



REPUBLIC OF KENYA

IN THE HIGH COURT KENYA AT MERU

(CORAM: CHERERE-J)

SUCCESSION CAUSE NO. 227 OF 2004

IN THE MATTER OF THE ESTATE OF LATE M'MWITHIMBU

M'MWIIRA ALIAS MWITHIMBU TUBU (DECEASED).

BETWEEN

THOMAS MBURUGU

M'MBWI.....2ND ADMINISTRATOR/1ST APPLICANT

GEOFFREY M'MBOROKI.....2ND APPLICANT

AND

BASILIO M'MUNGANIA

M'MWITHIMBU.....ADMINISTRATOR/1ST RESPONDENT

STEPHEN GITONGA.....2ND RESPONDENT

PAUL MURIITHI M'ITUAMIKWA.....3RD RESPONDENT

KAREGA JASON KAROBI.....4TH RESPONDENT

MOSES MUTHAURA.....5TH RESPONDENT

RULING

Introduction

1. By a ruling dated 22nd November, 2016, this court revoked the certificate of confirmation of grant issued in favour of Hellen Karegi M'Mbwi, Joanina Karambu M'Mbwi, Thomas Mburugu M'Mbwi, James Muthuyia M'Mbwi, Stanley Mwongera M'Mbwi, Mutethia Patrick M'Mbwi, and Kirimi Simon M'Mbwi who are the children of one of the 6 children of the deceased namely Francis M'Mbwii M'Mwithimbu (Deceased) on the ground that the other children of the deceased had been omitted.
2. The court additionally directed the parties to agree on the person or persons to be appointed as administrators of the estate of the deceased.
3. Subsequently on 13th June, 2018, letters of Administration were issued to **Basilio M'Mungania M'Mwithimbu** and **Thomas Mburugu M'Mbwi**.
4. Afterwards, an application for confirmation of grant dated 29th June, 2017 was filed on 20th June, 2018 in which both administrators made proposals for distribution of the estate.
5. By a ruling dated 21st June, 2018, this court agreed with the mode of distribution proposed by to **the 1st Administrator/Basilio**

M'Mungania M'Mwithimbu and directed that Deceased's estate comprised in **LR. NO. KIIRUA/RUIRI/512** be distributed equally to his 6 children as follows:

1. **1/6th share to M'Rimberia M'Mwithimbu(deceased) (Represented by Stephen Gitonga)**
2. **1/6th share to M'Ituamikwa M'Mwithimbu(Deceased)(Represented by Paul Murithi M'Ituamikwa)**
3. **1/6th share to Basilio M'Mungania M'Mwithimbu**
4. **1/6th share for Francis M'Mbwii M'Mwithimbu(Deceased) equally to Hellen Karegi M'Mbwi,Joanina Karambu M'Mbwi, Thomas Mburugu M'Mbwi, James Muthuyia M'Mbwi, Stanley Mwongera M'Mbwi, Mutethia Patrick M'Mbwi, and Kirimi Simon M'Mbwi**
5. **1/6th share to Geoffrey M'Mboroki**
6. **1/6th share for Margaret Kaigongi(deceased) To be held by Mrs Karega, Jason Karobi and Moses Muthaura in trust for themselves and children of Maragret Kaigongi in equal shares**

7. By summons for revocation dated 23rd October, 2021, the 2nd Administrator and the co-applicant pray for orders that the grant rectified on 19th September, 2018 be revoked on grounds that it was obtained fraudulently, by concealment of material particulars and by making of false statements.

8. In support of the application, the 2nd administrator by his affidavit sworn on 12th October, 2021 avers that the deceased had provided for of his sons and his father was not provided for and being the only one in occupation of deceased's land is the rightful beneficiary of the estate. In support of his contention that the deceased had provided for some of his sons, the 2nd Administrator has to his annexed search certificates for **LR. KIIRUA/RUIRI/196** and **LR. KIIRUA/RUIRI/1704** in the names of two sons of the deceased namely Twamikwa Mwimbimbu and M'Mboroki M'Mwithimbu respectively. He has also alluded to the fact that two other sons **Basilio M'Mungania M'Mwithimbu** (1st Administrator) and Njaru Rimberia were gifted LR. RUIRI/RWARERA/212 and 57 respectively which portions are still under adjudication.

9. Stephen Gitonga s/o deceased's son **M'Rimberia M'Mwithimbu**, Paul Muriithi M'Ituamikwa s/o deceased's son **M'Ituamikwa M'Mwithimbu** and Karega Jason Karobi s/o deceased's daughter **Margaret Kaigongi** who are the 2nd to 4th Respondents respectively have by their replying affidavit sworn on 09th November, 2021 opposed the application mainly on the ground that the issues in this application have been determined and on the ground that the land parcels owned by deceased's were acquired and not given by the deceased.

Analysis and determination

10. I have considered the application in the light of the affidavits and the submissions filed on behalf of the parties and the issue for determination is whether a case has been made for revocation of the grant.

11. The Court in **Jamleck Maina Njoroge v Mary Wanjiru Mwangi [2015] Eklr** stated THAT;

The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.

12. It is trite law that "whoever alleges must prove. **Section 107 of the Evidence Act, Chapter 80 Laws of Kenya** states as follows:

1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.

2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person

13. For Applicant's application to fall within the ambit of the provisions of **Section 76 Law of Succession**, they had a duty to prove that the proceedings that culminated in the order dated 21st June, 2018 distributing the estate of the deceased equally to his 6 children were **defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law which duty they failed to discharge.**

14. **And even if for the sake of argument, the Applicants allegation are true**, the evidence on record discloses that the 2nd Administrator/1st Applicant has all along participated in the proceedings on his own and through his appointed advocates and was so represented on 21st June, 2018 when the order distributing the estate of the deceased equally to his 6 children was made.

15. The present application was filed 3 years and 4 months after the grant was confirmed and the delay has not been explained.

16. Concerning the 2nd Applicant, there is no evidence that he renounced his right and as contended by the Respondents, his renunciation at this point in the proceedings is not sufficient cause to revoke the grant. And in any case, he is at liberty to give up his share to the 2nd Administrator/1st Applicant if he wishes.

17. A perusal of the court record reveals that the contention that only the 2nd Administrator/1st Applicant's father had not been provided for by the deceased was pleaded. If the Applicants are of the opinion that the court did not address its mind to that issue, they have a right to challenge the court's determination in the proper forum, but not to seek revocation of the grant which amounts to ask the court to sit on appeal on its own judgement.

18. Finally, a perusal of the court record demonstrates that since the grant was confirmed on 19th September, 2018, the 2nd Administrator/1st Applicant has for one reason or another frustrated the distribution of the estate. Litigation must come to an end. There must be rest and closure for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.

19. From the foregoing analysis, I have come to the conclusion the Applicants have not placed before the court any material to support their contention that the grant confirmed on 21st June, 2018 and whose Certificate of Confirmation of Grant was rectified on 30th July, 2019 was **obtained fraudulently by making of a false statement or by means of untrue allegations of facts or by concealment of essential facts.**

20. The orders which commends to me and which I hereby issue are **THAT:**

1) The summons for revocation dated 23rd October, 2021 has no merit and it is dismissed

2) Costs shall be none by the Applicants

DELIVERED IN MERU THIS 24TH DAY OF FEBRUARY 2022

WAMAE. T. W. CHERERE

JUDGE

Court Assistant - Morris Kinoti

For Applicants - N/A for D.M.Nyamu & Co. Advocates

For Respondents - Ms. Otieno for J.K.Ntarangwi & Co. Advocates