



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 682 OF 2015

IN THE MATTER OF THE ESTATE OF BENJAMIN KIREGENYI

MUIRI alias KIREGENYI S/O MURWANJOGO (DECEASED)

PETER GICHOHI KIREGENYI

CHRISTINE NYARWARE MUIRI

JOSEPH MAINA KIREGENYI

EVALINE MUTHONI NJERU.....APPLICANTS

VERSUS

NEWTON WACHIRA GICHOHI.....RESPONDENT

JUDGEMENT

Brief facts

1. Summons for Revocation dated 13/05/2019 brought under Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules seek for orders of revocation of grant issued and confirmed on 22nd November 2016 in favour of the respondent's father one Gichohi Muiri on grounds that the same was fraudulently obtained.
2. In opposition to the application, the respondent filed a replying affidavit dated 29th May 2019 in which he denies the allegations in the Summons General.
3. The Summons were heard by way of viva voce evidence based on the affidavits filed by the parties.

The Applicants' Case

4. The 1st and 2nd applicants testified but did not call any witness. PW1, Peter Gichohi Kiregenyi stated that he is a son of the deceased and that his father had one wife namely Hannah Muchiru Kiregenyi and together with the deceased were blessed with seven children as follows:-

- a) James Muiri Kiregenyi
- b) John Kiega Kiregenyi
- c) Peter Gichohi
- d) Gladys Ngima
- e) Margaret Nyokabi
- f) Joseph Maina
- g) Eunice Muthoni Kiregenyi

5. PW1 further testified that the suit property, L.R Mahiga/Ugachiku/150 measuring 1¾ acres ought to be distributed amongst the deceased's male children namely James Muiri, John Kiega, Peter Gichohi and Joseph Maina. He stated that his sisters are all married and they are not interested in getting any share of their father's estate. PW1 told the court that his father had a brother, Gichohi who PW1 states he met in 2014. He further stated that they occupied the suit property and it is not true that the said Gichohi used to live on the suit property as well.

6. PW1 further testified that the petitioner filed this succession proceedings without the knowledge of the children of the deceased and without the consent of the beneficiaries. He states that he came to learn of this cause from the notice in the Kenya Gazette.

7. PW1 further testified that after the burial of his mother in 2015, he stayed behind with clan members to sort out the issue of the claim of his father's land by his one Gichohi Muiri. The clan elders stated that the suit property belonged to the deceased and his brother in equal shares. Afterwards, another meeting with the Assistant Chief was held whereby it was directed that the suit property ought to be shared equally between the deceased's family and their uncle. PW1 states that he did not know that his uncle had instituted this cause. PW1 denied that he was cited but explains that he did not file a response to the citation in 2015. All he did was to enter an appearance to the citation. He states that he did not file an objection to the issuing of the grant as he did not know that there was a succession cause in court. He further stated that he was not aware that his uncle who was the original Petitioner died and that the respondent had taken over the succession cause.

8. PW1 further stated that he came to know of the succession cause when the surveyor came to the suit property. He further stated on cross examination that there was no marked boundary on the ground between the parcel of the deceased and that of his uncle.

9. PW1 further contends that the grant made to the petitioner should be revoked because it was obtained fraudulently and is defective.

10. PW2, Joseph Maina Kiregenyi the 3rd applicant testified that he came to know of the petitioner in 2015 during his mother's burial. He said that he together with his siblings have been residing on the suit property as alleged. He urged the court to distribute the property in five equal shares between the four sons of the deceased and the petitioner to get one of the five shares but not half share of the land.

11. PW2 stated that he did not know that his uncle had filed these succession proceedings or that the petitioner had taken over the proceedings after his uncle's death. He further stated that he came to know of the matter when he saw it in the Kenya Gazette in 2016. He told the court that they had attended the succession proceedings a few times.

The Respondent's Case

12. It is the respondent/DW1's testified that he is the son of the petitioner, Gichohi Muiri who petitioned for letters of administration after citing the applicants in 2016. He stated that the applicants entered appearance to the citation on 8th October 2015 but they did not file any objection to the petition for letters of administration. The respondent further states that the applicants were served with the summons for confirmation of grant on 14th November 2016 and since they did not file any protest, the summons were allowed on 22nd November 2016.

13. DW1 further stated that he approached the applicants to sign the transmission documents but they declined. He then served them with an application seeking for orders that the Deputy Registrar sign on their behalf. They did not file any response to the application which was allowed by the court on 14th March 2018 and ruling was delivered in their presence. The respondent stated that the applicants knew all along about this case and cannot claim that they came to know of it in 2019. Further, the respondent stated that the applicants cannot claim that the petitioner concealed anything because he kept them informed of the progress of this cause and they even appeared in court in person.

14. DW2 testified that he was an elder and member of Wagura Kaguongo clan and that he knew the parties in this cause. The deceased belonged to DW1's clan and that the deceased and the petitioner were brothers who jointly own the land in issue. He further stated that the clan caused the suit property to be registered in the name of the deceased during land consolidation. He said he knew that the deceased died before giving the petitioner his share. DW2 told the court that he was a witness during the meetings held to resolve the dispute on the land.

15. DW3, Samuel Migunda Gachura testified that he was a clan member to which the deceased and his brother belonged to. He further added that after the burial of the deceased's wife, the clan held a meeting where they decided that the suit property be shared equally. He told the court that the deceased was the registered proprietor of the suit land but held ½ of the share in trust for his younger brother, the petitioner. He further testified that the two brothers marked their boundaries and each one of them lived on their respective portions until the petitioner moved out with his family.

16. Parties opted not to file written submissions.

Issues for determination

17. After careful analysis, we humbly submit that the main issue for determination is whether the applicants have presented sufficient evidence to warrant revocation or annulment of the grant;

The Law

18. **Section 76 of the Law of Succession Act** gives the court the powers to revoke a grant provided the conditions stipulated therein have been met. It states 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) 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 has ordered or allowed; 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
 - iv. The grant has become useless and inoperative through subsequent circumstances.

19. The circumstances in which a grant can be revoked were discussed in the case of **In the Matter of the Estate of L.A.K. (Deceased) [2014] eKLR :-**

“Revocation of grants is governed by Section 76 of the Law of Succession Act. The relevant portions of Section 76 are paragraphs (a), (b) and (c) since the issues raised relate to the process of the making of a grant. A grant may be revoked where the proceedings leading up to its making were defective, or were attended by fraud and concealment of important matter, or was obtained by an untrue allegation of a fact essential to the point.”

20. Notably, the power to revoke or uphold a grant is a discretionary one. This principle was enunciated in the persuasive decision in **Albert Imbuga Kisigwa vs Recho Kawai Kisigwa Succession Cause No. 158 of 2000** where Mwita J stated:-

“Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”

21. In this case, it is not in dispute that the petitioner, Gichohi Muiro petitioned for letters of administration on 13th October 2015. It is also not disputed that he filed a Citation on 24th September 2015 against the applicants herein. The applicants entered appearance to the citation on 8th October 2015. On perusal of the petition for letters of administration, the petitioner listed the applicants as amongst the surviving heirs of the deceased. The 1st and 3rd applicants were present during the confirmation of the grant. Further on 30/11/2017, the application dated 6/2/2017 seeking orders to authorize the Deputy Registrar to sign the transmission documents on behalf of the applicants, came up for hearing and was allowed. The 1st and 3rd applicants were both present in court save for their sister Evaline Muthoni Njeru. It is therefore evident that the applicants were aware of the succession proceedings all this while despite testifying that they came to know of this cause during the gazettelement.

22. Furthermore, during the hearing for the confirmation of grant, the 1st and 2nd applicants were present in court. The petitioner was forthright about the applicants being the beneficiaries of the deceased and further included the applicants as beneficiaries of a portion of the estate of the deceased. Therefore, the court in confirming the grant, took into account the applicants’ interests in the estate of the deceased. The applicants therefore cannot claim that the grant ought to be revoked because it was obtained fraudulently by concealment of facts.

23. I have also looked at the Affidavit of protest filed by Joseph Maina dated and filed on 13th December 2017. This affidavit was filed after the grant was confirmed on 22nd November 2016 and after the respondent filed his application seeking orders to authorize the Deputy Registrar to sign the transmission documents. It took the applicants almost one year after the confirmation of the grant to file their protest despite having attended court for hearing of the confirmation of the grant.

24. I am therefore not persuaded by the applicants’ arguments that the respondent concealed material facts and thus the grant was obtained fraudulently. I find that pursuant to Section 76 of the Law of Succession Act, the applicants have not satisfied the court or made a case to warrant the revocation of the grant. In this regard, the application dated 13th May 2019 must fail.

25. Consequently, I hereby dismiss the application dated 13/05/2019.

26. Each party to meet their own costs.

27. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 24TH DAY OF FEBRUARY, 2022.

F. MUCHEMI

JUDGE

Judgement delivered through videolink this 24th day of February, 2022