REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

SUCCESSION CAUSE NO. 102 OF 2016

IN THE MATTER OF THE ESTATE OF MATHENGE GICHOBI (DECEASED)

WATHATA KINYANJUI ....APPLICANT

-VERSUS-

JOSPHAT MATHENGE WAGOTHO.....RESPONDENT

J U D G M E N T

1. This succession cause relates to the estate of the late Mathenge Gichohi who died on 31/07/1981 aged 70 years. He left behind land parcel no. KIINE/RUIRU/xxx (hereinafter referred to as the "suit property"). The Respondent sought representation to the deceased's estate vide a petition lodged on 11/01/1990 in Kerugoya Succession Cause No. 8 of 1990 and the same was granted to him on 14/08/1990 and confirmed on 08/01/1991. The court awarded the respondent the whole share of the suit property which was the only property forming the estate of the deceased.

2. Presently before this court is the Summons for Revocation of Grant dated 25/05/2016 and filed on 07/06/2016. The application seeks for the revocation and/or annulment of the aforesaid grant and is premised on the ground that the grant was obtained fraudulently and with non-disclosure of material facts to the court.

3. The application is expressed to be brought under **Section 76** of **Law of Succession Act** (the "Act") and **Rule 44** of the **Probate and Administration Rules** (the "Rules"). It is supported by the Affidavit sworn by the Applicant on 25/05/2016 in which she avers that the beneficiaries of the subject estate were not consulted prior to the obtaining of the said grant and that the Respondent was not a beneficiary of the estate thus not entitled to apply for the letters of administration in the estate of the deceased.

4. The Application was opposed by the Respondent vide a Replying Affidavit that was strangely sworn on 26/07/2017 yet filed on 24/07/2017. The application was canvassed by way of viva voce evidence which was recorded on 28/01/2020 as well as by way of written submissions. The Applicant and the Respondent filed their written submissions through their advocates on record on 20/02/2020 and 22/01/2021 respectively.

<u>Applicant's Case and Submissions</u>

5. The Applicant testified as the only witness in support of her case. She stated that herself and her late sister were the only children of the deceased. That the Respondent filed the Cause and obtained the subject grant without involving them. The Applicant further alleged that the Respondent is not a beneficiary or a proper person to be issued with a grant or to inherit from the estate of the deceased. As such, it was the Applicant's submission that the grant was obtained fraudulently and should thus be revoked.

<u>Respondent's Case and Submissions</u>

6. The Respondent relied on his affidavit sworn on 26/07/2017. He testified personally and called two (2) witnesses in opposition of the Application. The Respondent averred that he informed the Applicant and her late sister when he filed the succession cause but they denounced their right to inherit from their late father. In his submissions, the Respondent claimed that the deceased took him in and raised him as his son as the deceased did not have any sons of his own. He further submitted that the Applicant and her sister have never lived on or utilized the suit property. He thus urged this court to dismiss the application with costs.

7. DW2 was Josphat Maina Gacunji, a member of the Aceera Clan, Mbari ya Njagi. As his evidence, he relied on his statement dated 14/03/2019. He testified that the deceased left behind two daughters who were not utilizing the suit property since they were already married. DW1 further stated that the Respondent was born in 1955 and was living with the deceased having been adopted by him under Kikuyu customs. It was his testimony that the Respondent's father owned land parcel no. KIINE/NGUGUINE/KIBINGOTI/xxx. Despite having

their own land, DW1 stated that the Respondent's parents lived in the suit land and they were buried there. He also stated that the Respondent has two siblings, Bernard Kamau and Julia Wangithi, and that the said Bernard was living in the suit land before he was told to go to his father's land.

8. DW3 was Godfrey Mwangi, also a member of the Aceera Clan, Mbari ya Njagi. He adopted his statement dated 19/03/2019 as his evidence. In his testimony, he stated that he did not know when the Respondent was taken in by the deceased as a son but that it was sometime between 1979 and 1981.

9. Submissions:

10. For the applicant, submissions were filed by Waweru Macharia & Co. Advocates. He submits that the main reasons for seeking revocation of the said grant are that the respondent did not consult the applicant and her late sister who are the biological children of the deceased. That the respondent was not a beneficiary entitled to the estate of the deceased and was therefore not the proper person to be issued with the grant or to inherit the estate of the deceased. He has raised various issues which he wishes this court to determine and has relied on the case of ***Mary Rono-v-Jane Rono & Another, (2005) eKLR*** which held that when it comes to inheritance gender or marital status should not form a basis of discrimination. He has also relied on **Section 66 of the Act** which enlists the persons to be preferred to administrate the estate of a person who died intestate and gives first priority to the spouses followed by other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided under Part –v- of the Act. In this regard he has relied on **Section 38 of the Law of Succession Act** and submits that the applicant and her late sister who are the children of the deceased are entitled to administer and share the estate of the deceased equally. The applicant further relies on **Section 76 of the Act** and submits that the respondent obtained the grant fraudulently without following the laid down procedure, and failed to disclose material facts to the court. For the respondent, submissions were filed by Jackline Kiragu, Advocate for the Respondent. She submits that it is not true that the respondent failed to disclose material facts. This is because Form P & A 5 clearly indicated that the applicant and her sister are daughters of the deceased. The respondent submits that he was taken in by the deceased as his son. He further submits that there was in-ordinate delay in filing this application and therefore prays hat it be dismissed.

Issues for determination

11. From the issues raised by the parties in their respective pleadings, evidence and submissions, it is my view that the main issues for determination by this court are:

a. Whether the Respondent is a dependant of the estate of the deceased.

b. Whether the Applicant has established any of the statutory grounds warranting the revocation of the subject grant.

Analysis

a. Whether the Respondent is a dependant

12. Section 29 of the **Act** defines a dependant as follows:

> **"29 (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**
>
> **(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and**
>
> **(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death."** *[Emphasis added]*

13. Under the above provision, a dependant must prove that he was being maintained by the deceased immediately prior to his demise. It was the Respondent's contention that the deceased took him in and raised him as his son as he did not have sons of his own. In his affidavit in response to the present application, he depones that the deceased was his uncle. It was further his testimony that the deceased catered for his needs and that he lived in the suit property all his life and solely depended on the land to make a living.

14. There is no dispute that the respondent is not a biological son of the deceased. His claim is based on the allegation that the deceased had adopted him and had performed the requisite Kikuyu Customs. The Law imposes a burden of proof on the person who alleges. Simply stated, he who alleges must proof. **Section 107, 108 & 109** of the **Evidence Act** provides as follows:

> **"107(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.**
>
> **108. Incidence of burden. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.**
> **109. Proof of particular fact. The burden of proof as to any particular fact lies on the person who wishes the court to believe**

in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

The legal and evidential burden fell upon the respondent to proof that he was adopted as a son. This burden was not discharged. The witnesses who testified did not adduce any proof of the serious allegation. DW2 when he was cross-examined admitted that he did not know when the respondent was taken in by the deceased as his son. Of importance is that admission by DW2 that the respondent had his own parents and at the time they died, the respondent was an adult. There was therefore no reason given why the deceased would take him as his own. DW2 stated that he did not know when the respondent was taken in by the deceased. Indeed DW2 admitted that there was no traditional ceremony to adopt the respondent as a son of decease. DW2 said he knew of the land of the deceased and the respondent had no land. This despite the fact that DW3 admitted that the respondent owns land parcel No. Kiine/Ruiru/xxx and the father of the respondent owned land parcel No. Kiine/Nguguini/xxx. It follows that the evidence of DW2 was a mere fabrication which cannot be relied on. This also applies to the testimony of DW3 who when cross-examined stated that he did not know when the respondent was adopted but claimed that it was 1979-1981. By then the respondent was an adult who could not be adopted at that age. The respondent stated that deceased paid his school fees but did not produce any evidence. The allegation that he was educated by the deceased was a white lie which he exposed as it was his evidence during cross-examination that he does not know how to read.

The respondent admitted that he owns his own piece of Land Parcel No. Kiine/Euiru/xxx which is next to that of deceased and that his father owns a piece of land. He is not destitute. PW1 testified that the respondent was allowed to put up a small house as he cleared his father's land.

Having considered the totality of the evidence it is my finding that the respondent has failed to proof that he was taken in as a son by the deceased. The respondent is a nephew of the deceased and yet in Form P & A 5 he stated that he is a step-son. This was a fraudulent statement which shows that he obtained the grant by the making of a false statement that he was a step-son and concealed a material fact that he was a nephew and not a step-son. **<u>Section 76(b) of the Act</u>** provides that a grant may be annulled or revoked if the court finds that;

> (b) " That the grant was obtained fraudulently by the way of making false statement or by the concealment of something material to the case.

I find that the respondent has not proved that he is a beneficiary entitled to the estate of the deceased. He is not a dependant of the deceased.

<u>b. Whether the initial grant should be revoked</u>

15. The circumstances under which a grant of representation may be revoked by this court are provided for under **Section 76 (a)-(e)** of the **Act** which provides 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 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."**

16. The above provision was construed in the case of **<u>Matheka and Another vs Matheka [2005] 2 KLR 455</u>** where the Court of Appeal laid down the following guiding principles.

> **"i. A grant may be revoked either by application by an <u>interested party</u> or by the court on its own motion.**
>
> **ii. Even when revocation is by the court upon its own motion, <u>there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law</u> or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the**

administration of the estate."

17. In the instant case, the Applicant alleges that the Respondent obtained the grant fraudulently and through concealment of material facts to the court. It is not in dispute that the deceased died intestate. It is also not in dispute that the sole asset the deceased left behind was the suit property. The parties also agree that the deceased was survived by two daughters. As per the Affidavit in support of the petition, the Respondent disclosed himself and the other two children of the deceased who include the Applicant and her late sister, Wanjiru Waithaga. He described himself as the stepson of the deceased. In my view, this was a false statement as even his affidavit in opposition of the present application indicates that he was a nephew and not a child of the deceased.

18. The Applicant also contends that she was not informed of the succession proceedings leading to the grant being awarded to the Respondent. According to her, the Respondent never sought her consent and that of her late sister when the grant was issued or when it was confirmed. From her affidavit in support of the present application, the Applicant indicates that she only came to know of the Cause after the Respondent was issued with a Title Deed. An application under **Section 76 of the Law of Succession Act (supra)** an application for revocation of grant can be filed at any time and the issue of delay in filing the application does not arise. In any case the applicant has satisfactorily explained the delay as she was not aware that the applicant had filed the succession cause and distributed the entire estate to himself.

19. As evidenced by the green card availed to the court by the Applicant, the suit property was initially registered in the name of Maina Kinyoro on 16/06/19xx. He then transferred it to Maina Macharia on 21/02/19xx who then transferred it to the deceased on the same 21/02/19xx. The Applicant together with her late sister, Wanjiru Waithaga, then registered a caution on the suit property on 09/03/1990. Subsequently, the suit property was registered in the name of the Respondent on 14/01/1991 and a title was issued to the Respondent on the same 14/01/1991.

20. The Respondent was appointed as the administrator over the deceased's estate. In his written submissions, the Respondent states that he filed the succession cause in respect of the estate of the deceased in his capacity as a nephew. However, as noted above, the Respondent had sought representation in the estate of the deceased by identifying himself as the stepson of the deceased.

21. It is apparent that the Applicant and her late sister were not included in the distribution of the deceased's estate. The reason for this, according to the Respondent, is that the Applicant and her sister were summoned by the clan elders, and they renounced their right to inherit from their late father. The Respondent further averred that the Applicant had indicated before the chief that she had no problem with the Respondent succeeding the deceased. This contention is not supported by any evidence as the respondent filed the suit without the Chief's letter, introducing the beneficiaries. That not withstanding the applicant ought to have called the applicant who is a first line dependant at the time confirmation of the grant in compliance with **Section 70 of the Law of Succession Act.**

22. Filing the petition without obtaining the consent of all the beneficiaries is in my view contrary to **Rule 26 of the Probate and Administration Rules** which states as follows: -

> **"26(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.**
>
> **(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require."**

This rule is couched in mandatory terms and the respondent simply trashed and wants the court to take his word even when there is no evidence to support it.

23. The petition ought to have been accompanied by consent as provided under **Rule 26** of the **Rules** signed by all the beneficiaries or in the alternative a renunciation duly signed as required. In this case, although the Respondent disclosed of the existence of the Applicant and her late sister, there is however no consent that was filed confirming that they were agreeable to the Respondent being the administrator and sole heir to the estate.

24. The effect of failure to comply with **Rule 26** of the **Rules** was ably discussed by the court in **Al-Amin Abdulrehman Hatimy vs. Mohamed Abdulrehman Mohamed & another [2013] eKLR** where it was held that the law of succession by virtue of **Rule 26** requires that any application for issue of a grant must be accompanied by a consent duly signed by all persons entitled in the share in the same estate. In my view, the deliberate failure by the Respondent to involve all the beneficiaries at the time of filing the succession cause; or seek their consent or renounciation amounts to concealment of material facts. For that reason, it is my view that the present application is merited.

Conclusion

25. From the foregoing, I opine that the application dated 25/05/2016 has merits and is allowed I order that:-

1. The grant of letters of administration issued to the applicant on 14/8/1990 and confirmed on 8/1/1991 is hereby revoked.

2. The Land Parcel No. Kiine/Ruiru/xxx shall revert back to the estate of the deceased.

3. The registration of the respondent as the proprietor of the Land Parcel No. Kiine/Ruiru/xxx shall be cancelled forthwith.

4. The respondent Josphat Mathenge Kagotho is removed as the administrator of the estate of the deceased.

5. The applicant Wathata Kinyanjui is appointed as the administrator of the estate of the decease and is at liberty to apply for letters of administration within 60 days.

6. No orders as to costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 17TH DAY OF FEBRUARY, 2022

L.W. GITARI

JUDGE