



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2326 OF 2008

IN THE MATTER OF THE ESTATE OF JOEL CHERUIYOT RONO (DECEASED)

RULING

1. Although the application dated 21st March 2012 is headed 'Summons for Revocation of Grant,' and is founded on section 76 of the Law of Succession Act, Cap 160, Laws of Kenya, it does not seek revocation of the grant made herein on 16th February 2009. It seeks instead revocation of the certificate issued on 29th February 2012 following confirmation of the grant.

2. A certificate of confirmation of a grant is not a grant representation, but a certificate to the effect that the grant had been confirmed by the court. The discretion given to the court by the provisions in section 76 of the Law of Succession Act is for revocation of grants of representation, not certificates that confirm those grants. There is therefore no power in those provisions for the court to revoke a certificate of confirmation of grant. As can be seen from the outset, the said application stands on shaky ground.

3. The reasons given for the application are that the applicant had not been notified of the hearing of the confirmation application, hence there was no attendance on his part, and the hearing proceeded to his detriment. He urges that the certificate be revoked.

4. I am being invited to revoke a certificate of confirmation of grant. The certificate is not an order of the court. A certificate is not a judicial order. It is an extract from a court order made in the confirmation proceedings. The certificate is generated from the court order. It is important for the parties to differentiate between the character of a grant of representation and a certificate of confirmation of the grant. A grant is a court order; it is a judicial pronouncement to the effect that some person has been appointed as administrator and granted the power to act as such. The certificate of confirmation of grant on the other side merely certifies that orders have been made to confirm the grant. The certificate of confirmation of grant is not the order itself.

5. I wonder whether any purpose would be served by revoking the certificate without touching the orders that gave rise to the certificate. If I revoke the certificate dated 29th February 2012, another certificate can still be generated from the orders of 29th February 2012, for the revocation would leave those orders intact.

6. Perhaps I could exercise inherent power under Rule 73 of the Probate and Administration Rules, where such power is saved to meet the ends of justice or to prevent abuse of the process of court. The applicant has not invoked Rule 73, but the power is inherent, the court can tap on it at anytime when it appears that that may be necessary. I understand the applicant to be inviting me to set aside the confirmation orders that gave rise to the certificate of confirmation of grant dated 29th February 2012, on the ground that he was not granted opportunity to state his case for he was not served with the confirmation application or with notice of its hearing.

7. The applicant apparently first showed his face in the proceedings at the stage of appointment of administrators, when he filed an affidavit on 17th November 2009, asserting that he had an interest in the estate of the deceased, and that he had obtained temporary representation to the estate of the deceased, which had enabled him to bring a suit against a company known as Reka Enterprises Limited which had allegedly forged and transferred Kericho/Kipchimchim/3372 to the name of the deceased. He was contending that representation ought not to be granted before the alleged suit was finalized.

8. It transpires that the said affidavit served no purpose at all for a grant of letters of administration intestate had been made in the matter on 16th February 2009 long before the said affidavit was lodged in court on 17th November 2009. In any event, the filing of the said affidavit was not in compliance with the provisions in sections 68 and 69 of the Law of Succession Act, and Rule 17 of the Probate and Administration Rules. It did not pass for an objection to the making of the grant, and had it been filed before grant was made, it would not have stopped the court with proceeding to make the grant in keeping with the rules.

9. On 18th January 2012, the applicant filed a notice of appointment of an advocate. He expressed himself to be an objector in the proceedings. There is no affidavit of service on record, but there is a copy of the notice that was served on counsel for the respondents indicating that the service had been effected on 25th January 2012. The respondents do not deny the service, merely saying that the service was effected after the hearing date for 29th February 2012 had been obtained.

10. So was the applicant a party that the respondents ought to have involved in the process of the confirmation of grant? As stated above, the applicant styled himself an objector. An objector in the context of probate proceedings is that party who has lodged an objection, in terms of sections 68 and 69 of the Law of Succession Act and Rule 17 of the Probate and Administration Rules, to a petition for grant of representation. The objection entails filing of a notice of objection, an answer to the petition and an application for grant by way of cross-petition. The said objection proceedings ought to be filed within twenty-one (21) days of the publication of the cause in the *Kenya Gazette*.

11. I have laboriously gone through the papers in the file before me and I have not come across a gazette notice relating to the matter herein. However, it is clear that a grant of representation is only made after expiry of the period given in the gazette notice. That a grant of letters of administration intestate was made on 16th February 2009 is sufficient proof that a gazette notice had been published and the duration given for filing of objections had expired before the grant was made.

12. I have already stated that the applicant did not lodge any objection within the period stipulated, and thereof his affidavit of 17th November 2009 did not pass for an objection. He was therefore not an objector under the probate process.

13. The administrators herein lodged their summons for confirmation of grant on 23rd November 2011. There is on record an affidavit of protest on 7th November 2011. His pitch in the protest was that the administrators held at the time a temporary grant of representation and urged that a full one ought not be made to them until a dispute touching on the subject property be heard and determined first. He also complained that the application for grant ought to have been made at Kericho instead of Nairobi. He stated that he would suffer irreparable harm if the grant was confirmed.

14. So was the applicant at that stage a protestor? The process of confirming grants is set out in Rule 17 of the Probate and Administration Rules. Once a summons for confirmation is lodged at the registry, whoever is opposed to the proposed distribution ought to lodge an affidavit of protest at the registry. The registrar is then required to furnish the applicant in the confirmation application with a copy of the affidavit of protest. The usual practice is for the protestor to service the affidavit of protest on the administrator applicant. The matter thereafter goes for directions.

15. The affidavit that the applicant lodged at the registry in purported protest was before the administrators had filed their summons for confirmation of grant. The said affidavit of protest was

therefore not in reply to the confirmation application. In fact, it raised matters that were not germane to distribution of the assets. The applicant was apparently still pursuing the issue of representation to the estate. An affidavit of protest filed prior to the filing of a confirmation application cannot be said to be in compliance with Rule 17(6) of the Probate and Administration Rules.

16. In view of what I have stated above, it is my conclusion that the applicant was not a protestor within the meaning of Rule 17. The registrar was therefore not bound to comply with the requirements of Rule 17 as to notices to the parties and the listing of the matter for directions. In any event, the applicant has not demonstrated that he did serve the said affidavit on the respondents.

17. It is true that a notice of appointment of advocate had been filed and served by the time the confirmation application was being heard, but in my view the administrators were not bound to serve the applicant with any court process, for at that stage he was not a party to the proceedings. He was not an objector nor a protestor, for he had not filed any documents that would have made him a party in that respect. He was not an interested party either for no orders had been made to add him to the proceedings as such for he had made no application in that behalf.

18. He had merely filed a notice of appointment of an advocate. Such a notice does not make one a party to the proceedings. The notice merely notifies those concerned that a certain party to the proceedings had appointed advocates to act for him, and to notify them of the address of service of the said advocates. Ideally, a notice of appointment of advocates should be by persons who are already parties to the suit or are seeking to be such parties in an application lodged in court simultaneously with the notice.

19. Accordingly, the administrators cannot be faulted for not serving the application in question on the applicant. He was not a party to the suit. He had not regularized his position, and the administrators were not obliged to serve a non-party with court process.

20. The applicant has in his affidavits talked of a suit between himself and Reka Enterprises Limited over one of the assets listed herein as estate property. Copies of the suit papers have not been exhibited, and I cannot therefore tell whether the said suit was on the property in question, and whether the deceased was in any way mentioned in it. I cannot therefore find basis, if the applicant were to be found to be a proper party to the proceedings, to make orders to preserve the said property for whatever purpose.

21. The application dated 21st March 2012 is misconceived and I do hereby dismiss the same with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 23RD DAY OF SEPTEMBER, 2016.

W. MUSYOKA

JUDGE