



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

PROBATE AND ADMINISTRATION

SUCCESSION CAUSE NO. 437 OF 2014

IN THE MATTER OF THE ESTATE OF KARIRO GATIMU(DECEASED)

AND

ANNE WAMBUI KIRO & 3 OTHERS.....APPLICANTS

VERSUS

JANE WANJIRUKIRO & 4 OTHERS.....RESPONDENTS/PETITIONERS

JUDGMENT

1. The Applicants' filed a summon for revocation of Grant dated 25th April, 2019 seeking orders that the Certificate of confirmation of grant issued to the petitioner be annulled and/or revoked for having been obtained fraudulently by concealment of material facts. That costs of this application be provided for.
2. The application is based on the grounds that the applicants' are children of the deceased Kiriro Gatimu while the 1st Respondent/ Petitioner is a sister to the deceased.
3. The 2nd respondent is the wife of the deceased and also the applicant's mother.
4. That the applicants' were not aware of the Succession proceedings and they only came to learn about it after the Grant was confirmed. That the grant was obtained through concealment of material facts and hence the same was obtained fraudulently.
5. That the applicants' are the rightful beneficiaries of the estate of the deceased and that the Petitioner and 3rd, 4th and 5th Respondents are not beneficiaries of the estate and they never disclosed that position to the court.
6. That Land Parcel Number **Inoi/Kimandi/1114** should be registered jointly between the 2nd respondent and the Applicants as the beneficiaries of the Estate.
7. The Application is supported by the joint sworn Affidavit of Ann Wambui Kiriro, Richard Munene Kiriro, Catherine Muthoni Kiriro, and Elizabeth Kiriro sworn on 25th April, 2019.
8. They have reiterated that they were not aware of the Succession proceedings and only came to know about it after confirmation. They reiterate that the grant was obtained through concealment of material facts. The respondents failed to disclose that one Mubibu Gatimu is deceased having passed away in year 2015 before the Grant was confirmed and the Petitioner never disclosed to the court that fact.
9. They further depone that the 3rd, 4th and 5th respondents were not beneficiaries of the Estate of the deceased and they never disclosed that position to the Court.
10. The respondent opposed the application and filed a replying affidavit sworn by Cecily Wambui Gatimu. They depone that the Grant was confirmed with full knowledge of the applicants who even signed a consent in support of summons of confirmation of GRANT on 21st April, 2015 and they signed the consent at The Chief's office after the Area Chief explained to them the contents and the wording of the said consent.
11. They have not reported the alleged forgery, she depones further that Jane Wanjiru Kiriro was in court on the date the Grant was

confirmed and was agreeable to the proposed mode of distribution.

12. That all the Respondents are beneficiaries of the Estate Kiriro Gatimu and none of the Respondents is a stranger. That initially the land was Inoi/Kimandi/ 191 and 198 registered in the name of Gatimu Gatwe

13. That their late father had five (5) wives. After the death of their father Land parcel Inoi/Kimandi/191 and 198 were combined to form Inoi/ Kimandi/1085 to enable the wives share the land equally.

14. That at the time when the deceased died he was survived by three wives Beth Gakera Gatimu, Betha Wainoi Gatimu, Ann Karioko Gatimu.

15. That when their father died the family filed a Succession Cause in respect of the estate of Gatimu Gatwe in the Principal Magistrate's Court at Kerugoya in Succ. Cause No. 206 of 2001. Where the land parcel number **Inoi/ Kimandi/1085** was divided equally amongst Gatimu Gatwe's wives and the house of Beth Wanjiru Gatimu who was deceased chose Kiriro Gatimu to hold the land in trust for the said house, while the house for Lucy Wanjira Gatimu appointed Gitari Gatimu to hold the land in trust for them.

16. That later the land was sub-divided and there were five resultant portions in accordance with the number of houses.

- Kiriro Gatimu became the registered proprietor of Land Parcel Number Inoi/Kimandi/1114 to hold in trust for himself and the house of the mother the late Beth Wanjiru Gatimu.

- The late Beth Wanjiru had the following children

(i) Kiriro Gatimu

(ii) Cecily Wambui Gatimu

(iii) Mathew Wachira Gatimu

(iv) Mubibu Gatimu (deceased)

(v) Nancy Muringo

(vi) Faith Wainoi (deceased)

17. That the late Mubibu Gatimu was alive during the confirmation of grant.

18. The share of Faith Wainoi Gatimu was given to her daughter Edah Nyakio Kathuni. She contends that the applicant's mother who is the wife of Kiriro Gatimu one Jane Wanjiru Kiriro was given her husband's share and she should share it amongst her children the applicant herein.

19. She contends that The Estate was distributed equally and the Court applied the Principles of Equity since every beneficiary is adequately provided for and as such there is no need to revoke the GRANT. That the application for revocation of GRANT is an afterthought.

20. The Background in this matter is that, it relates to the estate of Kiriro Gatimu (deceased). A grant of letters of administration was issued to Cecily Wambui Gatimu who was a sister to the deceased.

21. The grant was later confirmed on 14th December, 2016 and the Estate of the deceased, comprised in Land Parcel No. Inoi/ Kimandi/114 was distributed equally among the beneficiaries that is:

SCHEDULE

Name Description of Property Share of Heirs

-Jane Wanjiru Kiriro Inoi/ Kimandi/ 1114 0.126 Ha

-Mathew Wachira Gatimu “ “ “ 0.126 Ha

-Mubibu Gatimu “ “ “ 0.126 Ha

-Cecily Wambui Gatimu “ “ “ 0.126 Ha

-Nancy Muringo Gatimu “ “ “ 0.126 Ha

Eddah Nyakio Kathuni “ “ “

22. The applicants' then filed this application seeking revocation of the said Grant.
23. The applicants' case is that her co-applicants are siblings while the 1st respondent is her Aunt and sister to her father the late Kiriro Gatimu. While the 2nd respondent is the applicants' mother, while the 3rd respondent is her uncle (a brother to her father) the late Kiriro Gatimu, while Nancy Muringo the 4th respondent is a sister to the deceased. The 5th respondent is deceased's niece whose mother was a sister to the deceased. Her contention is that land parcel Inoi/ Kimandi/1114 belonged to their father Kiriro Gatimu who had inherited it from her grandfather and that the 1st applicant Cecily Wambui never notified her and her co-applicants' when she filed a Succession cause in respect of their father the late Kiriro Gatimu.
24. The applicants' contend that they never signed any consent and that the respondents' had no right to inherit their father's estate.
25. When the applicants' gave evidence in court she claimed that she never signed the consent form and stated that the form was forged. On been challenged whether she took any action she claims to have reported the matter to C.I.D offices though she did not produce any evidence to confirm that. She also confirmed that Cecily Wambui Gatimu and the 3rd Respondent Mathew Wachira Gatimu had been cultivating on the land.
26. The Respondents case is as analyzed above from the averments in her Replying affidavit and the evidence tendered in court.
27. The parties filed submissions.I have considered the application, the evidence adduced and the submissions.
28. The Issue which arises for determination is revocation of GRANT.**Section 76 of THELAW OF SUCCESSION ACT(Cap 160) Laws of Kenya** on the Revocation of GRANT Provides.

Section 76 of The Law of Succession Act. which 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;

29. The procedure in filing the summons for revocation of grant is provided **Under Rule 44 of The Probate and Administration Rules.**

“ where any person interested in the estate of the estate of the deceased seeks pursuant to the provisions of Section 76 of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that resident magistrate's registry.

(2) There shall be filed with the summons an affidavit of the applicant in Form 14 for revocation or annulment identifying the cause and the grant and containing the following particulars so far as they are known to him

(a) whether the applicant seeks to have the grant revoked or annulled and the grounds and facts upon which the application is based, and

(b) the extent to which the estate of the deceased has been or is believed to have been administered or to remain unadministered, together with any other material information.

(3) The summons and affidavit shall without delay be placed by the registrar before the High Court on notice in Form 70 to the applicant for the giving of directions as to what persons (if any) shall be served by the applicant with a copy of the summons and affidavit and as to the manner of effecting service, and the applicant, upon the giving of directions, shall serve each of the persons so directed to be served with a notice in Form 68, and every person so served may file an affidavit stating whether he supports or opposes the application and his grounds therefor.

(4) When the persons (if any) so directed to be served (or such of them as the applicant has been able to serve) have been served with a copy of the proceedings, the matter shall be placed before the High Court on notice by the court to the applicant and to every person so served, and the court may either proceed to determine the application or make such other order as it sees fit.

(5) Where the High Court requires that notice shall be given to any person of its intention of its own motion to revoke or annul a grant on any of the grounds set out in Section 76 of the Act the notice shall be in Form 69 and shall be served on such persons as

the court may direct.”

A grant of letters of administration will be revoked at any stage where it is proved that the proceedings to obtain the grant were defective in substance and that the grant was obtained fraudulently by making of false statement or by concealment from court of something material to the case or the GRANT was obtained by means of untrue allegations of a fact essential in a point of Law notwithstanding that the allegation was made in ignorance or advertently.

30. The application by the applicant is based on a ground that the Grant was obtained fraudulently by concealment of material facts. Therefore, the applicant is supposed to prove that the Grant was obtained fraudulently.

31. The applicants' contention is that her Co-applicants' are all siblings of the deceased Kiriro Gatimu who was the owner of land parcel **Inoi/ Kimandi/ 1114**. Her contention is that, they were never notified when the Succession cause was filed and they never filed any consent at the time the Succession cause was filed in court and they are claiming that the Respondent had no right whatsoever to inherit the Estate of the deceased.

32. The Petitioner had filed a consent on 21st April, 2015 annexed to the affidavit in support of the confirmation of Grant, where all the applicants had signed as well as their mother Jane Wanjiru Kiriro had signed and the other beneficiaries.

33. It was therefore a mere denial that they never signed the consent, and they never established that the signatures on the consent are not their signatures. On allegation that the 1st respondent concealed material facts Form P& A 5 had listed all the names of the applicants'.

34. The applicant has accepted that the 2nd respondent Jane Wanjiru is her mother and she fully participated in the Succession Proceedings and she got a share of the Estate as can be seen from the GRANT which was confirmed on this Court on 11th of October, 2018.

35. The applicants' are not the 1st line beneficiaries in view of the **Provisions of Section 29** which provides that the wife or wives, or former wife or former wives are the 1st line beneficiaries followed by the Children. This is provided **under Section 29 (a) of The Law of Succession Act** which provides;

“For the purposes of this part ‘dependants’ means -

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

36. The applicants' who are the children of the 2nd Respondent in this Succ. Cause were represented by their mother who was supposed to take care of their interest. It therefore follows that since the mother was involved material facts were not concealed from the courts.

37. The Respondent in her affidavits given a background of the family and which facts are not in dispute. The respondent has shown with evidence that this was family land of a deceased who had five (5) wives. That the property in dispute Land parcel Number; **Inoi/ Kimandi/ 1114** was a resultant of Sub-division of land parcel number **Inoi/ Kimandi/191** which followed a confirmation of GRANT in another Succession cause in the Magistrate's court at Kerugoya number 206 of 2001.

38. The distribution in that Estate was done with respect to each of the houses of the deceased in that Cause who had five(5) wives that is Gatimu Gatwe.

39. That Kiriro Gatimu was registered in Trust for the 'dependants' in the house of Beth Wanjiru Gatimu one of the wives of the deceased. When Kiriro Gatimu died this Succession cause was filed and each of the dependants in the house of Kiriro Gatimu were given a share of the Estate with the share of the house of Kiriro Gatimu going to Jane Wanjiru Kiriro.

40. Jane Wanjiru Kiriro was the wife of Kiriro Gatimu who are parents of the applicants. The distribution was done by consent of all the beneficiaries.

41. These Facts are not in dispute and it follows that the applicants were fully represented by their mother who got a share of the Estate of the deceased. It follows that material facts were not concealed from the court.

42. The Applicants insisted that the land belonged to their father, they did not have a clear background of how the deceased got to be registered as the proprietor, and it came to light that some of the respondents' had been utilizing the land even during the lifetime of the deceased.

43. The applicants' seem to be relying on the fact that the Land is registered in the name of the deceased because the register does not indicate that he was registered in Trust.

44. Trust is an issue of Fact which has to be established with evidence, therefore the Fact that the register does not indicate that a person is registered in Trust does not mean that the Trust does not exist and in this particular case the Respondent has vividly demonstrated that the deceased in this case was registered in Trust for the benefit of all the Siblings in his mother's house. None of these siblings was left out in the distribution of the Estate including the mother of the applicants, representing the deceased in this case.

45. The applicants' are holding on straw to claim that the Land belonged to their deceased father to the exclusion of the other Siblings.

See the case of; **In re Estate of James Muiruri Kamau (deceased) 2018eKLR** where Justice A. K. Ndung'u relied on the case of; **Karisa Madumbo Mueni -vs- Kavumbi Kitsau Cheng'o and 2 others (2018) eKLR** where the Judge while amplifying Section 26 of The Registered Land Act stated that; There is no need to indicate in the Register that one is a trustee but the Principle of Trust can be inferred from the circumstances of this case. The same circumstances, are similar to the circumstances of this case.

46. The Succession was done openly, a Chief's letter was filed in court showing the beneficiaries and the mother of the applicants' was included as one of the beneficiaries in the Chief's letter.

47. The Succession cause was gazetted in the Kenya gazette and the GRANT was confirmed after the parties filed a consent and the mode of distribution of the Estate.

48. I find that the applicants have not brought this application within ambit of **Section 76 of The Law of Succession Act**, there was no proof that the grant was obtained fraudulently by concealing from court something material to the case.

49. I therefore find that this application is without merit and is dismissed.

50. Each party will bear its own costs.

Dated, signed at Kerugoya this 29th day of May 2020

L.W. GITARI

JUDGE.