



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

SUCCESSION CAUSE NO. 10 OF 2018

IN THE MATTER OF THE ESTATE OF PETER NG'ETHE KAMAU (DECEASED)

RAHAB WANJIRU NG'ETHE.....APPLICANT

VERSUS

JANE WANGARI NG'ETHE.....RESPONDENT

RULING

1. Before me is the Summons filed on 6th December, 2017 and brought inter alia under Sections 47 & 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules. The Applicant, Rahab Wanjiru Ng'ethe describes herself erroneously as an Applicant is seeking that the court be pleased to expunge the land parcel described as Nyandarua/Kitiri/3365 registered in the name of RAHAB WANJIRU NG'ETHE from the cause herein as the same does not form part of the estate. She also seeks an interim injunction against the Respondent and the revocation and or annulment of the grant issued on 5th June 2009 and rectified on 10th May 2013 as well as cancellation of any titles obtained thereby by the Respondent.

2. The application is based on the grounds that the Respondent petitioned for letters of administration in respect of the deceased herein without the knowledge of the Applicant and included the asset known as Nyandarua/Kitiri//3365 which parcel does not form part of the deceased's estate.

3. In her supporting affidavit the Applicant deposed that the deceased' was her husband and the Respondent her co-wife; that the deceased left a will in respect of his estate comprising of the land parcels Nyandarua/Tulaga/408, Kiambaa/Karura/T.22, Kiambaa/Karura/T.24 among others. She averred that she only learned in 2017 that her co-wife, the Respondent, had obtained letters of administration regarding the estate and disposed of the parcel Kiambaa/Karura/T.22; that she did not involve her in or inform her of the application for letters of administration ; that the said letters of administration were obtained fraudulently; and that the court should expunge the land parcel No. Nyandarua/Kitiri/3365 as the same belongs to her since 2002 and does not form part of the deceased's estate.

4. JANE WANGARI NG'ETHE filed her replying affidavit on 24th May 2018 asserting therein that the court is *functus officio* in terms of prayers 2 and 3. She denied the allegations by the Applicant and asserted that although the Applicant was served with a Citation to accept or refuse grant, she did not participate in the cause ; that nevertheless the Respondent had included the Applicant and her children in the list of beneficiaries . She contended that her house has already disposed parcel No. LR. No. Kiambaa/Karura/T.22 hence the instant application is only meant to hinder the new owner from possession. The court was urged to not revoke the grant as the application does not meet the threshold for revocation.

5. The Applicant filed a supplementary affidavit on 21st September, 2018 stating that there was no proof by the Respondent that citation was served upon her and her children and that the Notice of Appearance thereto , filed by the firm of Oreng & Co. Advocates was not authentic and is forged. She reiterated that Nyandarua/Kitiri/3365 does not form part of the deceased's estate and that the sale of Kiambaa/Karura /T.22 is only meant to disinherit her together with her children.

6. Daniel Oreng Advocate in his supplementary affidavit denied ever acting for the Applicant as alleged by the Respondent and disputed that his firm prepared and filed the alleged Notice of Appearance to the Citation dated 16th October, 2007.

7. The Summons was canvassed by way of written submissions. The Applicant submitted that she has suffered great prejudice of having to endure imminent eviction from her matrimonial home. Counsel for the Applicant submitted that the Applicant is a beneficiary as she is the deceased's second wife and ought to have been involved in the application for a grant. The Respondent was accused of hurriedly disposing of the deceased's estate asset without a care for the Applicant's interests making her apprehensive of eviction. It was further submitted that the Applicant stands to suffer irreparable harm and prejudice if an injunction is not granted. The court was urged to grant the prayers sought.

8. The Respondent submitted that the Applicant occupies all the deceased's properties to the exclusion of her household who reside in a rental house. It was asserted that the confirmed grant stipulates how the deceased's properties are to be shared and that the Applicant has no right of claim over Nyandarua/Tulaga/408 and Kiambaa/Karura/T.22. The Respondent denied that Nyandarua/Kitiri/3565 belongs to the Applicant absolutely as the same was purchased from proceeds of Nyandarua/Tulaga/408 which been previously utilized by the deceased's entire family.

9. The Respondent further submits that the succession proceedings were very transparent and that all the beneficiaries from both households were included and the failure by the Applicant to participate is an issue between her and her advocates. Finally, it was submitted that no evidence of forgery has been presented to the court. Counsel for the Respondent relied on the case of **Mutiso Kisini vs Kyengo Kisini & another (2016) eKLR** where it was held that allegation of forgery must be strictly proved as it imputes criminal conduct. It was argued in closing that revocation would only bring discord and disharmony in the family.

10. The court has considered the material canvassed in respect of the summons under consideration. That summons, per directions given by the court on 27.2.18, 7.6.18, 24.9.18, 26.11.18 is the one filed on 6.12.18. By the order made on 27.2.18 the summons dated 15th January 2018 was spent. The prayer in the summons filed on 13th December 2017 is subsumed in the summons under consideration hence the former is deemed to be spent. It was therefore surprisingly that despite the court's clear instructions counsel for the Applicant appeared to confine his submissions to the sole prayer for an injunction contained in the motion filed on 6.12.17, while at the same time making reference to the spent summons filed on 15.1.18.

11. Be that as it may, the court will determine the Summons under consideration on its merits. The undisputed facts surrounding the application for revocation filed on 6.12.17 can be stated briefly as follows. The deceased herein had two wives, Rahab Wanjiru Ngethe (the Applicant) being the second wife and Jane Wangari Ngethe (the Respondent) being the first wife. Between them, they had 14 children. At the time of his death on 19th February 2001, the deceased was possessed of several parcels of land in Nyandarua and Kiambu counties. On 24th July 2007 the Respondent petitioned alone for letters of administration intestate. Filed contemporaneously with the Petition was a citation to accept or refuse letters of administration intestate, whose service upon the Applicant is strongly contested.

12. On 17th October 2007 an entry of appearance to Citation by an advocate, Daniel Orenge of Daniel Orenge & Co. Advocates was filed. This entry is disputed by the advocates. On 21st January, 2008 the Respondent applied through her advocates for a grant to be issued to her and on 28th July 2008 a grant issued in the Respondent's name. This was followed by a summons for confirmation of grant, filed on 17th November 2008 by the grant holder. As before, the application was not consented to by all the beneficiaries of the estate.

13. The grant was confirmed, and the assets of the estate were distributed as follows:

A. To Rahab Wanjiru Ng'ethe to hold in trust for all the beneficiaries of her household in equal shares-

a. LR No. Nyandarua/Kitiri/3565

b. LR No. Kiambaa/Karura/T22

B. To Jane Wangari Ng'ethe to hold in trust for all the beneficiaries in her household in equal shares-

a. LR No. Nyandarua/Tulaga/408

b. LR No. Kiambaa/Karura/T24

14. A certificate of confirmation of grant issued on 5th June 2009. Six years later, on 16th January 2013, the Respondent unilaterally filed a summons to rectify the grant to re-assign the land parcels LR No. Kiambaa/Karura/T 22 and T 24, on grounds that the said assets "were inadvertently...interchanged... and the two families ended up being assigned a plot due to the other family". The consent of the other beneficiaries was apparently not sought, the Respondent being the only deponent to the affidavit supporting the motion.

15. On 10th May 2013 Musyoka J. delivered his ruling on the summons, observed inter alia that the mix up or error had been occasioned by the administrator and that:

"..... she (administrator) had proposed that Kiambaa/Karura/T22 be allocated to Rahab Wanjiru Ng'ethe while Kiambaa/Karura/T24 be allocated to Jane Wangari Ng'ethe. This was not an error on the face of the record. It cannot be cured by Section 74 of the Law of Succession Act. The Applicant should have come to court under Rule 63 of the Probate and Administration Rules and Order 44 of the Civil Procedure Rules seeking to have the order of 12th May 2009 reviewed. Under Order 44 of the Civil Procedure Rules ... a court order can be reviewed where there are sufficient reasons... I find that sufficient reasons do exist in this case... The certificate of confirmation of grant issued on 5th June 2009 is hereby reviewed along the lines proposed in the application dated 17th July 2012."

16. Thus, by rectified certificate of confirmation of grant issued on 10th May 2013, the plot No. Kiambaa/Karura/T22 earlier assigned to the house of Rahab Wanjiru Ng'ethe went to the household of Jane Wangari Ng'ethe and the earlier allotment in Kiambaa/Karura/T24 was assigned to the household of Rahab Wanjiru Ng'ethe. The Respondent now asserts that her family has already sold the land parcel/LR No. Kiambaa/Karura/T22 to a third party, and indeed annexure marked "3" to the Respondent's affidavit in reply, is a copy of title deed issued to one Anderson Koibitah Njoroge on 23rd October 2017, as proprietor of parcel LR. No. Kiambaa/Karura/T22. The Applicant asserts that the deceased did not die intestate and left a will, a copy of which is annexed to her affidavit in support of the summons for revocation as annexure "RWN 3".

17. 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”

18. The Applicant’s chief complaints are that the Respondent “in collusion with her children” petitioned for letters of administration intestate whereas the deceased left a will and that:

“The Applicant and her children have not been aware of the cause until on 17th November 2017 when one Anderson Koibitah Njoroge informed Anne Wanjiru Ng’ethe the Objector’s daughter that he had purchased Kiambaa/Karura/T22 from the Respondent and that he wants to develop the same. The Applicant has also fraudulently through the said grant assumed ownership of Nyandarua/Tulaga/408.”

19. The Applicant asserts herself to be the registered proprietor of land parcel No. LR Nyandarua/Kitiri /3565 since 13th November 2002. It is not in dispute that the family of the Respondent unilaterally filed the Petition for grant in Nairobi P & A Cause No. 1932 of 2007 (now Kiambu HC Succession Cause 10 of 2018). It appears in this case that the Respondent filed both the Citation to Accept or refuse Grant and her Petition for grant simultaneously. The Respondent claims that the Applicant was served with the Citation and Petition and entered appearance through Daniel Orenge Advocate. This has been disputed through the affidavit of the advocate who asserts that he had no instructions to enter appearance on behalf of the Applicant, and moreover the signature on the Entry of Appearance is a forgery. For her part, the Applicant denies ever being served with the citation. The record does not contain nor has the Respondent proffered an affidavit of service in this regard.

20. Rule 21 (3) of the Probate and Administration (P & A Rules) provides that:

“Every citation shall be served on the person cited either personally or by acknowledged registered post unless the registrar directs some other mode of service which may include notice by advertisement.”

21. In order to put to rest the Applicants denials, it was not enough for the Respondent to merely refer to the disputed Entry of Appearance. The Respondent should have filed an affidavit of service indicating the manner in which the Applicant was served with the citation. And while the coincidence that the same firm of advocates who allegedly filed the Entry of Appearance also filed this summons is not lost on the court, there are other steps taken in the matter in circumstances that go to reinforce the Applicant’s denials.

22. Subsequent to the letter dated 21st January 2008 by the Respondent’s advocate to the court, a grant was issued on 28/7/08 and thereafter, an application to confirm grant was filed by the Respondent. The Applicant and her children though listed as beneficiaries in the said application did not give consent thereto. The fact that the Applicant was served with the Citation and allegedly failed to act after entering appearance, did not preclude due service upon her and her involvement, together with her children in any subsequent proceedings taken. Evidently, the summons to confirm grant was not served on the Applicant and her house.

23. Rule 40(8) of the P & A Rules provides in part that:

“Where no affidavit of protest has been filed, the summons and affidavit ... shall be placed ... before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependents or other persons who may be beneficiary entitled, allow the application without the attendance of any person...”

24. Form 37 is the consent to confirmation of grant which all the dependents and persons beneficially entitled execute and which accompanies the summons to confirm the grant. What was filed in this case, on 19th January 2009 was a purported consent in a non-existent “Form 37 B” which is dated 12.1.09. This document contains no signatures or names of dependents or persons beneficially entitled despite stating on its face “see overleaf for the duly signed consent on the mode of distribution thereof”.

25. It seems that all that the Respondent did was to annex a copy of the same schedule of distribution of property filed with the summons to confirm grant on 17.11.08, only this time the schedule is signed by herself and all members of her family, but none from the house of the Applicant. The Applicant’s children were independent dependents or persons beneficially entitled quite apart from their mother. There is no

evidence that they, or the Applicant were served with the summons to confirm the grant or that their consent thereto was sought. The Respondent may have been allowed, in light of the alleged default by the Applicant to proceed to obtain a grant in her name. This however did not exempt her from complying with the law pertaining to the application for confirmation of the grant.

26. Similarly, the summons for rectification of the confirmed grant filed on 16th January 2013, despite seeking the re-assignment of assets of the estate as **Musyoka J.** observed was evidently not served on any dependents or beneficiaries. It is instructive that the Respondent while maintaining that the firm of Daniel Orege & Co. Advocates were the Applicant's Advocates did not find it necessary, after the issuance of the grant, to serve upon that firm, if not the Applicant with the summons to confirm the grant and the summons to rectify the confirmed grant.

27. In view of these omissions, and in light of the assertions by the Applicant that the deceased had left behind a will, is it not believable, that the Respondents did not serve the Citation upon the Applicant? It seems unlikely, that the Applicant would have ignored such process if indeed served upon her. More so, as the cause not only touched on the estate of the deceased but also one asset, namely LR NO. Nyandarua/Kitiri/3565 to which the Applicant lays a claim as her individual property.

28. Some of the documents filed with the Petition for grant were copies of official searches in respect of assets of the estate. Among these documents is a copy of a green card in respect of Nyandarua/Kitiri/3565 which shows that the parcel was registered in the name of the Applicant on 13.11.2002 and a title deed issued to her. Entry No.3 therein, dated 10th April 2006 however reads that:

“Restriction: No dealings without involving Jane Wangari Ng’ethe and until the dispute at the Divisional Land Dispute Tribunal is finalized... see DO’s North Kinangop Letter Ref. KIN/LND/16/4/79 dated 6.4.2006.”

29. Entry No. 4 records an order to stay execution in Misc. Application No.684 of 2006 at High Court of Kenya Nairobi. The entry is dated 22.11.04. The property ownership had seemingly not changed from the Applicant's name by the date of the instant application. Quite apart from the obvious anomaly of the inclusion of property not in the deceased's name in the Petition and distribution through the summons to confirm the grant, it is not conceivable that the Applicant who on the face of it was already tussling over the said Nyandarua property with the Respondent could have failed to respond to the Petition herein or to follow up.

30. Considering all these facts, the court is inclined to believe the Applicant's denials, and further, based on the highlighted anomalies in this matter, to conclude that the proceedings to obtain and confirm and later rectify the confirmed grant in this case were defective in substance. In all likelihood, the Applicant was not served with the Citation and Petition, and the Entry appearance herein was most probably a false document intended to assure that the Applicant and her children did not participate in the proceedings which ran *ex parte* for a period of almost ten years.

31. In view of all the foregoing, the court cannot allow the grant issued, confirmed and subsequently rectified to stand. The court grants prayer 4 of the summons filed on 6.12.2017. By the same token, the court is satisfied that the Applicant has established a prima facie case with a probability of success, as stated in **Mrao v Fast American Bank of Kenya Ltd. & 2 Others (2003) KLR 125**. The Applicant has asserted, and this has not been controverted, that she has resided on the property known as LR NO. Nyandarua/Tulaga/408 for 30 years. Her claim to the land parcel No. LR Nyandarua/ Kitiri/3565 cannot be determined at this stage, but at the moment the property is registered in her name, disputes thereto notwithstanding.

32. The Respondent has asserted that she already sold off the asset Kiambaa/Karura/T22, whose ownership she switched to herself through rectification of the grant. In lieu of prayer 3 of the summons and in lieu of the part of prayer 4 seeking the cancellation of disputed transfer of titles, the court will order that concerning all the assets listed in the Petition herein, there be an order to restrict any dealings therewith pending further orders of this court and/or the determination of the cause. The court hereby directs that the Applicant and or the Respondent, in accordance with Rule 23 of the Probate and Administration Rules do within 30 days of this ruling take out and serve a Citation to Propound the document presented and annexed to the Applicant's summons as the will of the deceased, upon **Samwel Mwaura**, the stated executor. In addition, the Respondent will within 21 days serve a copy of this ruling upon **Anderson Koibitah Njoro**ge the alleged purchaser of asset known as Kiambaa/Karura/ T.22.

33. The parties will bear own costs in light of the nature of the dispute.

SIGNED ON THIS 12TH DAY OF JUNE 2020 AND DELIVERED VIA eMAIL TO THE PARTIES ON 12TH DAY OF JUNE 2020

C. MEOLI

JUDGE