



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**SUCCESSION CAUSE NO. 409 OF 2020**

**IN THE MATTER OF THE ESTATE OF MONICA MIRIGO *alias***

**MIRIGO NJOROGHE CHECHE *alias* MONICAH MERIGO KANJA (DECEASED)**

ALICE MUMBI NJAAGA.....1<sup>ST</sup> PROTESTOR/APPLICANT

AMOS KIRURI KANJA.....2<sup>ND</sup> PROTESTOR/APPLICANT

**VERSUS**

HUMPHREY MWITHIGA KANJA.....1<sup>ST</sup> RESPONDENT

CHARLES NDUNGU KANJA.....2<sup>ND</sup> RESPONDENT

**RULING**

1. By a Notice of Motion dated 19.5.21, the Applicants Alice Mumbi Njaaga and Amos Kiruri Kanja seek for the following orders:

- 1. THAT the grant of Letters of Administration dated 27<sup>th</sup> November, 2020 issued in this succession cause be Revoked and/or annulled.***
- 2. THAT the applicants herein be included as beneficiaries of the estate of the Deceased.***
- 3. THAT costs of this application be provided for.***

2. The record shows that the deceased died intestate on 25.1.03. A grant of letters of administration was on 27.11.2020 issued to her 2 sons, Humphrey Mwithiga Kanja and Charles Ndungu Kanja, the Respondents herein. In their application for the Grant, the Respondents stated that the deceased was survived by themselves, 2 other sons, Peter Mungai Kanja, Frederick Njogu Kanja, 2 grandsons Francis Kinyua and Amos Kiruri Gachara and 2 nephews, Moses Njoroge Cheche and Job Kanja Cece. The estate of the deceased comprised of 6 acres to be excised from Parcel No. Karai/Karai/182, in the name of Cheche Mwangi. In their summons for confirmation of the Grant dated 8.2.21, the Respondents propose that the deceased's share in the said property be distributed equally to the named sons and grandsons of the deceased.

3. Together with their Application, the Applicants filed an affidavit of protest of even date. The Applicants averred that they are respectively the widow and son of Samuel Njogu Kanja (Samuel), a son of the deceased, who had predeceased her on 26.7.84. The Applicants accused the Respondents of leaving them out of the proceedings herein, with the intention of disinheriting them. The Respondents failed to inform and include the Applicants and further to disclose to the Court that their deceased brother Samuel was survived by a wife and children, who are also beneficiaries of the estate of the deceased. The Applicants came to know of these proceedings when they filed a citation to accept or refuse letters of administration, in Kikuyu Succession No. 45 of 2021 against the other survivors of the deceased. In their response to the citation, the Respondents disclosed that this succession cause was ongoing. In view of their exclusion herein by the Respondents, the Applicants urged the Court to revoke the Grant and that the estate be distributed to all beneficiaries of the estate.

4. In their affidavit in response, the Respondents stated that they had no objection to the Applicants being included as beneficiaries of the estate. They however claimed that the deceased did express to the Applicants and other people during her lifetime that the Applicants shall not be entitled to any benefit from her estate. The Respondents further averred that the suit property was erroneously included as an asset of the estate, having had been distributed in Succession Cause No. 554 of 1995, Estate of Simon Cheche Mwangi. They urged the Court to exclude the said property from the proceedings herein.

5. I have considered the Application, the rival affidavits as well as the submissions filed by the Applicants. The Respondents did not comply with the Court's directions to file written submissions. It is noted that in their submissions, the Applicants simply restated their averments in their affidavit in support of the Application.

6. The grounds upon which a grant may be revoked are stipulated in Section 76 of the Law of Succession Act which 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) 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.***

7. A party seeking revocation of a grant of representation must demonstrate the existence of any of the grounds set out in Section 76 of the Act. The Applicants are the widow and son of Simon, a son of the deceased who predeceased him. This is not disputed. In their application for the Grant, the Applicants were obligated to indicate the Applicants as survivors of the deceased. Section 51(2) of the Act sets out the information that shall be included in every application for a grant of representation. The information includes *inter alia*:

***(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;*** (emphasis added)

8. It is noted that the Respondents did not include in their application for the grant, the Applicants as survivors of the deceased by virtue of their being survivors of Simon, or inform them of the proceedings. Additionally, the Respondents, they did not disclose to the Court the existence of the Applicants as survivors of the deceased, and further made a false statement, that the deceased was only survived by the 8 persons listed in their affidavit. Accordingly, the Respondents obtained the Grant fraudulently by the making of a false statement and by the concealment from the court of something material to the case. The Respondent's claim that the deceased had indicated during her lifetime that Simon's survivors were not to have a share in her estate is not supported by any evidence. The Court therefore rejects the same.

9. The Court notes that among the beneficiaries listed by the Respondents as beneficiaries of the estate are 2 grandsons, Francis Kinyua and Amos Kiruri Gachara. It is not indicated whose children they are and whether their parents are alive or not. Suffice it to say that the 2<sup>nd</sup> Applicant is a grandson of the deceased and excluding him while including other grandchildren, amounts to discrimination which is prohibited under Article 27 of the Constitution of Kenya, 2010.

10. Further, a child or children of a child of an intestate who predecease him is or are entitled to the share which their parent would have taken had he not predeceased the intestate. The children of Simon are entitled to his share in the deceased's estate which he would have taken were he still alive. This is known as the principle of representation. The principle is set out in Section 41 of the Law of Succession Act as follows:

***Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.***

11. In the case of Christine Wangari Gachigi v Elizabeth Wanjira Evans & 11 others [2014] eKLR, the Court of Appeal had this to say regarding the principle of representation:

***Although Sections 35 and 38 of the Laws of Succession Act is silent on the fate of surviving grandchildren whose parents' predeceased the deceased, the rate of substitution of a grand child for his/her parent in all cases of intestate known as the principle of representation is applicable. The law on this is section 41. If a child of the intestate has pre-deceased the intestate then that child's issue alive or en ventre sa mere or that date of the intestate's death will take in equal shares per stirpes contingent on attaining the age of majority. Per stirpes means that the issue of a deceased child of the intestate takes between them the share***

*their parents would have taken had the parent been alive at the intestate's death.*

12. In their application for confirmation of the Grant, the Respondents did not include the children of Simon as beneficiaries of the estate of the deceased. They did not therefore comply with Section 41 of the Act. Upon being confronted with this omission in the present Application, the Respondents have stated that they do not have any objection to the Applicants being included as beneficiaries of the estate of the deceased.

13. I have looked at the documents exhibited in respect of Succession Cause 554 of 1995, Estate of Simon Cheche Mwangi. The gazette notice date 26.6.98 indicates that the deceased, Job Kanja Cece (Job) and Moses Njoroge Cheche (Moses) applied for a grant therein in their capacity as sister and sons of the deceased therein. The certificate of confirmation dated 6.2.01 indicates that Parcel No. Karai/Karai/182 was distributed to the 3 administrators, with the deceased getting 6 acres and the 2 sons getting 3 acres each. There is also on record, a subsequent grant issued on 8.5.13 to Job, Moses and the Respondents and certificate of confirmation of grant of even date in Succession Cause No. 554 of 1995. This was issued no doubt, after the demise of the deceased herein. In that certificate, the deceased's share devolved upon the Respondents. Thereafter, the said certificate of confirmation of grant was rectified on 14.5.18 and the deceased share in the property devolved upon the Respondents, the deceased's other sons Peter Mungai Kanja and Frederick Njogu Kanja, and grandsons Francis Kinyua and Amos Kiruri Gachara, the beneficiaries named herein. Accordingly, the estate of the deceased was fully distributed in Succession Cause No. 554 of 1995. This explains the Respondents averments that the property was erroneously included as an asset of the estate herein.

14. The record shows that the Respondents' petition for the grant herein is dated 18.8.2020. They indicated that the only property of the estate is 6 acres from Parcel No. Karai/Karai/182. The question that begs is given that the property herein had been distributed to them in Succession 554 of 1995, in May 2018, why did the Respondents commence these proceedings? The sole asset of the estate having been distributed in the other cause, the proceedings herein were an exercise in futility. Indeed, the Respondents' averments that the property ought not to have been included herein reeks of deception having filed the proceedings herein while fully aware that as co-administrators in the estate of Simon Cheche Mwangi, they had distributed the property to themselves and the other beneficiaries they chose, to the exclusion of the Applicants.

15. Given the circumstances, where does that leave the Applicants. Their recourse as beneficiaries of the estate of the deceased can only be in Succession Cause No. 554 of 1995 where distribution of Parcel No. Karai/Karai/182 was done, and not in this Cause.

16. In the end I find that the Application dated 19.5.21 is merited as the statutory grounds for revocation of a grant have been established. Accordingly, the grant of letters of administration issued to Humphrey Mwithiga Kanja and Charles Ndungu Kanja on 27.11.2020 is hereby revoked. This is a family matter. However, given the conduct of the Respondents, I award costs to the Applicants.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 25<sup>TH</sup> DAY OF FEBRUARY 2022**

.....

**M. THANDE**

**JUDGE**

**In the presence of: -**

.....**for the Applicants**

.....**for the Respondents**

.....**Court Assistant**