



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**SUCCESSION CAUSE NO. 1171 OF 2012**  
**IN THE MATTER OF THE ESTATE OF GATHURE**  
**MWANIKI alias GATHURE S/O MWANIKI (DECEASED)**  
**CHARITY WANJIKU MAINA.....APPLICANT**  
**VERSUS**  
**CHRISTOPHER WAMAI GICHERE.....RESPONDENT**  
**RULING**

**Brief facts**

1. The applicant has brought this application dated 27<sup>th</sup> November 2017, under **Section 76 of the Law of Succession Act and Rule 44 (3) of the Probate and Administration Rules** seeking for orders for revocation of the grant issued and confirmed on 17<sup>th</sup> December 2015 distributing L.R. No. Konyu/Ichuga/586 solely to the respondent.
2. In opposition to the application, the respondent filed a replying affidavit dated 18<sup>th</sup> December 2018.
3. The summons for revocation of grant was heard by way of viva voce evidence that was based on the affidavits filed by the parties.

**The Applicant's case**

4. The applicant's evidence is that the deceased had three(3) wives namely Kabuchi Gathure, Waruguru Gathure and Kabura Gathure.
5. The 1<sup>st</sup> wife is the grandmother to the respondent and her house had the following children:
  - a) Njoki Gakungu
  - b) Gichere Gathure
  - c) Wanyuki Mwaniki
6. The respondent's father is Gichere Gathure.
7. The 2<sup>nd</sup> wife had 2 daughters namely:-
  - a) Njoki Kagori
  - b) Wanjiru Gathure
8. The 3<sup>rd</sup> wife is the applicant's grandmother and her house had the following children:-
  - a) Kiame Gathure
  - b) Wanjiru Githui

- c) Joseph Mathenge Gathure
- d) Julia Gathoni Mwangi
- e) Julia Wamuyu Muchore

9. The applicant makes this application on behalf of her mother, Jane Wanjiru Mathenge who was married to Joseph Mathenge Gathure, a son to the deceased from the 3<sup>rd</sup> house. She adds that her father died leaving the following survivors:-

- a) Veronicah Wambui Mathenge
- b) James Karumba Mathenge
- c) John Waithaka Mathenge
- d) Lucy Njeri Mathenge
- e) Jane Wanjiru Mathenge
- f) Cecilia Nyaguthii Wanjiru
- g) Charity Wanjiku Maina

10. The applicant contends that each house was meant to get 3 acres of land from the deceased's estate. L.R. No. KONYU/ICHUGA/586 measuring 3 acres was identified for the applicant's grandmother, the 3<sup>rd</sup> wife to the deceased. The 1<sup>st</sup> and 2<sup>nd</sup> wife were meant to share Land Parcel No. KONYU/ICHUGA/606 measuring 6 acres. Currently, the mother to the respondent lives on Land Parcel No. KONYU/ICHUGA/606 whereas the respondent lives on Land Parcel No. KONYU/ICHUGA/586.

11. The applicant contends that the grant made to the benefit respondent absolutely should be revoked because he obtained the grant fraudulently by concealing material facts from the court as he left out the applicant's family from the distribution of the estate.

12. The applicant called one witness, the Chief of Ruguru location who testified that the bone of contention was Land Parcel No. KONYU/ICHUGA/586 the dispute of which was brought to her office for settlement. Despite summoning the respondent to come, he never complied. On cross examination the applicant said that the applicant's father and his family lived on Land Parcel No. KONYU/ICHUGA/586 and that his children were born on the said property.

#### **The Respondent's Case**

13. According to the respondent, the applicant is entitled to Land Parcel No. KONYU/ICHUGA/603 registered in the name of Nderitu Gathure Mwaniki who is an elder brother of her father. Together, the applicant's father and her uncle sold the said parcel of land and bought another one in Njoguini Nanyuki which the respondent referred to as Sweet Waters land.

14. He adds that neither the applicant nor her siblings have ever lived on Land Parcel No. KONYU/ICHUGA/586. They have always resided in Nanyuki in a place called Likii. Notably, the applicant's was buried on the Sweet Waters land.. As such, if the applicant's father had any entitlement in Land Parcel KONYU/ICHUGA/586 he would have been buried there and constructed his home.

15. The respondent also contends that Land Parcel No. KONYU/ICHUGA/606 measuring 4.5 acres was registered in his father's name on 4<sup>th</sup> April 1959 and has thus never formed part of the deceased's estate.

16. The respondent further avers that he did not conceal any material facts nor did he leave out the applicant's family. The truth is that they are not entitled to Land parcel No. KONYU/ICHUGA/586. The said property is registered in the name of the deceased and the respondent states that he is the one best suited to inherit the land as his siblings have no objection to the same.

17. Parties canvassed the summons by way of written submissions

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

18. The applicant submits that the grant herein ought to be revoked because it was obtained fraudulently. The respondent applied for the grant as a grandson to the deceased but he failed to indicate that the deceased had three houses. He also failed to attach consents from the two other houses or letters waiving their rights and interests to the estate. He further misled the court by stating that he was the only survivor of the deceased. By doing so, the applicant submits that he left out the family of the applicant's father who is a beneficiary. She adds that Land Parcel No. KONYU/ICHUNGA/586 was meant for the 3<sup>rd</sup> wife of the deceased. It is further contended that even though her father was buried at the Sweet waters land, it does not mean that he was not entitled to Land Parcel No. KONYU/ICHUNGA/586. The applicant further submits that her father did not sell any portion of land or his inheritance as alleged by the respondent.

19. The applicant submits that she has filed the application on behalf of her mother claiming the share of her late father in the estate Joseph Mathenge Gathure son of the deceased herein. The deceased was the applicant's grandfather and she and her siblings are entitled to inherit

their late father's share. The respondent and the applicant are grandchildren of the deceased, are therefore equally entitled to a share in the estate. The application states that her mother and her siblings have executed authority for her to plead on their behalf and to swear the necessary affidavits. The Law of Succession does not bar any such authority and as such the application is not incompetent and in any event she relies on Article 159(2) of the Constitution which cures any such irregularity.

20. The applicant further submits that PW2 the area chief confirmed that her father lived on the said property when he was young and that he lived there with his family before they moved to Laikipia County to settle on the Sweet Waters land.

21. The applicant also submits that the respondent's case is weak because he has failed to prove that he informed the applicant's mother and her children that he was filing the petition for letters of administration intestate. He also failed to obtain consents of the applicant's family. Despite claiming that he told one of her siblings to inform the others about the succession cause, he did not call the said son to buttress his testimony. The applicant further submits that despite the respondent alleging that the applicant's father and his siblings are entitled to Land Parcel No. KONYU/ICHUGA/603, registered in the name of Nderitu Gathure Mwaniki, the Green Card does not confirm that allegation. The respondent also failed to prove any land transactions or land sales on the said piece of property which he claims the applicant's father and his siblings sold to migrate elsewhere. The respondent also failed to address why he stated that he was the only heir to the deceased's estate. He is therefore guilty of non-disclosure of facts material to the case.

### **The Respondent's Submissions**

22. The respondent relies on **Section 76 of the Law of Succession Act** and submits that since the applicant claims the respondent obtained the grant fraudulently, she must strictly prove the same. This position was enunciated in the case of **Christopher Ndaru Kagina vs Esther Mbandi Kagina & Another [2016] eKLR**. He further adds that the applicant ought to show the court that the respondent's intention and state of mind was that of depriving the other beneficiaries of the deceased's estate by omitting their names in the grant. He relied on the case of **Gichinga Kibutha vs Caroline Nduku [2018] eKLR**. The respondent submits that the applicant ought to have called the beneficiaries as witnesses to demonstrate their interest in the deceased's estate; shown that the respondent was threatened by the competing interests of the other beneficiaries and that the respondent aware of the competing interests, omitted the names of the other beneficiaries so as to deprive them of their respective shares and thereby preserving his own interests. The respondent submits that the applicant did not prove any of the above allegations in relation to the respondent's state of mind. As such, the applicant has not proved the respondent's fraudulent conduct or deliberate concealment of facts beyond a balance of probabilities.

23. The respondent further submits that the court ought not to infer fraud from the fact that there are surviving beneficiaries from the deceased's third house and that they were omitted from the application of the grant. The respondent relied on the cases of **Kinyanjui Kamau vs George Kamau (2015) eKLR** and **Jane Njeri Nderi vs Rachel Wangari Nderi [2020] eKLR** to support his contention. He further adds that just from these facts alone, it cannot be conclusively stated that fraud was committed since no corroborative evidence was adduced. The respondent states that the applicant has failed to prove fraud under section 76(b) of the Law of Succession Act and thus the grant should be affirmed to him.

24. The respondent acknowledges that the decision to revoke or uphold a grant of representation is a discretionary one. Case law relied on is **Jane Njeri Nderi vs Rachel Wangari Nderi (supra)**.

### **Issues for determination**

25. After careful analysis, of the evidence and arguments of the parties, I identify the issues for determination as follows:-

- (a) Whether the application is competent.
- (b) Whether the applicant has presented sufficient evidence to warrant revocation or annulment of the grant.

### **The Law**

26. **Section 76 of the Law of Succession Act** gives the court the powers to revoke a grant provided the conditions stipulated therein have been met. It states 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

iv. The grant has become useless and inoperative through subsequent circumstances.

27. The circumstances in which a grant can be revoked were discussed in the case of **In the Matter of the Estate of L.A.K. (Deceased) [2014] eKLR :-**

**“Revocation of grants is governed by Section 76 of the Law of Succession Act. The relevant portions of Section 76 are paragraphs (a), (b) and (c) since the issues raised relate to the process of the making of a grant. A grant may be revoked where the proceedings leading up to its making were defective, or were attended by fraud and concealment of important matter, or was obtained by an untrue allegation of a fact essential to the point.”**

28. Notably, the power to revoke or uphold a grant is a discretionary one. This principle was enunciated in the persuasive decision in **Albert Imbuga Kisigwa vs Recho Kawai Kisigwa Succession Cause No. 158 of 2000** where Mwita J stated:-

**“Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”**

29. Applying the above principles to the instant case, it is not in dispute that the deceased died on 4<sup>th</sup> December 1979 and the respondent petitioned for letters of administration on 4<sup>th</sup> October 2012. In his application he petitioned as a grandson of the deceased and averred in his affidavit that he is the sole survivor of the deceased. He subsequently filed for summons for confirmation of grant confirming that the deceased was not survived by any other dependant other than the respondent.

30. **Section 66 of the Law of Succession** is instructive on who can apply for letters of administration. It provides:-

**When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference:-**

a) Surviving spouse or spouses, with or without association of other beneficiaries;

b) Other beneficiaries entitled on intestacy , with priority according to their respective beneficial interests as provided by Part V;

c) The Public Trustee; and

d) Creditors.

31. From the reading of Section 66 of the Law of Succession Act, the person given priority over intestate succession is the surviving spouse and children. Any surviving spouse or child takes precedence over grandchildren of the deceased. It is not in dispute that the deceased had three wives. Section 40 of the Law of Succession Act is the relevant law in distribution of the deceased estate having regard to the survivors. It provides:-

**Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.**

a) **Is the Application competent?**

32. On the competency of the application, it is noted that the applicant has annexed authority from her mother and siblings to file this application on their own behalf. The said authority has not been challenged and remains valid and authentic. Even assuming that the summons had a technical defect that does not go to the substance which is not the case herein. Article 159 of the Constitution would suffice to save such a defect. Rule 73 of the Probate & Administration Rules allows the court to make any orders as may be necessary to meet the ends of justice. This summons for revocation of grant is in my view competent.

b) **Has the Applicant made a case for Revocation of Grant?**

33. From the foregoing, it is clear that all the three wives of the deceased herein are not alive. As such the children of the three houses were the rightful persons to have applied for the petition of letters of administration intestate. One of them being the mother of the applicant who is still alive to date. The sons of the deceased are all deceased from what can be gathered from the evidence of the parties.

34. The grandchildren of the deceased including the applicant and the respondent are alive. Also worth noting is that the applicant's mother is still alive. She was the spouse of one Joseph Mathenge Gathure, a child of the deceased. In this regard the respondent ought to have complied with Rule 26 of the Probate & Administration Rules by procuring and presenting to court the consents of all the representatives of the three houses allowing him to petition for the grant of administration or annexed letters by the respective beneficiaries indicating that they renounced their rights to the estate. When asked about why he did not include the other family members, the respondent stated that his siblings had no problem with him inheriting the estate and that he had made an attempt to inform the 3<sup>rd</sup> house that he was embarking on applying for letter of administration.

**Rule 26 of the Probate and Administration Rules is clear.** It provides:-

**(1) Letters of Administration shall not be granted to any applicant without notice to any other person entitled in the same degree as or in priority of 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 communication, 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.**

35. It is not disputed that the respondent did not obtain consents of the surviving beneficiaries of the estate before filing the petition. The beneficiaries did not, therefore, renounce their rights to the estate as required by law. The reason for the omission is that they were not notified of the filing of the succession cause. It is therefore correct to say that they had no intention to renounce. In my view, the respondent failed to comply with the law in filing the petition for letters of administration intestate.

36. Despite the respondent knowing that the deceased had three houses, he presented himself as the only survivor and heir of the deceased. The evidence of PW2, the area chief, was that there was a dispute over the filing of the succession pleadings but when she summoned the respondent to her office, he did not show up. The respondent claims that all his siblings did not have an issue with him acquiring the land. What about the rest of the beneficiaries who are the respondent's cousins? He did not involve them at all which has led to these proceedings.

37. The importance of disclosing all material facts while seeking letters of administration and confirmation was discussed in the persuasive decision of in **Re Estate of Moses Wachira Kimotho (Deceased) Succession Cause No. 122 of 2002 [2009] eKLR** where it was observed:-

**“I am certain that had the applicants been made aware of the application for the confirmation of grant by being served they would have brought to the fore their aforesaid interest in the estate of the deceased and the resultant grant would have taken care of those interests. Further had the respondent been forthright and candid and included the applicants as beneficiaries of a portion of the estate of the deceased as purchasers for value, the court in confirming the grant would have taken into account their interests in the estate of the deceased. As it is therefore the grant was obtained fraudulently by making of a false statement and or concealment from court of something material to the cause. The respondent knew of the applicants' interest of the estate of the deceased yet she chose to ignore them completely in her petition of letters of administration intestate. She also ignored them completely when she applied for the confirmation of the grant.”**

38. The respondent alleged that L.R. No. Konyu/Ichuga/603 was registered in the name of Nderitu Mwaniki Gathure a son of the 1<sup>st</sup> house. I have perused the copy of register and noted that this parcel was transferred from the deceased's name to that of Nderitu M. Gathure on 31/07/2007. It was then transferred to one Morris Murathimi on 04/10/2007. The parcel is currently in the name of a 3<sup>rd</sup> party who is unknown in this estate which information the respondent did not bother to explain though he presented the official search. The respondent's allegations, in my view remain unsubstantiated.. It is also noted that the deceased died in 2004 while the parcel changed hands in 2007. The said Nderitu is not named as a son of the deceased in this case even by any of the parties herein. His name does not feature in the chief's letter dated 14/12/2016 as a beneficiary. At this stage, this court is dealing with an application for revocation of grant and not with distribution of the estate.

39. I am thus satisfied that the respondent concealed material facts and thus the applicant has demonstrated that the respondent obtained the grant fraudulently and as well concealed material facts of the case which if the same were presented to the court, such grant would not have been given.

### **Conclusion**

40. Having restated the relevant law and analysed the evidence of the parties, I am of the considered opinion that the respondent in filing these proceedings acted fraudulently, misrepresented the facts and was guilty of non-disclosure of facts material to the case. As such, two of the grounds provided for under Section 76 of the Act which upon proof justify revocation of grant have been satisfied.

41. The summons for revocation of grant is hereby allowed in the following terms:-

- a. That the grant issued in favour of the respondent Christopher Wamai Gichere and confirmed on 17<sup>th</sup> December 2015 is hereby revoked.
- b) That any transactions made under the revoked grant are hereby declared null and void.
- c) That the applicant Charity Wanjiku Maina and the respondent Christopher Wamae Gichere are hereby appointed co-administrators of the estate of the deceased to represent the three(3) houses of the deceased.
- d) That the co-administrators or any of them do file summons for confirmation of grant within sixty(60) and that the surviving

beneficiaries of the estate of the deceased be involved in the distribution.

42. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 29<sup>TH</sup> DAY OF JULY, 2021.**

**F. MUCHEMI**

**JUDGE**

**Ruling delivered through video link this 29<sup>th</sup> day of July, 2021**