



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 523 OF 2006

IN MATTER OF THE ESTATE OF THE LATE GITONGA NGAMINI (DECEASED)

PAUL GITONGA WAMAHIU.....APPLICANT

VERSUS

WACHIRA GITONGA

PAUL NYARE GITONGA.....RESPONDENTS

RULING

1. The applicant filed Summons for Revocation of Grant on the 19/07/2017 under the provisions of Section 76 of the Law of Succession Act and Rules 44(1) of the Probate and Administration Rules and is seeking to have the Grant issued to the respondents revoked on the following grounds;

(i) The proceedings to obtain the Grant were defective in substance;

(ii) The Grant was obtained fraudulently by the making of a false statement or by concealment from the court of something material to the case;

(iii) The Grant was obtained by means of an untrue allegation of a fact essential in a point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;

2. The application was supported by the grounds on the face of the application and on the supporting affidavit of the applicant sworn on the 19/07/2017;

3. Directions were given on the 29/11/2017 and after the full hearing the parties were directed to file and exchange written submissions; hereunder is a brief summary of the parties rival claims;

APPLICANT'S CASE

4. The Applicant in his testimony stated that his late father Robert Wamahu was the son of the deceased Gitonga Ngaminio whom this estate relates; that the respondents are his late father's step-brother and brother; making both of them his paternal uncles;

5. His parents lived on his paternal grandfather's land but upon the demise of his father his uncles started harassing his mother and when life became intolerable she moved to her parents' home together with her children;

6. While at his maternal grandparents home he maintained a close relationship with his paternal grandfather and attended family functions; he attended both his paternal grand-parents funerals and also a funeral of one the respondents sons; when his mother passed on his uncles and their children were in attendance at her funeral;

7. That he was entitled to his father's inheritance a fact which his uncles have continuously refused to accept.

8. The applicant called one of his uncles John Ndiritu Gitonga (**PW2**) as a witness; his testimony was that his father had two wives and he confirmed that the applicant's father the late Robert Wamahu Gitonga was one of the deceased son's and was his step-brother; that the applicant's father had a house on Thegenge/Gathuthi/129 and lived thereon with his wife and children; the applicant was born one week after

Roberts death and the widow left the homestead with her children because life became unbearable and moved to her parents' home; at the time his mother left he was eight (8) years old;

9. The widow never demolished her home this was done by others; when she was away she continued joining the family during its gatherings like funerals; this she did until her demise;

10. His brother Wachira Gitonga had filed a Succession Cause that the applicant and his mother didn't know about and were never in attendance; that they were only made aware after judgment was rendered and the applicant and his mother had been left out; as the applicants late mother was still a wife to his late brother when the cause was filed therefore she was entitled to a portion of the estate of the deceased; he knew that the deceased would never have denied land to his son Robert; and the uncles cannot not deny this fact; that there was a portion that belonged to no one and it was not being cultivated which portion should be given to the applicant;

11. The evidence of Moses Ndimia Ndiangu (PW3) was that he knew the applicant's parents Robert Wamahu and Esther Ngunju and that both had been his classmates; the two had established a matrimonial home on parcel number Thgenge/Gathuthi/129 which land belonged to Roberts father; that having visited the subject property he found existing boundaries thereon but did not know who had placed them; and could not also recall if the boundaries were in existence before the demise of the deceased.

12. He confirmed that Esther left before the demise of her father in law due to disagreements; she no longer resided there and her house had since been demolished; she had confided in him that she knew about the succession cause; that her being a member of the family the siblings of Robert should allow the applicant to inherit his fathers' portion of land.

13. After the testimony of this witness the applicant closed his case.

RESPONDENT'S CASE

14. The respondent Paul Nyare Gitonga in response stated his father had two wives and fifteen (15) children; the applicant's father (**Robert**) was one of the deceased's sons and that Robert was his brother; that his brother predeceased his father having passed away in 1969; whereas their father passed away later in 2006;

15. Robert had a wife who is the applicant's mother and the applicant was born one week after the demise of his father; from the time of his brother's demise his widow remained at their home for a period of nine (9) years and in 1978 she voluntarily left their homestead together with her children and went to live at her parents' home; at the time of her departure his father was still alive and both his father and the widow's father met and an agreement was reached that there was nothing for the widow to claim from their side of the family; no dowry was ever returned;

16. When the succession cause was initiated by his brother Wachira and obtained a Chief's Letter and the applicants mothers name was thereon; that the applicant and his mother knew about the case but neither the applicant nor his mother or his siblings filed any protest nor enjoined themselves to the proceedings;

17. During the pendency of the succession cause the Deputy Registrar conducted a site visit and confirmed that there were sub-divisions on the ground; and it was the respondents' evidence that these sub-divisions were done by his father in 1985 during his lifetime; and neither the applicant nor his mother who was still alive by then ever lodged any complaint;

18. That he had been enjoined to these instant proceedings but it was Wachira who knew more about the succession cause and about the citation and whether it had been ever served upon the applicant's mother; that he was not the one who harassed the widow nor was he the one who demolished the applicants mother's house; and he did not know the reasons as why the applicant was disinherited.

ISSUES FOR DETERMINATION

19. After hearing the parties and upon reading and taking into consideration the rival written submissions this court has framed the following issues for determination;

(i) Whether the applicant was a dependant of the deceased;

(ii) Whether the applicant has made out a case for revocation of the grant;

ANALYSIS

Whether the applicant was a dependant of the deceased:

20. It is not disputed that the applicant is the son of the late Robert Wamahu Gitonga who was one of the many sons of the late Gitonga Ngamini to whom this cause and estate relates; also it is not disputed that the applicant was a grandchild of the deceased and that his father passed on in 1969 and that he had predeceased his father whose death certificate shows him having passed on 10/09/2001;

21. The court record reflects that Wachira Gitonga who is one of the respondents herein had petitioned for the Letters of Administration and was issued with a Grant on 2/10/2007; it is noted that the applicant's mother is listed as a beneficiary; the question is whether the applicant can be described as a dependant of the deceased so as to qualify directly as a beneficiary;

22. The applicable law is found at Section 29 of the Law of Succession Act which gives a definition of a beneficiary and reads as follows;

‘Section 29. Meaning of a dependant

For the purposes of this part, “dependant” means-

(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-sister, and were being maintained by the deceased immediately prior to his death;

23. The evidence of the applicant which is corroborated by the evidence of **PW2** confirms that the applicant was born in 1977 and within a week of his father Robert’s demise; in the same year 1977 the applicant’s mother left the homestead with her children and went back to her parents home; nowhere in his evidence did the applicant or **PW2** state that his mother together with his other siblings were taken in by the deceased and had been maintained by the paternal grandfather prior to his death; in-fact the applicants evidence was that they maintained a relationship with the fathers family and attended family functions or funerals;

24. This is a clear indication that supports the fact that the deceased never maintained either the applicant nor his mother so as to qualify as a dependant as set out in the afore-going Section 29 of the Law of Succession Act; this court is satisfied that no claim can be derived by the applicant directly from his grandfathers’ estate save through his late father or through his late mother;

25. Which then leads to the next issue as to what can be deemed to be the late Robert’s interest in the estate of the deceased and whether the applicant has made out a case for the revocation of the Grant;

Whether the applicant has made out a case for revocation of the grant;

26. The issue at hand is whether the applicant has made out a case under the provisions of Section 76 (b)(c)(d) ii and (e) of the Law of Succession Act and Rule 44(1) of the Probate and Administration Rules; Section 76 of the Act reads as follows;

“Section 76

A grant of representation whether or not confirmed may at any time be revoked or annulled if the court decides, either on application by interested party or its own motion:-

(a) The proceedings to obtain the grant were defective on substance.

(b) The grant was obtained fraudulently by the making of false statements or concealment of something material the case.

(c) The grant was obtained by means of untrue allegations of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

The persons to whom the grant was made have failed after due notice and without reasonable cause either;

(i) To apply for confirmation within one year of such longer time as the court may allow,

(ii) To proceed diligently with the administration of the estate,

(iii) To produce to the court such inventory or account of Administration as required under section 83(e) and 83(g) of the act or has produced false accounts.

(d) The grant has become useless and inoperative through subsequent circumstances.

27. The applicant’s contention is that there was concealment of material facts by his late father’s family; facts that would have enabled the court to make a justified determination of the cause;

28. Exclusion of the applicant’s mother by the petitioner would have amounted to concealment from the court of material facts; the evidence of the applicant which is corroborated by **PW3** was that the applicant’s mother was privy to the succession cause proceedings from its initiation; and upon perusal of the court record it indeed reflects that at the commencement of the Petition the mother had been cited by the intended administrator and that she had even entered an appearance;

29. Apart from entering appearance nowhere is it reflected that the applicant’s mother took an active role to assert her right as a beneficiary by filing any papers in opposition to the mode of distribution; only one person namely Paul(**DW1**) the respondent herein filed a protest which was adopted by the trial court;

30. The court record reflects and confirms that there were previous proceedings in the form of a Protest relating to the same estate and property of the deceased; the Deputy Registrar was directed by the trial court to visit the subject property and to compile a report; the directions were complied with and a Report was duly filed and adopted by the parties evidence; the Report indicated that there were distinct boundaries separating six (6) portions that had been sub-divided and allocated by the deceased during his lifetime;

31. The beneficiaries of the six (6) portions were as by the then protestor (**DW1** herein) and the applicant's fathers name was missing from this list; the court adopted the names of the beneficiaries as proposed by the Protestor and made a determination that the Protestor's mode of distribution was fair and reasonable as it was in accordance with the wishes of their deceased father; again the record reflects no action taken by the applicant's mother and or the applicant and his siblings or evidence adduced by them to challenge this document containing this list that demonstrated that it had not been the wish of the deceased to bestow the late Robert's family with any portion of the subject property;

32. The court proceeded to confirm the Grant accordingly with no portion being allocated to the applicant's mother;

33. Further perusal of the court record reflects that Wachira from the inception of the cause had included the applicants mother in the proceedings by citing her; even when the application for the Confirmation of the Grant was drawn her name was included as a beneficiary; and his proposed mode of distribution was into two (2) households of the two wives of the deceased; which mode of distribution was disallowed by the trial court;

33. This court finds no evidence of deliberate exclusion by the petitioner when he filed the succession proceedings and at the hearing of the Protest; the applicant and his late mother were either indolent and it is blatantly clear from the onset of the cause that they made no effort to assert their rights; alternatively there was an assertion made, which this court is inclined to believe, that **PW2** being dissatisfied with the courts' decision on the Protest was using the applicant and his mother so as to get a second bite at cherry;

34. This court reiterates the provisions of Section 76 of the Act and Rule 44(1) of the Probate Rules and is satisfied that the petitioner/ respondent (Wachira) had not acted contrary to the provisions; and finds that the applicants application has failed to meet the threshold for Revocation of the Grant.

FINDINGS AND DETERMINATION

35. For the forgoing reasons this court makes the following findings and determinations;

(i) The application for the Revocation of the Grant is found lacking in merit and it is hereby dismissed;

(ii) The applicant shall bear the costs of this application.

Orders Accordingly.

Dated, Signed and Delivered Electronically at Nyeri this 11th day of February, 2021.

HON.A.MSHILA

JUDGE