



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**SUCCESSION CAUSE NO.16 OF 2018**

**IN THE MATTER OF THE ESTATE OF EVANS NGUGI WANJAU (DECEASED)**

**MOSES MWANGI NGUGI.....OBJECTOR/APPLICANT**

**- V E R S U S -**

**JANE WAIRIMU NGUGI.....1<sup>ST</sup> ADMINISTRATOR**

**ESTHER MUTHONI GITONGA.....2<sup>ND</sup> ADMINISTRATOR**

**- A N D -**

**EUNICE WAMAITHA MUNYUI.....1<sup>ST</sup> INTERESTED PARTY**

**PAUL KAMAU NDEMENGE.....2<sup>ND</sup> INTERESTED PARTY**

**JUDGMENT**

The summons for revocation/annulment of grant dated 27/11/2017 was filed by Moses Mwangi Ngugi the objector/applicant in which the applicant seeks the following orders:

1. ....spent;
2. ....spent;
3. *That the grant of letters of administration issued to Jane Wairimu Ngugi and Esther Muthoni Gitonga on the 27/10/2015 and the certificate of confirmation of grant issued on the 18/11/2016 be revoked;*
4. *That the title deeds for L.R.Nyandarua/Ol Kalou Central 326 be redistributed as prayed.*

The applicant is the son of Evans Ngugi Wanjau the who died intestate on 26/7/1995.

The deceased was survived by the following persons:

**1<sup>st</sup> House:**

1. Mariam Njoki Ngugi - Widow (deceased)
2. Mary Waithera Mbao - Daughter-in-law
3. Moses Mwangi Ngugi - Son (Applicant)
4. Esther Muthoni Gitonga - Daughter (administrator)
5. Naomi Njeri Njoroge - Daughter
6. Leah Wangechi Ngugi - Daughter

7. Rachael Wanjiku Ngugi - Daughter

**2<sup>nd</sup> House:**

1. Jane Wairimu Ngugi - Widow (administrator)

2. John Chege Ngugi - Son

3. Paul Kiarie Ngugi - Son

4. Mary Njambi Gichuru - Daughter

5. Elias Mungai Ngugi - Son

6. Dolin Wambui - Daughter

7. Julia Njeri - Daughter

The deceased left behind only one asset being LR.No.Nyandarua Olkalou Central/362.

On 8/5/2015, Jane Wairimu Ngugi and Esther Muthoni Gitonga filed a Petition for letters of administration intestate in their capacities as widow and daughter of the deceased respectively.

The grant of representation was issued on 27/10/2015 and confirmed on 18/11/2016 and they are the subject of challenge by the applicant.

The grounds upon which the application is premised are that the proceedings to obtain the grant were defective in substance; that the grant was obtained fraudulently by making false statements and concealment of material facts; that it was obtained by means of untrue allegations of facts and the estate has been distributed to persons not entitled and do not appear in the certificate of grant dated 18/11/2016. The application was also supported by the applicant's affidavit dated 27/11/2017 in which he deponed that he never consented to the respondents being appointed as administrators and the signature appearing against his name on the consent dated 25/3/2014 is a forgery; that he was not consulted when the respondents petitioned for grant of letters of administration and he was not present in court when grant was confirmed nor did he consent to the mode of distribution; that the respondents did not distribute the estate in accordance with the certificate of confirmation dated 18/11/2016 and that the estate has been transferred to strangers, that is, Eunice Wamaita Ndungu about one acre and Paul Kamau Ndemenge got ¼ acre; that the strangers have taken possession of the portion that the appellant settled on in 1990 and has developed; that one of the beneficiaries Mariam Njoki Ngugi, his mother died on 25/10/2017 and it is unknown what happened to her share. The applicant proposes that distribution of plot 326 be done as follows:

**1. Gakahu Goite (purchaser) - 2.5 acres;**

**2. Moses Mwangi Ngugi - 2.34 acres;**

**3. Mary Waithera Mbao - 2.34 acres.**

The second respondent Esther Muthoni Gitonga filed a replying affidavit opposing the application contending that all along the applicant was aware of the proceedings till the grant was confirmed and cannot come to court at this stage; that the applicant was notified of the confirmation of grant but refused to attend court; that all the deceased's beneficiaries were taken into account during confirmation, with 2.5 acres going to Gakahu Goite, who purchased the land during the deceased's lifetime; that 4.68 acres was to go to the 1<sup>st</sup> house which comprises their mother (1<sup>st</sup> respondent) and her six children. She denied that any land has been distributed to strangers but some of the beneficiaries sold their shares to 3<sup>rd</sup> parties and the said beneficiaries have no problem with the distribution. According to her, there is no good reason for the court to revoke the grant.

On 26/9/2018 directions were taken that the summons for revocation be determined by way of viva voce evidence with the objectors (applicant) case being heard first. The applicant reiterated the contents of his affidavit and added that after the death of their father, they called a surveyor and subdivided the land into two equal parts of 4 acres for each house, after taking into account 2½ which the deceased had sold to Gakahu Goite; that the father's land had been 10½ acres and hence the land available for distribution was only 8 acres; that he discovered in 2017 that Succession Proceedings had taken place. The land had been distributed and sold to strangers. He was not involved in the proceedings nor did he sign the consent dated 25/5/2015 allowing the administrators to be appointed or the consent for distribution. According to the applicant, his sisters were not entitled to ¼ acre each that each one of them got but that he should have shared the 4 acres of land with the wife of his late brothers because his sisters are all married and have land where they are married. The applicant also questioned where the one acre of land that had been given to his deceased mother, Miriam Ngugi went to as it should have been available for distribution to the first house after their mother's death.

The applicant also took issue with the fact that the land was not distributed in accordance with the certificate of confirmation in that three portions were registered in the 2<sup>nd</sup> respondent's name; the mother did not get any portion and that Eunice Wamaita and Paul Kamau Ndemenge are not beneficiaries of the deceased's estate yet they were registered as owners of the land.

Lastly, the applicant questioned why the 1<sup>st</sup> respondent got 4.68 acres of land. He said that if records show that the land is 11.8 acres, the

two houses should share equally. The applicant denied that the family ever agreed to sell land in order to pay off their mother's bills.

In addition to her affidavit, the 2<sup>nd</sup> respondent stated that the applicant was un-cooperative after their mother's death and she obtained a letter from the D.O. together with the 1<sup>st</sup> respondent with which they filed succession proceedings; that the applicant refused to attend the chief's office when summoned and that is when they listed him as a beneficiary; that the applicant was informed of the court attendance but he declined to attend; that she decided that each girl gets ¼ acre while the applicant and his deceased brother's wife got an acre each; that she created a road out of the rest, while ¾ of her mother's acre was sold to offset medical bills and ¼ was to be inherited by the oldest brother as per their mother's instructions.

As for the strangers, the 2<sup>nd</sup> respondent explained that her sisters authorized her to sell for them their pieces of land which she did and none has an issue with the distribution. The 2<sup>nd</sup> respondent also told the court that they had problems with the applicant who did not assist with the mother's ill health for 17 years. Though she claimed to have sold ¾ acre of her mother's land to offset the bills, she could not avail evidence of the sale. She denied that the administrators acted fraudulently.

I have carefully considered the affidavits filed, the oral evidence adduced by both parties and the submissions made by counsel on the evidence, the law and authorities cited.

The first issue for consideration is whether the applicant has demonstrated sufficient grounds for the court to revoke the grant under Section 76 of the Law of Succession Act. The Section provides as follows:

**“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.”**

A grant may be revoked by an application by a party or by the court on its own motion. Grounds upon which a grant may be revoked are statutory and it is incumbent upon the person making the application for revocation to demonstrate to the court that some or all of the said grounds exist. In the case of *Matheka and another v Matheka (2005) 2 KLR 455*; the Court of Appeal laid down the guiding principles on when a grant may be revoked. It said:

**“A grant may be revoked either by application by an Interested Party or by the court on its own motion;**

- 1. Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.”**

The 2<sup>nd</sup> respondent insists that the applicant was aware of the proceedings from the time of filing to its conclusion which contention the applicant has denied. The applicant produced in evidence a consent dated 25/3/2014 and filed in court on 8/5/2015 in which the signatories were contending that they agreed to the two respondents being granted letters of administration intestate. The applicant is listed as one of the signatories but he denies having signed it.

The 2<sup>nd</sup> respondent admitted that the applicant did not sign the said consent and seemed to suggest that Mary Waithera signed it. The 2<sup>nd</sup> respondent was the proposed administrator. Having known that the applicant had not cooperated or had not signed the consent form, she should not have presented it to court with a false signature. The signature appended to the consent is indeed a forgery. Section 26(1) of the P & A requires that letters of administration should not be issued to any applicant unless notice has been given to all persons entitled (beneficiary) in same degree or in priority to the applicant.

There is totally no evidence to show that the applicant was aware of when the proceedings were filed. By forging the applicant's signature, it goes to confirm the bad faith on the part of the 2<sup>nd</sup> respondent.

The court record of 18/11/2016 when grant was confirmed clearly indicates that the applicant was not one of those beneficiaries present. The court did not record that any of the beneficiaries had objected to the confirmation. No witness summons was returned to court as having been served on the applicant. All this time, the respondents were represented by counsel who knows the procedure.

When confirming the grant, the court did not strictly follow the provisions of Rule 40(8) of P & A Rules that require that there be a consent in writing to the confirmation of grant.

From the foregoing, this court is satisfied that the respondents concealed the filing of these proceedings from the applicant and in addition, forged the applicant's signature. It was admitted that the applicant and his siblings and especially, the 2<sup>nd</sup> respondent, do not get along. That explains the 2<sup>nd</sup> respondents' actions. Whatever the relationship of the sibling was, the court needed to be notified that all the beneficiaries were present or the reasons for any beneficiary's absence. In the end, I find that grounds for revoking of a grant exist and the grant is hereby revoked.

The mode of distribution is also challenged. As admitted, the only asset of the deceased was plot LR.No.Nyandarua/Olkalou Central/326. Although the applicant indicates that the total acreage was 10½ acres, it seems to have been more than that. I have seen the annexed copy of the title which indicates that the acreage was 4.8 HA which translates to about 11.86 acres. The applicant has recognized Gakahu Goite as a purchaser for value having bought 2½ acres during the lifetime of the deceased. It means that what was available for distribution is 9.36 acres. It is generally agreed that the deceased's two houses had agreed that the deceased's land be shared equally between the two houses.

The total acreage forming the estate being 9.36 acres each house is therefore entitled to 4.68 acres. As per the certificate of confirmation, 4.68 acres devolved to the 1<sup>st</sup> respondent which she was to hold for herself and in trust for her children. Though the applicant said he had a problem with the acreage, he did not demonstrate how he objected to it. The applicant had agreed that if the deceased's land was found to be more than 8 acres, he had no objection to the two houses sharing equally. That is the position and I find that the applicant has no issue with the 4.68 acres which devolved to the 1<sup>st</sup> respondent. The issue is with the 4.68 acres that was distributed amongst the beneficiaries of the first house any distribution made to 3<sup>rd</sup> parties is illegal and any said transfers made to the 3<sup>rd</sup> parties is cancelled.

The question then is how should the court distribute the 4.68 acres belonging to the 1<sup>st</sup> house? The deceased died intestate in 2007. Section 2(1) of Law of Succession Act provides for the applicability of the Act. Section 2(1) Law of Succession Act provides as follows:

**“Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.”**

It means that the law applicable in this case is the Law of Succession Act not customary law or any other law that applied before 1<sup>st</sup> July, 1981 when this Act commenced.

Article 27 of the Constitution prohibits any form of discrimination based on race, sex, marital status or culture. Article 27(3) of the Constitution specifically provides that... **“women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres”**.

Section 29(a) of the Laws of Succession Act recognizes 'children' of the deceased as dependants – it does not classify these children as sons or daughters, married or unmarried. By the applicant contending that his sisters are not entitled to inherit because they are all married is inviting the court to apply the Kikuyu Customary Law to which tribe I believe, he belongs. But customary law cannot supersede the Constitution and Statutory law (LSA). In Re: ***Estate of Solomon Ngatia Kariuki (deceased) 2008 eKLR***, the court said:

**“The Law of Succession Act does not discriminate between the female and male children or married and unmarried daughters of the deceased person when it comes to the distribution of his estate. All children of the deceased are entitled to stake a claim to the deceased's estate. In seeking to disinherit the protestor under the guise that the protestor was married, her father, brothers and sisters were purportedly invoking a facet of an old Kikuyu Customary Law. Like most other customary laws in this country, they are always biased against women and indeed they tend to bar married daughters from inheriting their father's estate. The justification for this rather archaic and punitive customary law demand appears to be that such married daughters should forego their father's inheritance because they are likely to enjoy inheritance of their husband's side of the family.”**

The issue of daughters inheriting was also addressed by J. Kimaru in ***Peter Karumbi Keingati & others v Dr. Ann Nyokabi Nguthi C.A.235/2014***:

**“As regard to the argument by the Applicants that married daughters ought not to inherit their parent's property because to do so would amount to discrimination to the sons on account of the fact that the married daughters would also inherit property from their parent's in-laws, this court takes the view that the argument as advanced is disingenuous. This is because if a married daughter would benefit by inheriting property from her parents, her husband too would benefit from such inheritance. In a similar fashion, sons who are married, would benefit from property that their wives would have inherited from their parents. In the circumstances therefore, there would be no discrimination. In any event, the decision by a daughter or a son to get married has no bearing at all to whether or not such son or daughter is entitled to inherit the property that comprise the estate of their deceased parents. The issues that the court will grapple with during distribution**

are the issues anticipated by Section 28 of the Law of Succession Act. This court is of the view that the time has come for the ghost of retrogressive customary practices that discriminate against women, which have a tendency of once in a while rearing its ugly head to be forever buried. This ghost has long cast its shadow in our legal system despite of numerous court decisions that have declared such customs to be backward and repugnant to justice and morality. With the promulgation of the Constitution 2010, particularly Article 27 that prohibits discrimination of persons on the basis of their sex, marital status or social status, among others, the time has now come for these discriminative cultural practices against women be buried in history.

**In the premises therefore, this court finds no favour with the Applicants' application seeking to disinherit the Respondents. This court declares that the Respondents are dependants of the deceased in accordance with Section 29(a) of the Law of Succession Act. They are entitled to inherit the properties that comprise the estate of the deceased during distribution."**

See also **Rono v Rono C.A.66/2002.**

It is now settled law that all children are equal before the law, both sons and daughters of the deceased married or unmarried. Daughters are entitled to inherit unless they renounce their rights to inherit. In this case therefore, the four daughters of the deceased have not renounced their rights to the estate. Each of them had been given ¼ acre each which they have not complained about.

The applicant questioned where the one acre that was their mother's share went. The 2<sup>nd</sup> respondent claimed to have sold it to offset hospital bills. However, the 2<sup>nd</sup> respondent was unable to produce any evidence of sale, for example an agreement of sale or how she disbursed the Kshs.800,000/= she received from the sale. As an administrator, the 2<sup>nd</sup> respondent is under a duty under Section 83(h) of the Laws of Succession Act to render an accurate account of any expenditure from the estate.

The 2<sup>nd</sup> respondent also claimed to have set aside some land for a road reserve. However, there was no evidence from the surveyor that any land was set aside for a road reserve.

It is apparent that this matter was handled discretely from the applicant. It is important for parties to try and agree on distribution because sometimes some beneficiaries may have settled and developed the land and during distribution, the issue of where people have settled may also be taken into account.

The applicant has complained that he had built his house and developed his home and even planted trees. The 2<sup>nd</sup> respondent admitted that fact though she added that it could not be possible for the applicant to remain where he had settled in any event. She did not explain why. Third Parties cannot take precedent to the beneficiaries. The distribution must be sensitive to those on the land and alleviate any inconvenience or/and unnecessary costs.

After taking all the above issues into consideration, I find that the land available for distribution is only 4.68 acres, to be shared amongst the six children of the deceased. The daughters of the deceased are married and have land where they are married. Distribution of an estate can never be exactly equal but the court has to try and carry out an equitable distribution. The court therefore makes the following orders:

- 1. That the grant issued to the 1<sup>st</sup> and 2<sup>nd</sup> respondents on 27/10/2015 and confirmed on 18/11/2016 is hereby revoked;**
- 2. That the applicant and 2<sup>nd</sup> respondent are appointed as administrators to represent the 1<sup>st</sup> house, while the 1<sup>st</sup> respondent is appointed as administrator to represent the 2<sup>nd</sup> house;**
- 3. That all the titles issued upon subdivision of the deceased's land Nyandarua/Ol Kalou Central/326 to the 1<sup>st</sup> house, that is, to Mary Waithera, Moses Mwangi, Esther Muthoni, Naomi Njeri, Leah Wangechi and Rachael Wangechi are hereby cancelled;**
- 4. The portion that devolved to the 2<sup>nd</sup> house (that is, Jane Wairimu Ngugi) to remain undisturbed;**
- 5. That the daughters of the first house are entitled to ¼ acre each of the 1<sup>st</sup> house's entitlement;**
- 6. For the balance of 3.8 acres, an access road be curved out and the balance be divided equally between the applicant and Mary Waithera Mbao (the widow of his brother);**
- 7. That the Government Surveyor to take into account existing developments on the land during the subdivision;**
- 8. That the Government Surveyor do undertake the survey work within 45 days from today's date;**
- 9. There be a mention to confirm compliance within 60 days from today's date;**
- 10. This being a family matter, each party to bear its own costs.**

**Dated, Signed and Delivered at NYAHURURU this 20<sup>th</sup> day of February, 2020.**

.....

**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

Mr. Kamanga for respondents - present

Ms. Muriithi for Waichungo for appellants – absent

Erick – Court Assistant