013

in

H.C. Succ. Cause No. 31 of 2006)

JUDGMENT OF THE COURT

This is an appeal arising from the ruling of **Muriithi, J.** delivered on 22nd February, 2013 in Mombasa **H.C. Succ. Cause No. 31 of 2006**. In the cause, **Tony Kent**, the 1st respondent herein filed two applications on 5th July, 2012. The first application was a Chamber Summons under **Section 47** of the Law of Succession Act and **Rules 49** and **73** of the Probate & Administration Rules. In the Chamber Summons application the 1st respondent sought orders, *inter alia* that he be “*admitted*” into the proceedings and that an injunction be issued to restrain Cosimo Polcino, the appellant herein, Nicholas Jack Polcino and Thomas Hinzano from interfering in any way with the property of the late Nicola Polcino who died in an accident along Malindi-Mombasa road on 3rd April 2002. The deceased's property in Kenya included 90% shareholding in Polcino Oasis Limited, a limited liability company which owns property known as Polcino Oasis Ltd comprising of 189 apartments and commercial shops. The injunction sought was to operate pending the hearing and determination of the summons for the revocation of a Grant. The second application for the revocation of the Grant was made under **Section 76** of the Law of Succession Act. In spite of the two applications filed by the 1st respondent under different provisions of the law of Succession Act, they both challenged the resealing of an alleged Italian Grant by the High Court in Malindi on 17th November, 2009 in which two of the 1st respondent's step brothers namely Cosimo Polcino (the appellant herein) and Nick Jack Polcino obtained a transfer to themselves of

the majority shares of Polcino Oasis Limited. It was the 1st respondent's case that the appellant had obtained the resealing of the Grant by the High Court at Malindi fraudulently as the appellant had failed to disclose that the deceased had two other children. It sought to have the resealing of the Grant revoked on the following grounds:

- (a) That the Grant ostensibly issued by the Ordinary Court of Benevento's Civil Section in Italy in a case entered in the said Court's General Register as Number 1334/04 and resealed by this Honourable Court on 17th November 2009 at the behest of Cosimo Polcino is a forgery.**
- (b) That the Resealed Grant was therefore obtained under cover of fraud.**
- (c) That the Resealed Grant was obtained through the concealment of relevant and material facts in this case;**
- (d) That the Resealed Grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the issuance of the grant;**
- (e) That the beneficiary of the Resealed Grant, Cosimo Polcino, has excluded the Applicant together with their sister Gina Louise Kent (formerly known as Gina Louise Polcino) from the interests accruing to them from the Estate of Nicola Polcino(Deceased).**

After hearing the rival submissions the High Court determined the two applications on 22nd February, 2013 and ordered *inter alia*, the revocation of the Resealed Grant dated 3rd July, 2012. The Court's final orders were that:

- (a) The summons for Revocation of Resealed Grant, dated 3rd July, 2012 is granted as prayed.**
- (b) The Chamber Summons dated 3rd July, 2012 is marked as spent having sought interlocutory orders only.**
- (c) There shall be no orders as to costs and each party will bear its own costs.**

The appellant was dissatisfied with the High Court's findings and filed this appeal.

In his memorandum of appeal dated 23rd April, 2013 the appellant listed a total of 8 grounds of appeal. However, the gist of the complaint was that the superior court erred in revoking the Grant issued by the Ordinary Court of Benevento's Civil Registry Section in Italy and resealed by the Malindi court on 17th November, 2009 as contrary to the 1st respondent's assertion the same was not issued fraudulently. The other complaint was that the 1st respondent had no *locus standi* to challenge the resealing of the Grant.

When the matter came before us on 9th October, 2013 counsel agreed to dispose off the appeal by way of written submissions and which submissions were highlighted on 5th November, 2013.

During the hearing of the appeal **Mr. Inamdar** for the appellant contended that Tony Kent, the 1st respondent herein had no *locus standi* as his application to be enjoined in the proceedings in the ordinary court in Benevento in Italy was yet to be determined. The appellant's further contention was that the deceased Nicola Polcino left two wills, an Italian and a Scottish will. Mr. Inamdar's further submission were that although the 1st respondent had alleged that the Italian will was a forgery, the allegation of forgery was not proved. He relied on the case of **Urmila w/o Mahendra Shah v Barclays Bank International Ltd & Another [1976-80] KLR 1168** in support of the proposition that to establish fraud a standard of proof required is that close to "beyond reasonable doubt." As to the allegation that the

appellant concealed material facts in failing to disclose that the 1st respondent and his sister Gina Kent were sired by Nicola Polcino, it was the appellant's case that the two were not named in the deceased's will. He faulted the issuance of an injunction in a Succession Cause as according to him, this relief is not provided for in succession proceedings.

In his rejoinder **Mr. Macharia**, learned counsel for the 1st respondent opposed the appeal. He referred us to the “*affidavit in support of petition by personal representation for resealing of a grant issued in another country*” in which the appellant swore on 2nd September, 2009. In the said affidavit the appellant deponed that the deceased Nicola Polcino died on 3rd April, 2002 domiciled in Kenya; that he was issued with a grant of probate on 31st July, 2009 in respect of the deceased's will of 24th September, 1994 by the Court of Benevento in Italy on 31st July, 2009 vide file No. 1334/04; and that the deceased was survived by the appellant Jack Nicolas Polcino and Cosimo Polcino the appellant herein. He challenged the purported resealing of the grant and urged us to find that what was 'sealed' was a collage of documents in relation to proceedings in Case No. 1334/2004 in Italy.

We have carefully considered the facts, the submissions and the authorities cited in this cause.

One of the grounds raised by the appellant was that the 1st respondent had no *locus standi* and that he is a “*busy-body*” in the proceedings. The appellant urged us to find that the 1st respondent had applied to be declared as a beneficiary in the court in Benevento in Italy and that that application was still pending as the 1st respondent's position as a beneficiary was yet to be determined. Mr Macharia for the 1st respondent contended that on 1st March, 2012 a consensus was recorded to the effect that the 1st respondent Tony Kent was to be enjoined in the proceedings. That may well be the position but the crux of the matter is that **Section 76** of the Law of Succession Act provides for an “*interested party*” to be enjoined. Hence, an applicant seeking to annul a grant under section 76 of the Law of Succession Act does not require to be enjoined before challenging the grant of probate. It is our view that the 1st respondent being a son to Nicola Polcino the deceased, he was an interested party and he did not need to seek to be enjoined as a party as appears to have been the case here. The Chamber Summons filed by the 1st respondent on 5th July 2012 was therefore unnecessary as **Section 76** of the Law of Succession Act gives a beneficiary a right to challenge issuance of a grant without having to seek an order for joinder of parties for the revocation or annulment of a grant (or resealing grant.) Accordingly, we reject the invitation by the appellant's counsel to find that in order to bring oneself under the ambit of **Section 76** of the Law of Succession Act one must seek to be enjoined before doing so. We are in agreement with the findings of the superior court Judge that this is not the procedure. The argument by the appellant's counsel's that “*there has to be a legal basis laid for the joinder of a party to existing proceedings in the first instance*” and that “*The issue of joinder ought to have been dealt with by the Judge in limine*” is rejected as it has no basis in law.

The unwarranted application for joinder also sought orders for injunction pending the determination of the application for annulment of the grant. Mr. Inamdar took issue with the prayer for injunction and urged us to find that an application for an injunctive relief is not provided for in the Law of Succession Act. It is our view that again, this was not necessary and the learned Judge was right in refusing to grant an order for injunction albeit on the reasoning that “*the chamber summons dated 3rd July, 2012 is marked as spent having sought interlocutory orders only.*”

As stated above, the final orders made by the court were:-

- (a) ***The Summons for Revocation of Resealed Grant, dated 3rd July, 2012 is granted as prayed.***
- (b) ***The Chamber Summons dated 3rd July, 2012 is marked as spent having sought interlocutory orders only.***
- (c) ***There shall be no orders as to costs and each party will bear its own costs.***

It therefore follows that any appeal to be preferred would be against those orders. It is evident that nothing turns on order Nos. (b) and (c) and the court having granted prayer (a) of revoking the grant, it did not issue an order for injunction. Indeed, as pointed out by the learned Judge, having annulled the grant, the prayer for injunction sought in the first application was spent. In respect of prayer (a) that is the revocation of the resealed Grant dated 3rd July, 2012, the appellant in his memorandum of appeal faulted the revocation. The attack on the superior court Judge's finding was that the allegation that the proceedings in Italy that the appellant sought to reseat in Kenya were a forgery, did not meet the required threshold.

It is instructive to note that the appellant in the Italian proceedings as well as in the proceedings for the resealing of the Grant make no mention of the 1st respondent Tony Kent and his sister Gina Kent. In the affidavit in support of petition by personal representatives for sealing of Grant issued in another country and in paragraph 5 thereof the appellant states:

“5. THAT the deceased NICOLA POLCINO was survived by the following:

- i) Jack Nicolas Polcino(son).**
- ii) Cosimo Polcino (son).”**

It is not disputed that the 1st respondent and Gina Kent are the children of the deceased namely Nicola Polcino. In an affidavit sworn by Cosimo Polcino on 21st July, 2012 in response to the two applications, he admits that Tony Kent and Gina were sired by his father Nikola Polcino whilst the latter lived in Australia. Under the Law of Succession, the fact of such non-disclosure is sufficient to set aside a grant. **Section 76** of the Law of Succession Act provides:-

“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 false statement or by the concealment from the court of something material to the case.

Indeed as noted by the superior court Judge, the resealing of the Grant was made after the court was satisfied that the appellant's brother Nicolas Jack Polcino had no objection to the resealing of the Grant in favour of the appellant. As the superior court observed, had the court been made aware of the existence of the 1st respondent and Gina Kent, the court would have sought their consent or otherwise before resealing the grant. It is our view that the fact that the appellant failed to disclose the existence of his two siblings, is sufficient ground to annul the grant resealed in Malindi Court on 17th November, 2009. We do not therefore need to delve into the issue of whether there was forgery or not and whether the same was established to the required standard.

For the foregoing reasons the appeal is dismissed with costs.

Dated and delivered at Mombasa this 12th day of February, 2014

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR