



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 621 OF 2009

IN THE MATTER OF THE ESTATE OF NJOROGE GIKUNI NGATA (DECEASED)

JUDGMENT

Njoroge Gikuni Ngata died on 22nd November 2003. He was polygamous. He was survived by his second wife (who later died) and children from both houses two sons and two daughter in the first house, four sons in the second house. Two sons, Joseph Njuguna and Eliud Mathu each from filed for Letters of Administration and obtained Letters of Administration of estate intestate on 24th February 2010.

Via a Summons for Confirmation of Grant dated 27th September 2010, they sought and obtained certificate of confirmation of grant in which they shared the entire estate between themselves except one property that was distributed to a non beneficiary one Edward Koigi Kariuki. There was an undated consent apparently signed by all the beneficiaries.

The record shows that the Summons for Confirmation of Grant was filed under certificate of urgency because it was alleged that the said Edward had bought part of the Estate from the petitioners and would be travelling out of the country.

On the 29th October 2010, only in the presence of counsel for the applicants the Summons for Confirmation of Grant was allowed.

On 28th January 2011 the applicant Mary Wangui one of the daughters of the deceased filed for the revocation and /or annulment of the grant as made to, and confirmed in favour of the petitioners. The summons was brought on the basis that the proceedings to obtain the grant were defective in substance, the grant was obtained fraudulently by making false statement and concealment of something material to the case, by means of untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in total exclusion of most of the beneficiaries.

The applicant sought the cancellation of the titles:

- 1. Kabatini/Kabatini Block 1/1200***
- 2. Bahati/Kabatini Block 1/3099***
- 3. Kampi ya Moto/Menenagai Block 1/502***
- 4. Kiambu/Githunguri /Githiga T36***
- 5. Githunguri /Githiga 3178***
- 6. Thika Municipality Block 19/1123***
- 7. Plot no 380(Pangani TPH)Nakuru***
- 8. Wanyororo Farmers Company Limited 50 Shares***

The application is supported by the affidavit of Mary Wangui sworn on the 27th January 2017 where she depones that it is on her behalf and on behalf of her sisters. That they were unaware of the cause and that is why they had filed Citation No. 583. That that is when they learnt of the cause and that the two administrators had shared the estate between them to the exclusion of the female children of the deceased. That the LR *Kabatini/Kabatini Block 1/1200* was left to Teresia Wanjiru to whom their father had bequeathed the title deed, and *Kampi ya Moto/Menenagai Block 1/502* was sold without their consent.

The petitioners filed two affidavits, one sworn on the 10th February 2011, and the other on 7th March 2011.

In the affidavit they deponed that one Mary Wangui and Elizabeth Wambui are not beneficiaries of the deceased's estate. That one Poly Wanjiru is deceased, and in any event the cause was filed with the consent of the applicant and other beneficiaries. That the *LR Kabatini/Kabatini Block 1/1200* was for the minor by the name Joseph Njuguna Njoroge as was indicated in the title deed by the deceased and that he had reported the loss of the same to the police. That the applicant had sold the MV Registration Number KWH 776 belonging to the estate of the deceased without consulting the others. That it was agreed that the deceased's properties be shared equally between the two houses. In the further affidavit they reiterated that the estate had been distributed equally between the two houses, as agreed in the presence of the applicants.

During the oral hearing of the summons the applicant reiterated the contents of her affidavit. Her case was closed on 10th April 2017.

On 22nd January 2020 the case for the Petitioners was closed without their testimony as they never showed up for the hearing. Ms Njoroge and Mr. Karanja Mbugua each filed written submissions.

I have carefully considered the submissions on record. The issue for determination is whether the applicant has established grounds for the revocation of the grant as provided for under **Section 76 of the Law of Succession Act**.

Was there a consent by the parties to the making of a grant of administration intestate to the two administrators?

In **re Estate of Wahome Mwenje Ngonoro (deceased) [2016] eKLR Mativo J** found that where **Rule 26 of the P&A rules** was not complied with, then the grant was up for revocation on account of defective proceeding. The Rule states:

“(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.”

In this case there was a consent that was signed by all the beneficiaries. It is there on the record filed together with the petition. The signatures therein are not disputed by the applicant.

Was there a similar consent for the distribution of the estate?

Yes, it appears to have been signed by the other beneficiaries who were not inheriting any property.

Was there misrepresentation of facts?

What seems to have rattled the sisters is the fact that the distribution when it finally happened was not between the two houses but between the two petitioners. It is evident in their affidavits in response to the Summons that the beneficiaries had agreed that the estate be distributed between the two houses. Instead they went ahead and had the estate in their own names hence disinheriting the other beneficiaries and in particular the girls.

Counsel for the petitioners in his submissions did not address this factual issue but cited several authorities urging this court not to revoke the grant but to take other available options. For instance, that in **Re estate of Ngugi (Deceased) [2002] 2KLR 434** where the court found that the Certificate of Confirmation of Grant could be dealt with without interfering with representation as, according to the judge there were two grants, the original one and the confirmed one. That in **Re estate of Gitau (deceased) [2002] 2 KLR 430** the same judge held that a complaint about the distribution of the estate could not be brought under **Section 76 of the Law of Succession** as it deals with revocation; that in **re estate of Justus Wangai Muthiru (deceased) NBI HC Succ Cause no 1949 of 2001**, the judge, faced with a complaint about distribution of the estate opted to cancel the certificate of confirmation of grant, and in **Re Estate of Thareki Wagunya (deceased) NBI HC Succ Cause no. 1996 of 1999**, the court declined to revoke the grant and instead added the names of the omitted beneficiaries to the certificate of confirmation of grant. In in **Re estate of Jonathan Mutua Missi Machakos HC Succ Cause 95 of 1995** and **Re estate of John Kamau Gichuhi (deceased) NBI HC Succ Cause 833 of 2003** the court set aside the Certificate of Confirmation of Grant and allowed the parties to start off the confirmation proceedings afresh.

From these proceedings, it is clearly evident that the petitioners are alive to the fact that they omitted their sisters from the distribution of the estate and are suggesting that the confirmation proceedings can commence afresh.

The issue then is whether the grant is up for revocation. **Section 76 of the Law of Succession Act** provides:

“Revocation or annulment of grant

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.”

My understanding of the statement *a grant of representation, whether or not confirmed* means that the court issues a grant of representation which is later confirmed. There are no two grants as argued by counsel.

It is evident from the petitioner's affidavits in response to the summons for revocation that the intention was to distribute the estate equally between the two houses of the deceased. However the Certificate of Confirmation of Grant contains only their names and those of an alleged buyer. From the Summons for Confirmation of Grants it is stated that he bought the land from the petitioners BEFORE the confirmation.

It would appear that what was agreed by family is not what they did in the Summons for Confirmation of Grant. Hence the complainant by the applicant is not without merit.

Secondly the alleged sale by the petitioners was contrary to **section 82(b) (ii) of the Law of Succession Act.**

Hence it is my finding that indeed the petitioners misled not only the applicant but the court that there was agreement on the mode of distribution as indicated in the Summons for Confirmation of Grant, as the intention was to share the estate equally between the two houses. By acting differently they proceeded to disinherit their sisters.

Nevertheless I find that it would not be in the interests of justice to revoke the grant. That would take the matter back unnecessarily.

The appropriate thing would be to enforce the family agreement.

I therefore make the following orders:

1. The Certificate of Confirmation of Grant dated 27th September 2010 is cancelled and set aside.
2. Any transfer of the estate pursuant to the said certificate of confirmation of grant is revoked.
3. The entire estate be shared equally between the two houses of the deceased and the children of each house to share their share equally among themselves.
4. Orders accordingly.
5. Costs in the cause.
6. Right of Appeal 30 days.

Dated this 14th January, 2021.

Mumbua T Matheka

Judge

Delivered virtually this 21st day of January 2021

In the presence of:

Court Assistant Edna

Ms Njoroje for objectors

Later Mr Karanja Mbugua appeared for petitioners

Mumbua T Matheka

Judge