



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO.1676 OF 2013

IN THE MATTER OF THE ESTATE OF GRACE GACIKU GACHERU alias

GRACE GACHIKU GACHERU – (DECEASED)

JOYCE NGOMBI THIONG'OAPPLICANT

VERSUS

PAUL CHEGE GACHERURESPONDENT

RULING

1. The Objector/Applicant in this case JOYCE NGOMBI THIONGO filed a summons for revocation dated 21.9.2018 seeking for orders that the grant of Letters of Administration issued to PAUL CHEGE GACHERU on 7.10.2013 and confirmed on 10.6.2014 be revoked.
2. The hearing proceeded by way of Viva voce evidence. The objector/Applicant said she got married to Mungai (Deceased) who was a son of the deceased herein in April 1981.
3. The Applicant said she was married to Mungai for 20 years. She said when the deceased died she was not at home.
4. The Respondent told the court that his brother Mungai Gacheru was not married. He said he does not know the objector/ applicant.
5. The Respondent said prior to filing the Petition he got a letter from the chief which contains the names of all the beneficiaries.
6. The Respondent called NJOKI MUTUA and JOHN KAMAU NJENGA and they both said that Mungai Gacheru was not married.
7. NJOKI MUTUA was married to BERNARD MUGWE GACHERU (Deceased) who was a brother to MUNGAI GACHERU (Deceased) while JOHN KAMAU NJENGA was a friend to Mungai.
8. The parties filed written submissions which I have duly considered. The issues for determination are as follows:
 - (i) **Whether the Applicant is a beneficiary of the deceased's estate.**
 - (ii) **Whether the grant of letters of Administration and Certificate of Confirmation issued to the Respondent should be revoked.**
 - (iii) **Who pays for the costs of this suit?**
9. On the issue as to whether the Objector/Applicant is a beneficiary of the estate of the deceased, I find that the evidence of the objector is that she was married to Mungai Gacheru (deceased) who was a son to the deceased herein.
10. It is trite law that he who alleges a fact is duty bound to prove the same.

Section 107 of evidence Act succinctly states:

“Whosoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts

must prove that those facts exist.

And **Section 108** of **Evidence Act**, further states thus:

“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.”

11. In the current case, I find that there is no iota of evidence that the objector/applicant was married to the respondent's brother the late Mungai either under customary law or any recognized law.
12. I find that there is no evidence that the two cohabited as husband and wife and this court has not been called upon to presume existence of a marriage.
13. I find that when the deceased died, the Objector/Applicant was not present and neither is there evidence that she was known to the Respondent.
14. I find that the Respondent who did not know the objector/Applicant would not have included her as a beneficiary of the Estate. It cannot be said that he obtained the grant herein fraudulently or by concealment of material facts.
15. The grounds for revocation of grant are contained in **section 76** of the Law of Succession Act (Chapter 160 of the Laws of Kenya) relied upon by the applicant 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 interested party or its own motion:-

- i. That the proceedings to obtain the grant were defective in substance;*
- ii. That the grant was obtained by the making of a false statement or by concealment of from the court of something material to the case.*
- iii. That the grant was made by an untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.*
- iv. The person to whom the grant was made has failed, after die notice and without reasonable cause either:-*
 - a. To apply for confirmation of the grant within a year from the date thereof or such longer period as the court has ordered or allowed; or*
 - b. To proceed diligently with the administration of the estate; or*
 - c. To produce to the court, within the time prescribed any such inventory or account of administration as is required by the provisions of paragraph (e) and (g) of section 83 or has produced such investigation or account which is false in any material particular; or*
- v. That the grant has become useless and inoperative through subsequent circumstances.*

16. I therefore find that the Objector/Applicant is not a beneficiary of the Estate of the deceased as she has failed to prove that she was married to Mungai Gacheru (Deceased) . Indeed Ojwang, J (as he then was) put it very succinctly in the case of **NJAU AND ANOTHER – VS- WAHITO [2008] eKLR:**

“...the principle of this decision is that the overriding presumption may cut across all formal processes of marriage, whether they be statutory, ecclesiastical, or customary, and by this principle, marriage existing defects, whereby a man and woman simply cohabit”

17. It follows that the grant of letters of administration and the certificate of confirmation were property issued and the same are upheld.
18. The summons for revocation dated 21.9.2018 be and is hereby dismissed with costs to the Respondent.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 6TH DAY OF MARCH, 2020

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.