



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 200 OF 2012

IN THE MATTER OF THE ESTATE OF MARY NJOKI GITAU.....(DECEASED)

JAMES MWANGI GATHUNGU.....APPLICANT

V E R S U S

JAMES KINYUA GITAU.....1ST RESPONDENT

JOHN IRUNGU GITAU.....2ND RESPONDENT

JUDGMENT

1. The applicants James Mwangi Githungu filed a summons for revocation and/or annulment of grant under **Section 76 of the Law of Succession Act (to be referred to as the Act)** dated 3/8/2018 seeking the following prayers:-

a) That the grant of letters of administration issued to the Respondents on 4.12.2014 and confirmed on 3.3.2016 be revoked and annulled on the grounds 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.

- 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.

b. Cancellation of all titles that emerged after subdivision of L.R.

KIINE/KIBINGOTI/NGUNGUINE/2705 (that is 4035-4043) so that the land reverts back to the name of the deceased.

c. Costs of this Application be provided for.

2. The application is supported by the affidavit of James Mwangi Gathungu. He deposes that the respondents James Kinyua Gitau and John Irungu Gitau are his Nephews and sons of his late Step-brother the late Gitau Wamwea. His late Step-brother was the registered proprietor of land parcel No. Kiine/Kibingoti/Ngunguine/2705. His step brother took him, his two brothers and his mother and they have been living on L.R No. Kiine/Kibingoti/Ngunguine/2705 since the year 1971. The respondents have been threatening them with eviction from land parcel No. Kiine/Kibingoti/2705 (to be referred to as the 'suit land'). This prompted him to file a suit before Baricho Land Disputes Tribunal held that himself and his brother be included as beneficiaries in the suit land. He has annexed the award of the Tribunal annexture JMG 2.

3. The respondent, being dissatisfied with the award of the tribunal filed H.C Embu Misc Case No. 65/2005 where the decision of the Land Disputes Tribunal was quashed, annexture JMG 3. The applicant did not appeal nor did he file an application for revocation of grant. Later he came to discover that the land had been sub-divided and given to third parties. He filed a suit at Baricho Court No. 117/18 to restrain the respondents from evicting them but came to realise that the respondents had obtained a grant in the Estate of Mary Njoki Giku which was confirmed on 3/3/2016, annexture JMG 5.

4. That the grant was secretly filed and material facts were concealed that himself and his two brothers ought to have been included as beneficiaries. He then filed this application as he has no other place to go having lived on the land since 1971 and made various developments thereon. That is was the wish of his late step-brother Gitau Mwea and that of his late wife Mary Njoki Gitau that they stay on the land in interrupted. The suit land has been subdivided and they are likely to be evicted.

5. That the court to find that they are beneficiaries of the estate of the deceased and provide them with a share. The respondents James

Gitau Kinyua and John Irungu Gitau (to be referred to as 'the respondents) opposed the application and filed an affidavit sworn by James Kinyua Gitau on 8/11/2018.

In respondent's case

That their mother Mary Njoki is now deceased. Their deceased brother Nicholas Maina Gitau Petitioned for Letters of Administration intestate in the estate of their mother Mary Njoki Gitau in this cause which was formerly succession cause No.27/2005 but died before the cause was concluded.

Thereafter Daniel Mwangi Muriithi and one Edith Muthoni Wamuguna sought to be substituted as administrators but the application was dismissed by Hon. Justice Musyoka, annexure JKG-1.

6. Later on 4/9/2014 Letters of Administration were issued to the respondents and confirmed on 9/3/2016 by Hon. Justice Limo upon which they proceeded with transmission, annexure JKG 2. The applicants had filed Land Disputes Tribunal case at Baricho which held that they be included as beneficiaries. However, the decision of Tribunal was quashed by the High Court sitting at Embu. They further aver that the respondents are abusing the court process as there is a grant issued in succession cause No. 145/2002 which has never been challenged. That the applicant is a stranger in that when their father died the applicant was staying in Mombasa while his mother had been married in Mombasa. That the land was bought by the respondent's father and the applicants have no claim over it. The respondents contend that the grant was obtained properly without making a false statement, fraud and or concealment of material fact. They pray that the application be dismissed.

7. The application proceeded by way of oral evidence. The applicant James Mwangi Gathungu (PW-1) testified that he wishes to rely on his affidavit and the annexed documents as his exhibit 1,2,3,4 & 5 as marked on the affidavit.

8. In cross-examination he testified that the land belongs to Gitau Wamwea who is his step-brother; - i.e same father but different mothers. That the deceased Gitau Wamwea bought the land from one Mwangi Thagana and therefore the land was not an inheritance. Gitau and his wife are now deceased. That the respondents are children of his brother. That the respondents have filed a case in the estate of their mother. That Gitau built a house for him and that he never asked the deceased for land during his lifetime. The deceased did not give him land nor did he transfer any land to him.

9. The second witness Benson Maina Mutugi (PW-2-) testified that the land in dispute belongs to Gitau. That the deceased had built a house for the mother of the applicant and wanted them to live on the land. He admitted that the deceased had children who are still alive.

10. James Kinyua Gitau (DW-1-) testified that the applicant lives on the land by force. They took him to court and he was ordered to pay but he did not. The deceased Gitau Wamwea and their mother Mary Njoki and Six children namely –

-Nicholas Maina – Deceased,

-John Irungu

-Susan Wanjiku -Deceased

-Peterson Wanjohi – Deceased

-Gladys Wangithi

-James Kinyua Gitau.

11. That there was succession cause No. 145/1992 which has never been challenged. That the applicant has never demanded land from his parents and he was not given land through the Land Control Board. In cross-examination he stated that the applicant has not been living on the land. He testified that the applicant is not a brother to his father.

12. DW-3- Anne Njage who is the Executive Officer Kerugoya Law Courts produced file No. 145/1992 in the estate of Gitau Wamwea where the grant was confirmed and the estate was distributed. The estate involved was land parcel No. Kiine/Kibingoti/522 which was registered in the name of Gitau Wamwea. The petitioner was Mary Njoki Gitau. The estate was distributed as follows:-

- Edith Muthoni Wamugunda – $\frac{3}{4}$ Acres in trust for her daughters Benedicta Wacira and Catherine Wanjiku,

- Mary Njoki Gitau – 1.7 Acres.

- Nicholas Maina Gitau – $\frac{3}{4}$ Acres.

- James Kinyua Gitau – $\frac{3}{4}$ Acres.

- John Irungu Gitau - $\frac{3}{4}$ Acres.

The resultant parcel for Mary Njoki Gitau is land parcel No. Kiine/K/Nguguine 2705 – 1.5 Ha.

13. The parties filed submissions. For the applicant, it is submitted that he wants the grant to be revoked and title deeds for Kiine/Kibingoti/Nguguine/2705 be (4035-4043) reverts back to the name of the deceased.

14. That the estate relates to Gitau's land namely LR Kiini/Kibingoti/2705. That the said parcel of land was clan land. That Gitau Wamwea was given land to hold in trust for the rest of the family. This submission is however misleading as there was no evidence from the applicant or his witness that Gitau Wamwea was registered in trust. The undisputed evidence is that Gitau Wamwea (deceased) bought the land from one Mwangi Thagana, a fact supported by the green card for Land parcel No. Kiine/Kibingoti/Nguguine/522. The land is also not family land as submitted by the applicant. That the applicant is a dependant as provided under **Section 29(6) of the Law of Succession Act** which provides:-

“such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and”

15. That the applicant was never informed when the succession was filed it is submitted that the applicant filed the dispute at Baricho Land Disputes Tribunal case No. 27/2004 and the tribunal ordered that the names of the applicant and his brothers be included as beneficiaries. That the applicant was never served with when the succession cause No. 145/1992 was filed. He submits that the applicant was a dependant of the deceased and were maintained by him by being given a place to stay.

16. For respondents it is submitted that the applicant admitted that the land in dispute was bought by Gitau Wamwea and as such it was not ancestral land. That the applicant admitted he never asked for land from Gitau Wamwea nor Mary Njoki during his lifetime. He submits that the applicant has no reasonable grounds to seek revocation of grant.

17. The applicant never challenged the succession cause that was filed by the respondents' mother, subsequently, land parcel No. Kiine/Kibingoti/Nguguine/522 was partitioned into parcels No. 2705 and 2706 with the respondent's mother taking 2705. He referred the court to a ruling by Justice Lenaola (as he then was) in **Embu High Court Misc. Cause No. 65/2005 R –v- Land Dispute Tribunal**, Baricho Resident Magistrate's Court and James Mwangi Thungu (the applicant herein) where the Judge stated –

18. That the applicant fully participated in the proceedings and never challenged the grant that was issued to the respondents mother. That the application be dismissed.

Analysis and Determination:-

The land in dispute is a sub-division of land parcel No. Kiine/Kibingoti/Nguguine/522 which belonged to Gitau Wamwea. It was not ancestral land as he had bought it from one Mwangi Thagana. The wife of Gitau Wamwea, Mary Njoki Gitau filed succession No. 145/1992 at the Principal Magistrate's Court Kerugoya and a grant was confirmed 8/3/2003. Mary Njoki Gitau got land parcel No. 2705.

19. The applicant came to know about the grant issued in the Principal Magistrate's court and filed a claim in the Baricho Land Disputes Tribunal Case No. 27/2004. The Tribunal held that the applicant and his siblings be included as beneficiaries of the subdivision of Kiine/Kibingoti/2705.

20. Mary Njoki was dissatisfied and filed Embu High Court Misc. Application 65/2005. Justice Lenaola as he then was held that, those entitled to the estate were determined in the Succession Cause No. 145/92 (Kerugoya). Judgment in the matter was finally given by Justice Khaminwa who held that the Lands Tribunal is not empowered to deal with registered land and has no power to alter or amend the orders of distribution of estates issued under **Succession Act Cap 160**. Any person not satisfied in the manner estate of the deceased person is distributed has other ways of raising the issue either by applying for revocation of grant or by way of appeal.

21. The appellant did not appeal against that Judgment nor did he apply for revocation of grant. Later Mary Njoki Gitau died on 14/10/2003. The respondents then filed this succession cause. A grant of letters of Administration was issued to Nicholas Maina Gitau who passed away before the grant was confirmed. The respondents were then by consent substituted as administrators. The grant was subsequently confirmed on 9/3/2016 and the land parcel No. Kiine/Kibingoti/Nguguine/2705 distributed to the children of Gitau Wamwea and Mary Njoki Gitau. The applicant then filed this application on 9/8/2018 seeking revocation of the said grant.

22. There two issues which arise for determination. These are:-

- 1) Dependency.
- 2) Revocation/annulment of grant.

1. Dependency.

The **Law of Succession Act, (cap 160)** has provided estates of deceased shall devolve to his dependants and has also provided an order priority on how the estate should devolve. The Act defines a dependant under **Section 29 of the Act**, it provides

“(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had

taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

23. The wife and children of the deceased have priority. The second category mentioned under Sub Section (b) do not inherit as of right where deceased is survived by a wife and child/ren they are supposed to prove dependency. The applicant is supposed to prove dependency. If dependency is not proved, a person will not qualify as a dependant. The court will ensure that the dependants priority should get the estate of the deceased without interference. In the case of Re-estate of Joshua Orwa Ojodeh (2014) eKLR the court held –

“Going by the above provision (Section 29 of the Act) where a deceased person survived by a spouse and child or child, the other relatives are not entitled to a share in the intestate estate of such a person. The spouse and child are entitled to the estate to the exclusion of other relatives. The excluded relatives include parents of the deceased. Parents are only entitled where there is no surviving spouse or child.”

24. This is what I have stated above that the wife and child have priority. The applicant was claiming land from his step-brother Gitau Wamwea. It has been proved that the land of Gitau Wamwea was not ancestral land as he acquired it through purchase. He therefore had no obligation to give his step-brother land. The applicant did not claim from Gitau Wamwea in his lifetime. The applicant was categorical that his claim was against Gitau Wamwea. The applicant did not file an objection or a protest when the succession cause in the estate Gitau Wamwea was filed, i.e succession cause No. 145/1992. I have perused the file and all the processes were followed including having the cause Gazetted vide Gazette Notice 3840 of 4/9/92. The process of publishing the cause through Kenya Gazette is an accepted mode of notifying the public and any interested that a succession cause has been filed. There is therefore no denial that the applicant was made aware that a succession cause had been filed in the estate of the deceased Gitau Wamwea.

25. The applicant was a party in the proceedings before High Court Embu Misc. Case 65/2005 where the court held that anybody not satisfied with the distribution of the estate should either apply for revocation of grant or by way of Appeal.

26. The applicant did not apply for revocation of grant in the estate of Gitau Wamwea nor did he file an appeal against the Judgment of Justice Khaminwa. My view is that the applicant’s claim against the estate of Gitau Wamwea is time barred. Section 30 of the Act provides:-

“No application under this Part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by section 71.”

27. The applicant was claiming as a defendant. His claim is therefore time barred. Section 30 of the Act refers to Section 26-30 of the Act which on provision for dependants. The applicant having failed to file his claim in the estate of Gitau Wamwea and before this court he is not seeking revocation of that grant, the claim is clearly time barred.

28. The applicant has also failed to prove that he was given a piece of land by the deceased Gitau Wamwea. In the replying affidavit by the respondent, Para -11- it was deposed –

“The applicant is a stranger in that when our father died the applicant was staying in Mombasa while his mother had been married in Mombasa too.”

29. There was no response to this averment and it leads to the conclusion that the applicant was living in Mombasa at the time the deceased died and was therefore not being maintained by him.

30. Secondly, the applicant has not made developments on the land. He stated that the deceased built a house for him on the land. This was contradicted by his witness who said that the deceased built a house for the mother of Mwangi (applicant) and that is where they used to live. In his affidavit the applicant stated that he has built on the land and made various developments. These are material contradictions which show that he was truthful.

31. I find that the applicant has not proved that he was a dependant. The deceased died in 1978 and going by what the applicant said he was 21 years old, he was an adult who could feed for himself. If he lived in Mombasa he must have been earning a living. There is no reason why he could not buy his own land. It is also surprising that the applicant did not in his evidence indicate the size of the land which he alleges he was given by the deceased. It raises doubts as to whether he was ever given a portion.

32. The applicant changed tune in the submissions by claiming that the land was ancestral land and that the deceased held it in trust. It is a clear indication that his claim is not justified and he is trying by hook or crook to get land from the deceased which he does not deserve. The deceased bought the land and was the registered proprietor with all the rights prescribed under Section 27 of the Registered Land Act Repealed as an absolute proprietor and now under Section 25 of the Land Registered Act. I find that the applicant has not discharged the burden to prove that he was a dependant of the deceased Gitau Wamwea. His claim for dependency is also time barred by operation of Section 30 of the Act.

2. Revocation of Grant.

Section 76 of the Law of Succession Act provides:-

“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

(e) that the grant has become useless and inoperative through subsequent circumstances.”

33. The Section gives several grounds upon which a party may seek revocation of grant or the court can order revocation on its motion. These include:-

- where the proceedings to obtain the grant were defective in substance.

- The grant was obtained fraudulently by making of a false statement or by concealment from court of something material to the case.

- The grant was obtained by means of untrue allegation of facts essential in a point of law to justify the grant.

- That the grant has become useless and inoperative through sub-segment circumstances etc.

34. In this case the applicant relies on the allegation that the grant was obtained fraudulently by making of a false statement or by concealment from court of something material. The contention by the applicant is that he was not informed of the succession proceedings. That the respondent concealed material facts that himself and his two brothers ought to have been included as beneficiaries.

35. On the other hand the respondents depone that the land in dispute was bought by their father and the applicant is a stranger who has no right to claim the estate.

36. From what I have stated above, I have given reasons why the applicant is not a dependant. Though the applicant has stated that himself and his brothers are entitled to the estate, he has not joined in his brothers in this application. The applicants affidavit sworn on 3/8/2018. He has not deponed that he has authority to swear on his behalf and on behalf of his two brothers whose names are not given in his entire affidavit. These two brothers were also not called as witnesses. Even the suit he filed in the Land Disputes Tribunal he was the only claimant. Even the suit he filed at Baricho Court C.C. 117/2018 he was the only plaintiff.

37. My conclusion is that the brothers of the applicant have no claim in the estate as they are not dependants of the deceased. This explains why the applicant did not claim land in the lifetime of his step-brother Gitau Wamwea or in the lifetime of his wife Mary Njoki and is claiming against their children who are by law the lawful dependants.

38. The cause was filed on 16/2/2005. It was Gazetted vide Gazette Notice 1818 of 2/3/2007. On 6/6/2005 in Misc. Cause 65/2005 it was held as I have stated above that those entitled were determined and the distribution was upheld in the Judgment. The applicant was party. The administrator then was a party in the suit. In view of the ruling in Misc Cause 65/2005 no material facts were concealed as the court of the High Court confirmed that those entitled to the estate had been determined. The respondent at the time they filed the succession cause were the only beneficiaries with priority in the estate of their deceased mother Mary Njoki Gitau. Failure to include the applicant was in no way fraudulent.

39. I find that the application has not met the threshold for revocation of grant.

40. In conclusion I find that the application lacks merits. I order that –

a) The application is dismissed.

b) Costs of the application to the respondent.

c) The application dated 29/6/15 is allowed.

d) The grant issued on 3/12/2014 is confirmed and a certificate of confirmation of grant shall be issued.

Dated at Kerugoya this 30th Day of April 2020.

L. W. GITARI

JUDGE