



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 316 OF 2014

In the Matter of the Estate of M' Kuambuthu M' Mwiticha M' Kangunyuru alias Kaumbuthu Mwiricha (Deceased)

FRANCIS KAAI M' TWERA.....PETITIONER

-versus-

KARUGURU M' MUNGANIA.....1ST APPLICANT

EVANGELINE KARWITHIA.....2ND APPLICANT

MARION NTIRINYA M' INANGA.....3RD APPLICANT

CECELIA MUKUMURIUNGI.....4TH APPLICANT

RULING

1. **M' Kaumbuthu M' Mwiricha M' Kangunyuru** (*the deceased herein*) died on 10/2/1991 domiciled in Kirimaitune S/Location. From the letter of introduction of the Area chief Kirimaitune Location the deceased left behind two beneficiaries i.e. **M'Itwera M' Kaumbuthu and Francis Kaai M' Itwera. Francis Kaai M' Twera** (*the petitioner herein*) petition for letters of administration on 13th June 2014 listing **Nyaki/Giaki/190** as the only asset of the deceased.

2. The matter was gazetted on 22nd August 2014 and a grant of letters of administration issued on 23rd September 2014. On 26th March 2015, the petitioner filed Summons for Confirmation of Grant. The Grant was confirmed on 4/6/2015 and a Certificate of Confirmation of Grant issued on same date. The estate of the deceased was distributed wholly to the petitioner herein.

3. **On 14th August 2019** the applicants applied for **revocation of the grant** issued to the applicant. The application was supported by the sworn affidavits of all the applicants. They averred; (1) That they are daughters of the deceased herein and reside in **Nyaki/Giaki/190**; (2) That they were recently shocked to learn that the petitioner herein had filed this succession cause, registered the suit premises in his name and was scouting for potential investors; (3) That the petitioner had no capacity to file the petition by virtue of him being a grandson of the deceased; (4) That the petitioner concealed from the court that he is a grandson of the deceased; (4) That the chief's letter used in these proceedings is a fake and forgery; (5) That they have since obtained the genuine letter from the area chief; (6) That the grant issued should therefore be revoked and the title deed issued cancelled.

4. The petitioner replied to the application vide Replying affidavit dated 13th September 2019. He averred that he is a son of **M'Etura M'Kaumbuthu** (a son of the deceased) who equally passed on 17th March 2018 long after this cause was filed and finalized. He also averred that the cause was filed with the knowledge of his father and the applicants. That the applicants attended court during confirmation of the grant and did not object. That the chief's letter was obtained regularly and is not a forgery. That he is currently in exclusive possession of the land and has extensively developed the land.

Submissions

5. On 24/2/2020 the court directed the parties to canvass the application through written submissions. Both parties have filed their written submissions. The applicants expounded on their averments in the affidavit. And more specifically emphasised petitioner's lack of capacity to file the succession cause, and that the chief's letter deliberately excluded them. They argued that being a grandchild of the deceased, the petitioner did not stand in the order of priority to file the succession cause. The applicants relied on the provision of section 51 (2) of the Succession Act. They reiterated that the Constitution provides for equality before the law hence they should not be excluded from their father's estate.

6. The petitioner submitted that the application is an afterthought and not merited. That the applicants knew of the filing and prosecution of

this cause.

Analysis and Determination

7. Before the court is a request for revocation of grant. Is the application merited under **Section 76** of the **Law of Succession Act**?

8. **Section 76** of the **Law of Succession Act** provides that;

“76: 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.

9. Some facts in this case are not disputed and are crystal clear; that the applicants are daughters of the deceased and the petitioner is a son of **M’Etura M’Kaubuthu** (a son of the deceased) but who passed on 17th March 2018 long after this cause had been filed and finalized. The petitioner is therefore a grandson of the deceased.

10. I have perused the petition. I find that, the petitioner listed his name and that of his father as the only beneficiaries of the estate of the deceased. He did not list the applicants as children of the deceased as required in law. This was contrary to section 51(2) (g) of the Law of Succession Act which provides as follows:

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;

11. One thing is quite disturbing; that the applicants are daughters of the deceased and were completely excluded from the estate by the grandson of the deceased. I am aware that the Ameru did not allow women to inherit land. The tradition may have been well intended to ensure the clan or family preserved their lands within them. Within the African tradition, the land provided shelter and support for all members of the clan and or family. And this was backed by a solid social framework that kept the family as a unit and guaranteed shelter, support and provision of livelihood to all the members of the clan. But, that kind of land ownership has been greatly altered into private ownership. Again, there has been a paradigm shift on human rights including property rights. Now, traditions which propagate discrimination on the basis of gender have been declared to be prohibited discrimination especially those which exclude women from inheritance simply because they are women. The Constitution in article 27 so declares that none should be discriminated upon on the basis of gender or sex or status. And, as the Constitution overrides all other law including customary law, any customary law that engenders prohibited discrimination of women is inconsistent with the Constitution, and therefore, null and void. In fact, the Ameru tradition that excluded women from inheritance has been a subject of many cases up to the Court of Appeal.

12. Applying the test of the law, the applicants herein are daughters of the deceased yet they were all excluded from the estate of their father by the petitioner. I have stated before that daughters have right to inherit their parents just as sons.

13. Be that as it may, the law requires that the petitioner ought to have listed all the names of the children of the deceased whether male or female. He did not. There is also no indication that the petitioner sought or obtained a consent from the applicants. Similarly, nothing shows that the applicants renounced their rights to the estate. I need not remind the petitioner of **Part VII** on making of grants as well as **Rule 26(1) and (2) of the Probate and Administration Rules** which provides: -

“26. (1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall,

in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”

See; In re Estate of George Muriithi Gitahi (Deceased) [2019] eKLR

14. I have looked at the proceedings herein. During confirmation of the grant the following were present; Samuel Mururu, Abednego Buriol, Japheth Kaikumi, Morris Kithinji and the petitioner. The persons mentioned were recognised as the sons of the petitioner. I do not find anything to show that the applicants were present during the confirmation of the grant. Therefore, it is not correct to state that the applicants were present during confirmation of grant.

15. The foregoing recapitulation of important matters in this case points to the following; (1) that the petition was defective in substance; and (2) that the grant was obtained through concealment of material facts of the case. Thus, the grant is a perfect candidate for revocation. Accordingly, I revoke the grant issued to the petitioner.

Cancellation of title and issuance of grant

16. Having revoked the grant, the court must do things; (1) determine whether the title issued to the petitioner ought to be cancelled; and (2) make a grant to appropriate persons.

17. The petitioner herein obtained the grant through misrepresentation and concealment of material facts. The grant so obtained was the basis for the acquisition of the title by the petitioner. Of nullity of acts founded on void actions, see what Lord Denning stated in the case of **Mcfoy –vs- United Africa Co. Ltd (1961) 3 All E R 1169-** that:

...If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

18. Accordingly, the actions of the petitioner were invalid and so also was everything done under the impugned grant of representation. Therefore, I hereby order the registrar to cancel the transfer and registration of the petitioner as the proprietor of the estate property herein, and to revert the title into the name of the deceased for purposes of these proceedings. For the avoidance of doubt, the title in the name of the petitioner in respect of the estate property stands cancelled. See **Musa Nyaribari Gekone & 2 others v Peter Miyianda & another [2015] eKLR**

19. By this order, the estate is restored. I should now exercise my final discretion under section 66 of the Law of Succession Act and make a grant to such persons in the best interest of all parties concerned. See **Section 66 of the Law of Succession Act**, which provides: -

“66. When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors”

20. The upshot of my analysis therefore is that the application dated 14th August 2019 has merit and is hereby allowed in the following terms;

a. The grant issued to the petitioner herein dated 4th June 2015 is hereby revoked.

b. In the best interest of all parties, a fresh grant shall be issued in the name of the petitioner and KARUGURU M' MUNGANIA, the 1st applicant.

c. The 1st applicant shall apply for confirmation of grant and serve all parties within 21 days. Upon service, the petitioner shall file a protest clearly detailing his proposed mode of distribution of the estate within 21 days thereof.

d. The title to Nyaki/Giaki/190 measuring 6.96 Ha issued to the petitioner is hereby cancelled and it shall revert back to the name of the deceased.

e. No orders as to costs.

Dated, signed and delivered at Meru this 30th day of July 2020

F. GIKONYO

JUDGE