



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 2955 OF 2014

IN THE MATTER OF THE ESTATE OF MUTHONI NJOROGE (DECEASED)

PATRICIA WAMBUI NJOROGE.....APPLICANT

VERSUS

ANNE WAMBUI NJUGUNA.....1<sup>ST</sup> RESPONDENT

RAPHAEL MBUCHO MUHIA...2<sup>ND</sup> RESPONDENT

JUDGMENT

1. The Deceased herein Muthoni Njoroge died intestate on 7<sup>th</sup> August 2006, leaving behind one son John Njoroge as the only survivor. Vide Gatundu Succession File No. 7 of 2008, her son John Njoroge Gathu together with Raphael Mbucho Muhia petitioned for a grant of representation. The same was issued on 7<sup>th</sup> June 2008 and confirmed on 15<sup>th</sup> January 2009. Consequently, the estate was shared out as follows;

- i. Raphael Mbucho Muhia – Ruiru/Kiu Block 2/3176 sole beneficiary
- ii. John Njoroge Gathu – Share Certificate 009201092 sole beneficiary.
- iii. John Njoroge – Share Certificate 0091/2506/92 sole beneficiary.
- iv. Raphael Mbucho Muhia – Share Certificate 0091/2366/092 sole beneficiary.
- v. Raphael Mbucho Muhia – National Bank Account 29200 sole beneficiary.
- vi. John Njoroge Gathu – KCB Account No. 147085476 sole beneficiary.
- vii. John Njoroge Gathu - National Bank Account No. 0124359190700 sole beneficiary.
- viii. John Njoroge Gathu – National Bank Account No. 24709700 sole beneficiary
- ix. Miriam Wanjiku Njuguna – Lang’ata Development Plot No. 486 Sukuma sole beneficiary
- x. John Njoroge Gathu – Entry No. 7399 Certificate No. 17678 sole beneficiary
- xi. John Njoroge Gathu – Wamwaso Plot 314 sole beneficiary
- xii. Raphael Mbucho Muhia – Donyo Sabuk Komarock Block 1/5412 sole beneficiary
- xiii. Ann Wambui Njuguna – Donyo Sabuk/Komarock Block 1/10678 sole beneficiary

2. Subsequently, vide a Chamber Summons application for Revocation of a grant dated 30<sup>th</sup> October 2014 and Amended on 21<sup>st</sup> May 2015, Patricia Wambui Njoroge a sister to the deceased sought orders to the effect that;

**1. The Grant of Letters of Administration Intestate and the Certificate of Confirmation of Grant issued to Raphael Mbucho Muhia be revoked.**

**2. That pending hearing and determination of this application, this Honourable Court do issue orders that caveats be put on L.R. No. Donyo-Sabuk/Komarock1/5412, L.R Donyo-Sabuk/Komarock 1/10678 and under Certificate No. B2793 1¼ acres by Githunguri Constituency Ranching Company Ltd to bar any dealings in the said lands.**

**3. That the Respondents bear the costs of this application.**

3. The application is premised upon grounds set out on the face of it and an affidavit sworn on 21st May 2015 by the Applicant Patricia Wambui Njoroge who averred that she was a sister to the deceased herein who died intestate on 7<sup>th</sup> August 2006.

4. That before her sister died, she gave her shares and land ownership documents to hold in trust of her (Deceased) son John Njoroge. That the documents given were in respect of;

**a. Title Deed for Donyo Sabuk/Komarock Block 1/4512 and 10678**

**b. Share Certificate No. 1.8932801/91 for Kenya African National Traders and Farmers Union (KANTAFU)**

**c. Original Shares description form for KANTAFU of 25<sup>th</sup> June 1991.**

**d. Original official receipt for Title Deed collection Certificate for KANTAFU being Title Deed Donyo-Sabuk Komarock Block 1/10678.**

**e. Original Official Receipt for Title Deed collection Certificate for KANTAFU being Title Deed No. Donyo Sabuk Komarock Block 1/5412.**

**f. Share Certificate No. B2793 for ¼ acre shamba by Githunguri Constituency Ranching Company Limited and receipts thereto.**

**g. Share Certificate No. B1308 which was later transferred to Certificate No. 1238 by Githunguri Constituency Ranching Company Limited for residential Plot Shamba No. 976 and receipts thereto.**

**h. Original Title Deed for residential Plot which has been stolen from her possession.**

5. That when she commenced the process of petitioning for a grant of representation in respect of her sister's estate, she discovered that some properties had been transferred to some people pursuant to **Gatundu Succession Cause No. 7/2009** without her knowledge yet she was holding ownership documents.

6. That when she went to Gatundu Law Courts to peruse the court file, she was informed that the original file had been destroyed by fire. As proof of the said fire destruction, she attached a letter from the Executive Officer Gatundu Law Courts dated 12<sup>th</sup> September 2014 responding to her letter of 8<sup>th</sup> September 2014 confirming that the original file had been destroyed and the same had not been reconstructed.

7. She contended that the grant issued via Gatundu Succession file was based on fraud, concealment of material facts and an abuse of the court process as the same was issued to strangers who had no relationship with her late sister without consulting nor her consent sought.

8. It was further contended that the gazettelement of the alleged loss of Title Deeds in respect of Donyo Sabuk/ Komarock Block 1/5412 and Donyo Sabuk Komarock Block 1/10678 was fraudulent.

9. Upon being served, John Njoroge the original 1<sup>st</sup> Respondent/Administrator her nephew now deceased did not file any response. The 2<sup>nd</sup> respondent Raphael Mbucho filed a response vide a replying affidavit sworn on 25<sup>th</sup> May 2015 and a further replying affidavit sworn on 16<sup>th</sup> May 2016 in which he claimed that he was a bonafide purchaser for value representing the interest of other purchasers among them Anne Wambui. That the Applicant was misusing the Court process as she had failed to appoint a representative of John Njoroge (1<sup>st</sup> Administrator / 1<sup>st</sup> Respondent) now Deceased.

10. He contended that Gatundu Magistrate's Court had jurisdiction to entertain the suit. He further stated that a valuation report had been attached hence the properties in question never exceeded the monetary jurisdiction of the SRM Court Gatundu. He also contended that the Applicant was not a beneficiary nor a dependant of the Deceased's estate.

11. He denied that there was any fraud in petitioning for a grant of representation as every procedure was followed with the concurrence of the sole heir to the estate one John Njoroge.

**Hearing**

12. This matter first commenced before Judge F. Amin who later got transferred after hearing evidence from one witness. Parties agreed to proceed from where the case had reached.

13. During the hearing, the Applicant told the Court that the Deceased was her sister. She claimed that before her sister died, she left her with her land ownership documents. She claimed that Raphael Mbucho was not a family member to have been appointed as a co-administrator to John Njoroge a son to the Deceased. She claimed that John Njoroge her nephew died leaving three (3) children but one died.

14. She further stated that Raphael who was given a Grant jointly with her nephew Njoroge was not a family member and that she chased him from the shamba. She further claimed that Raphael left the land /shamba with a 30-year-old son of John Njoroge.

15. The Applicant closed her case on 29<sup>th</sup> June 2020 without calling any witness. The Respondents did not offer any evidence. The Court directed parties to file their written submissions. Mention was then fixed to confirm compliance on 19<sup>th</sup> October 2020. On that day, the Respondents were not present nor was their Counsel. The Applicant filed her submissions dated 7<sup>th</sup> October 2020. However, the Respondents did not file any submissions.

#### **Applicant's Submissions**

16. In his submissions dated 7<sup>th</sup> October 2020, Mr. Amutalla submitted on the following issues;

**i. Whether Gatundu Magistrate's Court had pecuniary jurisdiction to entertain the matter in Succession Cause No. 7/2008.**

**ii. Who was entitled to a Grant of Letters of Administration.**

**iii. Whether the Grant issued and confirmed on 15<sup>th</sup> January 2009 ought to be revoked.**

**iv. Powers of the High Court under the Law of Succession Act.**

17. According to Mr. Amutalla, Gatundu Law Courts did not have monetary jurisdiction to entertain the probate cause. Counsel relied on the repealed Section 48 of the Law of Succession which then limited the monetary jurisdiction of a Magistrate's Court to a maximum of Kshs. 100,000/-.

18. He further contended that Section 66 of the Law of Succession provides guidelines on the order of preference on who has a direct link to the Deceased to take out Letters of Administration. It was counsel's argument that Raphael Mbucho has no family relationship to the Deceased and therefore not entitled to take out a grant of representation.

19. Counsel contended that it was only John Njoroge who was entitled to be appointed as the sole administrator and after his death, the grant became inoperative and the Applicant was entitled to succeed him as the next administrator. To support this proposition, Counsel made reference to the decision in the case of Julia Mutune M'Mboroki –Vs- John Mugambi M'Mboroki and 3 Others (2016)eKLR in which the Court held that when a sole administrator dies, a Grant is rendered useless and inoperative and that in case of more than one administrator, Section 81 of the Law of Succession applies with the surviving administrators taking over hence substitution does not apply.

20. As whether the Court has jurisdiction, Counsel made reference to Section 47 and 76 of the Law of Succession which confers jurisdiction to the High Court to adjudicate over revocation proceedings.

#### **Determination**

21. Having considered the Petition herein, responses thereto, testimony by the Applicant and submissions by the Applicant's Counsel, issues that arise for determination are;

**i. Whether this Court has jurisdiction to entertain the revocation application.**

**ii. Whether the Grant of Letters of Administration was properly issued to John Njoroge and Raphael Mbucho.**

**iii. Whether the Applicant has met the threshold for revocation of the Grant.**

#### **Whether the High Court has jurisdiction over this matter**

22. It is trite that jurisdiction flows from either the Constitution or written law. See Samwel Kamau Macharia and Another –Vs- Kenya Commercial Bank and Another (2012)eKLR and Kenya Hotel Properties Ltd –Vs-AG & 5 Others (2018)eKLR. In the instant case, this Court has been moved pursuant to Section 47 and 76 of the Law of Succession Act. In particular, Section 47 provides that;

**“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”**

23. Indeed, the High Court has unlimited jurisdiction both in Civil and Criminal Cases and in this case it draws authority from Section 47 and

76 of the Law of Succession. Besides, Section 73 of the Law of Succession Act empowers the Court to exercise inherent jurisdiction to do what is necessary in discharging its duties for the ends of justice to be achieved. Accordingly, this court has jurisdiction to entertain the suit herein and does exercise oversight in respect of the Magistrate's decision(s).

**Whether the Grant issued on 15<sup>th</sup> January 2009 ought to be revoked**

24. The Applicant is seeking revocation of the Grant on grounds that the proceedings to obtain the Grant were defective in that Gatundu Law Courts Succession Case proceedings were instituted by non-family members or beneficiaries of the estate; that the Respondents did not disclose all beneficiaries pursuant to Section 51(2) of Law of Succession; that the grant was obtained through concealment of material facts, fraud and abuse of the Court Process and, that the Respondents did not obtain any consent from the Applicant.

25. Section 76 of the Law of Succession 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 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**

**(e) that the grant has become useless and inoperative through subsequent circumstances.”**

26. It is therefore incumbent upon the Applicant to convince the Court that the ingredients as contained in Section 76 above stated were not complied with upon proof of either one or more of the factors required before the Court can revoke the Grant (See Matheka –Vs- Matheka and Another (2005)E.A. 251).

27. However, the power to revoke a grant is a matter of discretion by the Presiding Court which must be exercised reasonably and not whimsically so as to achieve the objective of upholding substantive justice. See Nyaga Cottolengo Francis -Vs- Pius Mwaniki Karani (2017) eKLR where the Court stated that:-

**“The combined effect of the provisions of the law cited above is to clothe the court with considerably wide powers to do justice in any particular estate of a deceased person on case by case basis. The discretion exercisable is in terms unfettered but, of course, it must be guided by the law and reason but not whim or caprice.”**

28. The Applicant claims that the impugned grant was issued to non-family members and beneficiaries. It is clear from the Confirmed Grant that the administrators are John Njoroge a son to the Deceased who died during the pendency of this application and Raphael Mbucho who was co-opted by John Njoroge as co-administrator to represent purchasers' interest. The provision governing the order of preference in acquiring a Grant of Letters of Administration is Section 66 of the Law of Succession and Part V of the law of Succession Act.

29. Section 66 gives the Court discretionary powers and general guidance on who to appoint an administrator following the order of priority with the spouse or surviving spouses with or without association of other beneficiaries entitled under intestacy, according to their beneficial interests as provided by part V; Public Trustee or Creditors. Section 38 under Part V recognizes the order of preference where there is no spouse, the surviving child or children come next in equal shares in order of preference. In the absence of a spouse and children, the order then follows the sequence below;

**a. father, if dead;**

**b. mother, if dead;**

**c. brothers and sisters and any child or brother's and sister's children in equal share.**

30. In the circumstances of this case, the Deceased left one child one John Njoroge who opted to co-opt a Creditor one Raphael as a Co-administrator to represent the interest of other purchasers (Creditors). There is no doubt, John Njoroge the sole survivor and beneficiary to the estate had priority and the legal capacity to petition for a Grant without seeking consent from anybody or even consulting Aunties or any relative. The claim that John Njoroge was a drunkard and was manipulated is not proved nor established by furnishing evidence that by the time he petitioned for the Grant he was mentally incapacitated to the extent that he did not know or understand what he was doing. John was not duty bound to seek consent from the Applicant nor his relatives.

31. See **In the Matter of Orwa Ojode (Deceased) (2014)eKLR** where the Court stated:-

**“Going by the above provision, where a deceased person is survived by a spouse and child or children, the other relatives are not entitled to a share in the intestate estate of such person. The spouse and child are entitled to the estate to the exclusion of all the other relatives. The excluded relatives include the parents of the deceased. Parents are only entitled where there is no surviving spouse or child.”**

32. Based on the above finding, the Applicant being a sister rank far below the Deceased’s son and therefore a relative who has no direct beneficial interest. Since the applicant does not claim dependency, and considering the fact that she is not a direct beneficiary to the estate, she had no right to be consulted. Further, Since the only son(survivor) decided out of his own free will or choice to include an interested party in this case Raphael Mbucho a purchaser to be a co-administrator, I do not see anything wrong about it.

33. Ordinarily, the law ranks a Creditor last in the order of preference. However, John Njoroge having voluntarily included Raphael as an interested person to be a co-administrator, I cannot fault the Grant on that ground. John Njoroge was conscious of what he was doing as a sane person. Section 66 recognizes that any person with interest in the estate can apply for a Grant. As a purchaser, Raphael was an Interested Party and nothing out of the ordinary to be a co-administrator at the choice of the person entitled in order of priority.

34. Having held that Raphael was properly joined, can the Grant be revoked on being inoperative or useless? I do not think so. This is because there is a surviving administrator who under Section 81 of the Law of Succession should continue executing the mandate of administration of the estate which in any event appears to be complete. See **Julia Mutune M’Mboroki –Vs- John Mugambi M’Mboroki and 3 Others (supra)**. To that extent the Grant cannot be revoked for being inoperative.

35. However, assuming that there is any part of the estate still unadministered and which has not been transmitted, then, any child or children to John Njoroge should move the court to be made co-Administrator/s to Mbucho after acquiring a grant in respect of his/their father’s estate.

36. Concerning the issue of lack of monetary jurisdiction by Gatundu Magistrate’s Court, the law then under Section 48 of the Law of Succession Act now repealed provided a maximum value of property a Magistrate’s Court could then entertain at Kshs. 100,000/-. Since I have already held that the Applicant had no interest in the estate either as beneficiary or dependant, I do not think she has the capacity to challenge the proceedings before the Magistrate’s Court.

37. In the interest of justice and considering that the administration of the estate is complete, it will be unfair for a person who had no interest in the estate from the word go to seek to reverse the whole process. It will be a great injustice to all parties to allow the Applicant to restart the process. Since 2006 when the Deceased died, how come she did not institute any Petition for a Grant or even challenge his nephew’s Petition for a Grant. To wait until the sole beneficiary is death is an afterthought.

38. The next issue that arose was in Mr. Amutalla’s submission was the argument that the Respondents did not give any evidence nor file submissions. Whereas it is true that the case was closed before the Respondents could testify, it is not automatic that the Applicant’s case must succeed. The burden of proof does not change simply because the other side did not tender evidence. If the issues in controversy are matters of law which do not need to be controverted, then, failure to give a defence on the Respondent’s side is immaterial.

39. Basically, the issues in controversy are matters of law which do not need any specific proof other than to interpret the law. To that extent, I do not find that ground sustainable.

40. What remedy does the Applicant have now that the nephew is Deceased? During her evidence on cross-examination, she stated that the Deceased left two children one of whom is 30 years old. In my view, these children if all are adults or one of them should move the Court for a Grant in respect of their father’s estate so as to succeed the property their father left or bequeathed under this file. Alternatively, if there is any good explanation why Njoroge’s children should not move the court, the Applicant can take out a grant of representation in respect of the estate of John Njoroge so as to administer his estate in trust of or for the benefit of his children (John Njoroge).

41. The administration of the estate having been completed, I do not find it necessary to reopen the same. Litigation must come to an end. Should any property which is not disclosed, be found to be un-administered, John Njoroge’s son or children as the heir(s) apparent or the Applicant if she thinks she has capacity under Section 39 of the Law of Succession, can seek review of the orders under **Gatundu Succession file No. 7/2008** to include an additional co-administrator to the existing administrator. This can be done after construction of a skeleton file since the original file was destroyed and at the discretion of the court.

42. Having held as above, it is my finding that the application herein for revocation has no merit hence the same is dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26<sup>TH</sup> DAY OF JANUARY 2021.**

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**J. N. ONYIEGO**

**JUDGE**