



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

SUCCESSION CASE NO. 28B OF 2017

IN THE MATTER OF THE ESTATE OF NJOROGE KIBUTU (DECEASED)

GLADWELL WANGARI KAHIRA.....APPLICANT

VERSUS

JOSEPH MUNGAI NJOROGE.....RESPONDENT

R U L I N G

1. Before me is the Summons for Revocation or Annulment of Grant filed on 20th December, 2004 and expressed to be brought under Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules.
2. The application is based on the grounds that the grant was obtained fraudulently and by means of untrue allegations of facts material to the case and is further supported by the affidavit of **Gladwell Wangari Kahira**, the Applicant herein. She deposed that as a beneficiary to the estate herein, she did not consent to the grant issued to **Francis Waruinge Njoroge** and that her purported signature in the Petition for grant is a forgery. She deposed that she is divorced and that her three brothers disinherited other beneficiaries under the confirmed grant and have since applied for consent to approve the subdivision of the properties in the confirmed grant.
3. In opposing the summons, **FRANCIS WARUINGE NJOROGE** filed his replying affidavit on 22nd February 2005. He deposed that upon his father's demise, he petitioned for Letters of Administration and that the applicant signed the said consent; that the Applicant is not being truthful as all persons concerned were informed.
4. When the Summons came up for hearing, the court directed the parties to file witness statements which would be adopted at the hearing and the witnesses cross-examined.
5. The Applicant testified as PW1 adopting her witness statement. In cross-examination by Mr. Kirimi, she denied giving her consent for the filing of the succession cause in regard to the deceased's estate. She contended that she filed her application shortly after a surveyor visited the portion of the estate land on which she lives since leaving her matrimonial home. She claimed that on documents requiring her signature, she uses a thumbprint and not signature as purported in the disputed consents to the Petition. She asserted that her brother's children have erected homes on the estate land, while her children got nothing from the estate.
6. **JAMES NJENGA WANGARI** (PW2) testified that he is PW1's son. He adopted his statement and was cross-examined by Mr. Kirimi. He stated that he is the one who informed the mother about the succession cause after witnessing the survey work on the suit land. He reiterated evidence that his cousins have developed their portions of land.
7. **BEDAN NJOROGE (PW3)** testified that PW1 is his step-sister. He testified that PW1's siblings and their children have developed their respective portions of the estate land.
8. **JOSEPH MUNGAI NJOROGE (RW1)** adopted his witness statement and was cross-examined by Mr. Kaai. He stated that PW1 resides on the portion of land assigned to a deceased brother as inheritance from the deceased. He contended that PW1 signed the consent and that all the beneficiaries participated in the Succession Cause
9. The parties later filed their written submissions. The Applicant submits that after her divorce, the deceased gave her land parcel number **KIAMBAA/THIMBIGUA/1648** where she resides. It was her submission that in the year 2003, surveyors came to subdivide the land and that, it is at this point that she learnt that her brothers had obtained orders in Kiambu Succession Cause number 46 of 2002 to share the land amongst her three brothers but leaving her out. She submitted that she did not consent to the petition for grant or confirmation thereof and that the signatures in the respective consent documents are a forgery. She further contends that as the deceased's daughter she is entitled to a

share equal to her brothers'. She urged the court that her application was filed promptly, was not an afterthought and that she was unaware of the succession cause until the surveyor's visit. She expressed apprehension that she risks eviction if the summons is not allowed.

10. The Respondent's counsel filed his submissions on 25th June, 2019. He submitted that he petitioned for Letters of Administration Intestate with the consent of the applicant among other beneficiaries and thereafter, no objections were raised. He contended that the allegations by the Applicant have not been proved and as such the grant should not be revoked. Counsel for the Respondent relied on the case in **Samuel Iregi Gitau vs Wanjiku Gitau (2016) eKLR** where it was held that the burden of proof of a fact lies on the person who wishes the court to believe in its existence. Counsel submitted that it would be a grave injustice to disturb the *status quo* as the land was sub-divided a long time ago and permanent structures have been put up by respective beneficiaries. Finally, the court was urged to dismiss the application with costs.

11. The court has considered the parties' respective affidavits, evidence as well as submissions. The grant sought to be revoked was issued in the then **SPM's Court Kiambu Succession Cause No 46 of 2002** and confirmed on 2nd July 2003. By the latter, the intestate's sole asset namely land parcel No. **KIMBAA/THIMBIGUA/1648** was shared equally between the intestate's admitted 3 sons, namely Francis Waruinge Njoroge, Joseph Mungai Njoroge and Rev. Stephen Gitunda Njoroge. The latter beneficiary died in July 2018 while the former is said to be suffering from dementia. It fell on Joseph Mungai Njoroge to defend the impugned grant.

12. The key ground in support of the revocation is captured in paragraph 2 and repeated in paragraph 5 of the Applicant's affidavit, the former which states that;

“THAT the said grant was obtained fraudulently in that, I was implied been informed and to have consented and signed for its application, which is entire untrue as I was never informed at all and my purported signature is a forgery as I normally thumb print” (sic)

13. Section 76 of the Law of Succession Act 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 circumstances”.

14. The onus in this case of proving that her signature in the two consents attached to the Replying affidavit of Francis Waruinge Njoroge as annexure **“A”** was a work of forgery lay with the Applicant. Notably, in her statement filed into court on 28/3/18, the Applicant merely states that she was not informed (erroneously spelt as 'infringed') of the succession cause and did not give consent thereto (erroneously spelt as 'current'). When confronted with the two sets of consents during cross-examination by the Respondent's counsel, the Applicant was equivocal, stating *inter alia* that :

“I don't recall having given consent for the filing of Succ Cause No 46 of 2002 I can't recall if I signed the consent document you are showing me (witness reluctant to look at the consent document shown her). I did not sign consent to confirm grant, I cannot recall if I attended proceedings for the confirmation of grant (Referred to consent for confirmation of grant). I cannot recall if I signed this document These days I use a thumb print not a written signature. No I have not reported that anyone forged my signature.”

15. During Re-examination by her counsel she was shown the signature beside her name in the disputed consents. Her response was that :

“I cannot tell if these are my signatures”. Her son and stepbrother who testified as **PW2** and **PW3** merely confirmed what was severally emphasized by the Applicant and admitted by the Respondent; that the Applicant has in the last decade or more been accommodated on the piece of land which devolved upon her deceased brother Rev. Stephen Gitunda Njoroge pursuant to the succession cause.

16. In the cause of perusing this file, I have noted some correspondence/documents previously authored and apparently signed by the Applicant while acting in person.

These include:

- a) Letter dated 22.2.2010
- b) Letter dated 11.2.2010
- c) Hearing Notice filed on 2.2.2010 and dated 15.1.2010

d) Letter dated 21.10.09 attaching affidavit sworn on 4th November 2009 and signed by the Applicant.

Notably, while the Applicant's affidavit in support of the motion dated 20th December 2004 and her statement filed on 26th March 2018 bear a thumb print above her name, her affidavit sworn in support of the summons to substitute the administrator, filed on 19th April 2016 bears a handwritten signature.

17. Thus, it is difficult to understand her disclaimer to the contrary, as contained in paragraph 2 of her affidavit in support of the summons for revocation. These facts and her equivocal answers during her testimony regarding the question whether she signed the disputed consents created doubt as to the veracity of the Applicant's denials. Moreover, she did not commission an expert to examine the disputed signatures and to confirm whether or not these disputed signatures were hers. Her case after all, rested on the authenticity of the disputed signatures on the consent documents.

18. Section 108 of the Evidence Act provides that:

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side”.

The evidence and material relied upon by the Respondents put to serious test the Applicant's assertions herein. It seemed to me more plausible that the Applicant indeed appended her signatures to the disputed consents but developed second thoughts afterwards. Her main concern, emerging from her evidence and that of her witnesses was to obtain sanction for her continued admitted occupation of a portion of land now lawfully devolved upon her deceased brother, and possibly to secure an inheritance for her children such as PW2. It is too late in the day for the Applicant to turn back the clock.

19. The court finds that the Applicant has failed to make out the grounds upon which her motion for revocation was premised. The application must fail and is dismissed. Parties will bear own costs.

DELIVERED AND SIGNED AT KIAMBU THIS 20TH DAY OF FEBRUARY 2020

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C. MEOLI

JUDGE

In the presence of:

Mr. Kinyanjui holding brief for Mr. Kaai Mugambi for Applicant

Mrs Gathua holding brief for Mr. Karimi for Respondent

Court Assistant – Nancy/Ndege