



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**MISC. CIVIL CAUSE NO. 237 OF 2018**

**JONNAH NJIHIA GITIBA.....1<sup>ST</sup> PLAINTIFF**

**MOSES CHEGE NJIHIA.....2<sup>ND</sup> APPLICANT**

**GEORGE NGUGI NJIHIA.....3<sup>RD</sup> APPLICANT**

**-VERSUS-**

**JAMES MWAURA NJIHIA.....1<sup>ST</sup> RESPONDENT**

**DANIEL MWAURA NJIHIA.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. **Joseph Njihia Gitiba**, the deceased herein died intestate on 21<sup>st</sup> June, 2004. He was succeeded by two widows and several children. He died possessed of several properties including land parcels and shares in companies. A succession cause no. 116 of 2011 was filed at the SPM's Court at Githunguri and a grant of letters intestate was granted on 22<sup>nd</sup> June, 2012 to **James Mwaura Njihia** (1<sup>st</sup> Respondent) and **Daniel Mwaura Njihia** (2<sup>nd</sup> Respondent).

2. The grant was confirmed on 5/02/2015 and amended on 9/04/2015. The Applicants, **Jonah Njihia Gitiba** and **Moses Chege Njihia** are brothers to the 1<sup>st</sup> respondent and together with three other siblings are members of the deceased's second house of the widow **Monica Njeri Njihia**. The 2<sup>nd</sup> Respondent is a son in the deceased's 1<sup>st</sup> house of the widow **Teresiah Nyambura Njihia** (now deceased) who had five children. The Applicants moved the court through a summons for revocation of grant filed on 6<sup>th</sup> December, 2018. At the time of filing, the pleading was correctly entitled as a succession cause but it appears that the registry opened a miscellaneous cause, an error not corrected despite the Applicants' advocates protestation through the letter dated 19<sup>th</sup> December, 2018 and filed on the same date.

3. The key prayer in the summons is prayer (1) which seeks that the grant issued and confirmed in respect of the estate of the deceased herein be revoked or annulled on grounds inter alia that the proceedings leading to the grant were substantially defective for want of jurisdiction, that the grant was obtained fraudulently by the making of a false statement and concealment of the facts regarding the full list of the beneficiaries of the estate of the deceased, and that the proceedings were conducted in secrecy without consultation and consent of all the beneficiaries including the Applicants.

4. The application is supported by the three affidavits of Jonnah Njihia Gitiba (the 1<sup>st</sup> Applicant) on the authority to plead executed in his favour by his co-Applicants. The administrator **James Mwaura Njihia** (1<sup>st</sup> Respondent) also swore an affidavit in support of the application though entitled as a replying affidavit. By his two affidavits the 2<sup>nd</sup> Respondent denied the assertions by the Applicants and defended the grant issued and confirmed in the lower court.

5. The court directed that the matter proceeds by way of *viva voce* evidence. At the hearing in which the 1<sup>st</sup> Applicant and the two respondents testified as **PW1**, **RW1** and **RW2** respectively, the parties adopted their filed affidavit material and were cross examined.

6. The gist of the Applicants' case is that though they are undisputed sons of the deceased, they were not consulted and did not give consent to the mode of distribution adopted in confirming the grant and the result was that they did not receive their share of the estate. When confronted with depositions in the replying affidavit asserting their consent to confirmation and involvement, the Applicants pointed out that the mode of distribution differed with that in the application to confirm grant to which they had consented and denied that they attended the confirmation proceedings or that the reason for their exclusion as the beneficiaries in the second house was that their mother Monica Njeri Njihia had demanded to hold the share due to her house in her name; and asserted that the mode of distribution was skewed in favour of the

1<sup>st</sup> house. The Applicants maintained that value of the estate of the deceased exceeded the pecuniary jurisdiction of the subordinate court at the time of the proceedings. The 1<sup>st</sup> Respondent supported the Applicants' case.

7. The case by the 2<sup>nd</sup> Respondent was that the Applicants and indeed the entire family of the deceased were consulted and participated in the succession process having appointed the two Respondents herein as representatives of the two houses. That the beneficiaries gave consent to the filing of the succession cause and the mode of distribution, which he asserts was fair and equitable. Further that the Applicants' share of the estate vested in their mother as a result of failure by the second house to agree on how to share their entitlement to the estate and therefore the Applicants' recourse lay in pursuing their mother for their share as the first house has shared their respective portions and have no dispute.

8. The 2<sup>nd</sup> Respondent initially took the position that the applicants had not undertaken a valuation of the estate and therefore had no proof that the value exceeded the jurisdiction of the lower court. In evidence however, the 2<sup>nd</sup> Respondent admitted during cross-examination that the estate of the deceased exceeded Kshs. 100,000/- and was worth millions. He also admitted that one parcel of land belonging to the estate, namely, **KIAMBU/BLOCK5/456** which was sold subsequent to the confirmation of the grant had fetched about Kshs. 9,000,000/- and that some of his siblings had been unhappy with the distribution of the estate.

9. He also conceded that the record of the court proceedings of 5. 2. 2015 when the grant was confirmed did not indicate the names of the individual beneficiaries in attendance and that while the shares of the members of the first house were indicated in the confirmed grant, the shares of members of the second house were not. His explanation was that the widow **Monica Njeri Njihia** in the latter house held the shares of her house in her own names. Subsequent to the hearing parties filed their respective submissions.

10. The court has now considered the submissions alongside the evidence tendered. Section 76 of the Law of Succession Act (LSA) 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)...”**

11. Two key issues arising in the matter related to the jurisdiction of the lower court to entertain the succession cause in which the impugned grant issued, and the consent of the beneficiaries to confirmation of the grant, in particular the mode of distribution adopted by the court at the time of confirming the grant.

12. The first issue is relatively straight forward. The deceased died possessed of fairly large estate. According to the schedule in the confirmed grant, 16 of the assets were land parcels, four of these located within Kiambu Municipality, while twelve assets were comprised of shares in companies, including six land buying companies. Although as stated repeatedly by the 2<sup>nd</sup> Respondent, no valuation had been carried out, the net value of these properties could not be Kshs. 100,000/= which was the pecuniary cap of jurisdiction of the lower court at the material time. Indeed, the 2<sup>nd</sup> Respondent admitted in his testimony during cross-examination that the value of the estate was in the millions and that one of the land parcels in the Kiambu Municipality sold subsequent to the confirmation of the grant had fetched Kshs. 9,000,000/=.

13. Prior to the enactment of the Magistrate's Court Act in 2015, which commenced in February, 2016, Section 48 of the LSA limited the jurisdiction of a subordinate court to estates whose value did not exceed Kshs. 100,000/=. Thus between 2011 and April, 2015 when the subordinate court purported to deal with the estate of the deceased herein, the said court acted without jurisdiction. An action taken without jurisdiction is a nullity. I agree with the sentiments of **Ngaah J. in Francis Muteru Gathogo v. Winnie Nyanjugu & 2 others (2014) e KLR** that succession proceedings taken without jurisdiction amounts to proceedings which are defective in substance under Section 76(a) of the LSA. This finding is enough to dispose of the matter.

14. Additionally, however, the court further notes that the mode of distribution in the grant was at variance with the mode in the summons for confirmation to which the beneficiaries had given consent. It appears from the proceedings annexed to the 1<sup>st</sup> Applicant's affidavit filed on 17/07/2019 that prior to the confirmation there were protests and wrangles among the beneficiaries. At some point, the court referred them to the local administration to attempt settlement. On 22/01/2015 almost all beneficiaries were present in court and seemingly indicated that the disputes were unsettled. However, on the next mention on 5/02/2015 when the grant was confirmed, the record of proceedings does not indicate the parties present by name, save for the 2<sup>nd</sup> Respondent and the widow **Monica Njeri Njihia**, the latter who addressed the court as follows:

**“The half that is meant for my children should be registered in my name. I will then divide it amongst my children...”**

15. This mode of distribution is not in consistence with the mode in the summons to confirm grant to which all beneficiaries had consented to. Hence there was need for the court to confirm with the beneficiaries, especially of the second house if they were agreeable to the proposal by their mother. There is no record of such confirmation beyond the 2<sup>nd</sup> Respondent's recorded statement that the mode was agreeable. The Applicants' complaints in this regard therefore have merit.

16. Additionally, although the court's order was that the widow Monica Njeri Njihia was to hold the share due to the second house in trust for her children, the actual certificate of confirmed grant eventually issued does not contain the rider. Instead, the certificate purports that the 2<sup>nd</sup> widow was to take the properties distributed to her absolutely. It is not surprising that soon thereafter she sold one asset of the estate, seemingly without any reference to the beneficiaries in her house. The grant and confirmed grant cannot in the circumstances of this case be allowed to stand and is hereby annulled.

17. The court further directs, to obviate extra costs to the parties that the file in respect of **Githunguri Succession Cause No. 116 of 2011, In the matter of the estate of Joseph Njihia Gitiba** be transferred to the High Court at Kiambu and that a new High Court succession file be opened to house the lower court file and this miscellaneous cause. Subsequent to that a fresh grant will be issued in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as it is indicated that the widow **Monica Njeri Njihia** has been rendered incapacitated by the onset of senile dementia. Within one month after the issuance of the fresh grant, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents shall be at liberty to apply for confirmation, taking care to include all the beneficiaries, indicate their specific shares to the estate and to obtain the necessary consents. Parties will bear own costs.

**Dated, signed, and delivered electronically this 19<sup>th</sup> day of February 2021.**

**C. MEOLI**

**JUDGE**