



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL MISC. APPLICATION NO. 72 OF 2018

IN THE MATTER OF ESTATE OF JOHN KARIUKI GETHU (DECEASED)

HELENA WAHU.....1ST APPLICANT

RAPHAEL GITHU KARIUKI.....2ND APPLICANT

-VERSUS-

RAPHAEL GETHU.....RESPONDENT

RULING

1. By summons dated 28th November 2018, brought under section 76 of the Law of Succession Act and rule 44 of the Law of Succession Rules, **Helena Wahu** and **Raphael Githu Kariuki**, the applicants, applied for revocation and annulment of the grant of letters of administration intestate issued to Raphael Kariuki Githu on 27th July 2018 as the administrator of the Estate of John Kariuki Gethu, deceased and confirmed on 17th October 2018.
2. The grounds upon which the application is made are that the grant was obtained fraudulently by means of untrue allegation of facts essential in the point of law to justify the grant, and that the grant was obtained fraudulently by making of false statements or by the concealment from the court of something material to the case.
3. The summons is supported by a joint affidavit sworn by Helena Wahu and Raphael Githu Kariuki, daughter and son to Kariuki Gethu, also deceased, who died on 18th July 1989. The applicants depose that Raphael Kambo Githu, the administrator of the estate of John Kariuki Gethu, obtained a grant of administration to that estate through Loitokitok Senior Resident Magistrate's court Succession Cause No. 16 of 2018, in a fraudulent manner, by making a false statement that **parcel No. Loitokitok/Ngama/131**, belonged to the late John Kariuki Gethu.
4. According to the applicants, **parcel No. Loitokitok/Ngama/131** belonged to their deceased father, Kariuki Gethu. They attached a copy of search issued on 31st October 2018 to show that the land belonged to Kariuki Gethu and not the respondent's father, John Kariuki Gethu. The applicants further deposed that they have filed Succession proceedings on behalf of their father's Estate, being succession cause No. 131 of 2017, which is now pending before the Chief Magistrate's court, Kajiado. They also deposed that they have included the disputed property as part of the deceased's estate.
5. They contend that based on the advice from their advocate, they believe that the grant of administration intestate obtained by the respondent for the estate for the late John Kariuki Gethu, was obtained through fraudulent misrepresentation of facts and, therefore, it should be revoked and annulled.
6. The respondent filed a replying affidavit by Peter Kihui Munga sworn on 21st February 2019 and filed on 25th February 2019. He deposed that his mother, Mary Wangui Munga purchased 3 acres of **Loitokitok/Ngama/131** from Mzee Ole Kanderi and that his brother had constructed a house on the parcel of land. He also deposed that he placed a caution on that parcel of land in 1996 after he realized that the land had a problem and that his mother and John Kariuki Githu, deceased, had an agreement to get 12 acres out of which the deponent would get 3 acres on subdivision. He stated that he was involved in the succession cause to get the 3 acres.
7. Raphael Kombo Githu the, respondent and Petitioner in Succession Cause No. 16 of 2018 at Loitokitok, filed a replying affidavit also sworn on 21st February 2019 and filed in court on 25th February 2019. He deposed that the name of the deceased in his Petition for grant, is John Kariuki Gethu, is the same as that of Kariuki Githu, also deceased. He further deposed that his deceased father and the other deceased were relatives and that his father left behind several properties including **Parcel No. 131**, now in dispute.
8. The deponent contended that his father had even applied for sub-division of **Parcel No. 131** but the process was not concluded before he died; that his deceased father had continuous possession of the land (No. 131) from the time he purchased it; and that the applicants' claim is fraudulent.

9. During the hearing of the summons, Mr. Onchiri, learned counsel for the applicants, submitted that the grant issued to the respondent on 27th July 2018 and confirmed on 22nd October 2018 was fraudulent and should be revoked and annulled. In counsel's view, the petition for grant includes **Parcel No. 131**, which did not belong to the deceased in that cause. According to Mr. Onchiri, the applicants had attached a search to demonstrate that **Parcel No. 131** belonged to **Kariuki Githu** their father and not **John Kariuki Githu** father to the respondent. He fully relied on the applicants' affidavit and the annexures and urged the court to allow the summons.

10. Mr. Itaya, learned counsel for the respondent, submitted that the applicants had not proved the statutory grounds under section 76 of the Law of Succession Act. According to counsel, no fraudulent acts have been established. In his view, the respondents have annexed documents to show that **John Kariuki Githu**, the deceased in Cause No. 16 of 2018, was the owner of **Parcel No. 131**. He therefore urged the court to dismiss the summons.

11. I have considered the summons, the responses and submissions on behalf of the respective parties. I have also perused the impugned grant of administration and the resultant certificate of confirmation.

12. This summons has been brought under section 76 of the Law of succession Act and rule 44 of the Rules. Section 76 gives this court powers to revoke and annul a grant of representation if certain conditions exist. The section 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 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 circumstance"

13. Considering the above provisions and the circumstances under which a grant may be revoked, I do not think the applicants have shown that there is reason for this court to revoke or annul the grant issued to the respondent for the estate of **John Kariuki Githu** in Cause No. 16 of 2018.

14. The respondent is a son and therefore a family member of the deceased in that cause. The applicants have not shown that they are in any way interested in that estate. There should, therefore, be no justification for revoking that grant.

15. What I find however to be an issue is whether the whole or part of Parcel No. 131 included in that deceased's estate belonged to that deceased. Both the applicants and the respondent have laid claim to that Parcel of land. The applicants claim that the property belonged to their deceased father while the respondent holds the view that it belonged to his deceased father. That, in my view, is the issue raised in this summons and it has nothing to do with who the administrator of the estate of the deceased in Cause No. 16 should be.

16. The question that arises, is; what should this court do with regard to the summons given that the real issue is whether the property, namely; **Parcel No. 131** belongs to either deceased in Cause Nos. 16 of 2018 or 131 of 2017.

17. I have perused the documents attached to the summons relating to **Parcel No. 131**, and also perused the rival affidavits. What I gather from the summons, the affidavits and the submissions, is that there is a dispute as to who the owner of that parcel of land is. I have also seen a copy of the **certificate of confirmation of grant** issued on 22nd October 2018 in cause No. 16 of 2018. Parcel No. 131 was included as part of the estate and was distributed amongst the beneficiaries of **John Kariuki Githu**, the deceased in that cause.

18. The applicants also filed cause No. 131 of 2017 for the estate of their deceased father, **Kariuki Githu**. They indicated that the same Parcel of land **Loitokitok/ Ngama/ 131** formed the estate of **Kariuki Githu**, the deceased in that Cause, giving credence to the fact that there is a dispute on the real proprietor of that Parcel of land.

19. Having considered the summons, the responses and the real issue in dispute, I am not satisfied that there is reason to revoke the grant of administration issued to the respondent herein for the estate of **John Kariuki Githu, deceased**. I find however that there is reason to interfere with the certificate of confirmation issued pursuant to confirmation of that grant and the distribution as contained in that certificate

of confirmation.

20. This action, in my view, is the best cause to take in the circumstances of this dispute to allow parties seek determination of the ownership dispute which falls within the jurisdiction of the Environment and Land Court in terms of Article 162(2) of the Constitution.

21. Consequently, I make the following orders.

a) The summons dated 28th November seeking revocation of grant issued to Raphael Kambo Githu on 27th July 2018 is declined.

b) The order made on 17th October 2018, confirming the grant of of letters administration intestate issued to Raphael Kambo Githu on 27th July 2018 is hereby set aside.

c) Raphael Kambo Githu do file fresh summons for confirmation of grant for the estate of John Kariuki Githu, (deceased), in cause No. 16 of 2018, excluding the disputed Parcel No. Loitokitok/ Ngama/131.

d) The legal representatives of the estate of Kariuki Githu, (deceased) and the legal representative of the estate of John Kariuki Githu, (deceased) do move the Environment and Land Court for determination of the real owner of Parcel No. Loitokitok/ Ngama/ 131.

e) A restriction is hereby issued restricting any transaction on Parcel No. Loitokitok/Ngama/131 or any subdivisions arising therefrom, until the determination of the ownership dispute on that parcel of land by the Environment and Land Court.

f) No order as to costs.

Dated, Signed and Delivered at Kajiado this 28th day of February, 2020.

E. C. MWITA

JUDGE