REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NUMBER 236 OF 2009

(IN THE MATTER OF THE ESTATE OF DAUDI GACHONDE (DECEASED)

PAUL GACHAHI GACHONDE.....APPLICANT

-VERSUS-

ROSEBELL NJERI MURIUKI.....1ST RESPONDENT

VINCENT DAUDI WANJOHI.....2ND RESPONDENT

JUDGMENT

This judgment is in respect of a summons by the applicant seeking to revoke or annul the Grant of letters of administration made to the respondents in respect of administration of the estate of the late David Gachonde Wanjohi who died intestate on 23 July 1998.

The record shows that the grant was initially made in the joint names of two of the deceased's children; the 2nd respondent and his brother Eutychus Daudi Muriuki. The latter son died and so the grant was subsequently revoked; a fresh one was made in the joint names of the respondents, the first of whom is the wife of Muriuki, the deceased son.

That Grant was confirmed by a ruling of this court delivered on 22 October 2009; according to that ruling, the deceased's estate was to be distributed between the deceased's widow, her children and the 1st respondent as proposed by the 1st respondent herself in her summons for confirmation of Grant. These beneficiaries were identified as follows:

i. Shellomith Wanja Gachonde (Widow)

ii. Eudia Wandia Gitahi (daughter)

iii. Catherine Wangui Wachira (daughter)

iv. Vincent Daudi Mureithi (son)

v. Weston Daudi Muriuki (son)

vi. Rosebell Njeri Muriuki (daughter-in-law)

Almost seven years after the Grant was confirmed and, in particular, on 5 July 2016, the applicant filed the present summons which is anchored on section 76 of the Law of Succession Act, cap. 160 and rule 44 of the Probate and Administration Rules. The grounds for this summons are that the proceedings to obtain the Grant were defective in substance; 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; and, that the grant was obtained by means of untrue allegation of a fact essential in a point of law to justify the Grant notwithstanding that the allegation was made in ignorance or inadvertently.

In the affidavit in support of the summons, the applicant has deposed that the deceased was his father and therefore he is one of the deceased's children. Regardless of his capacity in the deceased's family, so he has sworn, he was neither named in the petition as one of the deceased's survivors nor was a provision made in his behalf in the distribution of the estate. He claims that he has effectively been disinherited.

At the hearing of his summons, the applicant testified that unlike the rest of the deceased's children, his mother was not married to the deceased and that he only joined the deceased's family in 1980 although he was born in 1968. It was his evidence that it is only in the year 2014 that Eudia, one of the deceased's children, and the chief of Kirimukuyu location informed him of this Succession cause. In support of

his case, he produced a birth certificate he obtained in 2009 and in which the deceased is indicated as his father. To prove that he had adopted the deceased's surname, he produced the original copies of his school leaving certificate and the Kenya Certificate of Education issued in 1987 showing that he shared the same surname with the deceased and it is in the same name in which his national identification card was issued. He produced a copy of the identity card in proof of this fact.

He testified further that he was a dependant of the deceased. He left the deceased's home in 1991 when he went to look for a job in Nairobi. He concluded his evidence by stating that his mother, one Ann Wanjiru Muhugo, is still alive.

Eudia Wandia Gitahi testified that she not only knew the applicant but also that she was aware that he was educated by the deceased. As a matter of fact, the applicant was not the only person her deceased father assisted but there were several other children who benefited from his philanthropy. As far as the applicant is concerned, she recalled that he came to the deceased's home when he was still in primary school. Contrary to the applicant's allegation that he was brought to the deceased's home by his mother, it was her evidence that the applicant was picked from the streets of Katarina town. She was also aware that after the applicant finished school, Eutychus Muriuki, her late brother, took him in and lived with him in Nairobi.

On cross-examination, she testified that she had known the deceased's mother since the applicant was brought to their home. Besides knowing her for a long time, the two of them were partners of sorts in business.

On her part, Catherine Wambui Wachira agreed with her sister that the applicant was brought up by their parents but added that the applicant's mother was opposed to the position the applicant had adopted in this cause. However, she admitted that despite the fact that their deceased father supported many children, no other child lived with them. Emily Wambui Mureithi's evidence was along the same lines.

So much for the evidence.

More often than not, an interrogation of the validity of a grant would not be complete without interrogating the petition from which it was made. As a matter of fact, most of the grounds upon which a grant may be impugned as prescribed in section 76 of the Act, are rooted in either what the petitioner did or omitted to do in a petition that eventually culminates in the grant. The law on the nature and form the application for a grant of representation takes is found in section 51 of the Act; this provision of the law prescribes not only the manner in which a petition for grant of letters of administration may be made but also prescribes the particulars to be included in such an application including the particulars of the survivors; it is fairly detailed but for our present purposes, section 51. (1) (2)(g) would suffice: it states as follows:

> ***51. (1) An application for a grant of representation shall be made***
>
> ***in such form as may be prescribed, signed by the applicant and witnessed***
>
> ***in the prescribed manner.***
>
> ***(2) An application shall include information as to -***
>
> ***(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;***

The section makes it mandatory for the applicant to provide the names and addresses of the deceased's surviving children, among other defined relatives, where, as in the present case, the deceased died intestate. It follows that if this honourable court comes to the conclusion that the applicant was one of the deceased's children there would not be much debate on whether the respondents petition fell short of the threshold set forth in section 51. (1) (2) (g) for making a petition upon which a valid grant can be made and if that shortfall would, as a matter of course, result in the revocation or nullification of the grant.

So, the immediate question that arises is whether the applicant was the deceased's child and who, for this very reason, ought to have been included in the petition as such. Perhaps owing to the status to which a child or children have been elevated in succession to estates, the word "child" has not been left to speculation; the Act clothes it with a technical connotation whose ramifications are wider than it is literally understood; it is defined in section 3. (2) and (3) of the Act in these terms:

> **3. (*2) References in this Act to "child" or "children" shall include a***
>
> ***child conceived but not yet born (as long as that child is subsequently***
>
> ***born alive) and, in relation to a female person, a child born to her out of***
>
> ***wedlock, and, in relation to a male person, a child whom he has expressly***
>
> ***recognized or in fact accepted as a child of his own or for whom he has***
>
> ***voluntarily assumed permanent responsibility.***
>
> ***(3) A child born to a female person out of wedlock, and a child***

as defined by subsection (2) as the child of a male person, shall have

relationship to other persons through her or him as though the child had

been born to her or him in wedlock. (Emphasis added).

Thus, a child whom a deceased has expressly recognised or accepted in fact as his own child or for whom he has assumed permanent responsibility is treated as his own child for purposes of the Act. Such a child has the same inheritance rights as the deceased's other biological children born in wedlock.

From the available evidence the applicant would be a such child that the legislature had in mind when it came up with section 3. (2) and (3) of the Act. There is no dispute that the applicant joined the deceased's family at the age of 12. He spent the rest of his childhood as a member of the deceased's family.

In the words of Eudia Gitahi:

"Paul was a street boy. I knew his background when he was brought to our home. He was in primary school. He lived with my father until he finished school. He was brought up by my father and mother."

And according to Catherine Wambui Wachira:

"Paul came at home when he was in primary school. He was brought up by my parents. I cannot tell when the applicant adopted my father's names. There was no child living in our home; that is, those being supported by our father."

Other than being incorporated in the deceased's family, the applicant adopted the deceased's identity, at least as far as his surname is concerned; a school leaving certificate from Kianjogu Secondary School shows that he was admitted to second in that school in 1985 as Paul G. Gachonde. The Kenya Certificate of Education issued in 1987 shows that he enrolled for his fourth term examinations as Paul Gachahi Gachonde. As his national identity card would show, the name Paul Gachahi Gachonde is the official name by which he is known. As earlier noted, the birth certificate shows that his father is the deceased. I would have had some doubt with this latter piece of evidence considering that the certificate was obtained in 2009, more than ten years after the death of the deceased but I also note that it was never contested and the applicant's name in that certificate is consistent with the name in his other official documents, in particular, the school certificates and the national identification card which were obtained much earlier before the deceased's demise.

All these facts point to the irrefutable conclusion that irrespective of whether the applicant was the deceased's biological child, the deceased had either recognised him or accepted him as his own child for whom he had assumed permanent responsibility. It follows that, under the Act, the applicant assumed the status of the deceased's child who has as much rights to the inheritance of the deceased's estate as the rest of the deceased's children.

Since, for all intents and purposes, the applicant was the deceased's child, it behoved the respondents to include in their petition the information relating to the applicant as they would for any of the other deceased's children if section 51. (1) (2)(g) is anything to go by. Failure to do so tainted, to some degree, the petition and ultimately the grant in the manner contemplated under **section 76(c)** of the Act; that section reads:

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) ..

(b) …

(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)…

(e)…

It is quite likely that the defendant omitted the applicant from the list of the deceased's survivors and beneficiaries to his estate in good faith and were not in any way out to defraud him or disinherit him; after all, it was their honest understanding that the applicant was not a biological child of their parents or one of their own, so to speak. In the words of section 76. (c) they must have omitted the applicant 'in ignorance' of the status the applicant had acquired the moment the deceased recognized or in fact accepted him as a child of his own or when he voluntarily assumed permanent responsibility towards him. I dare say that the deceased himself may have been oblivious of the consequences of what he thought was his generous gesture towards the applicant. As it has turned out, the law would read his conduct differently; it attached some rights to this relationship to which the applicant is entitled.

It would by now sound like that for all I have said, the only inevitable conclusion that this court is bound to reach is the revocation or

nullification of the grant. However, my reading of section 76 of the Act is that the court is not always bound to revoke a grant where an applicant has proved all or any of the grounds prescribed in section 76. The section begins by saying that:

> ***"A grant of representation, whether or not confirmed, may at***
>
> ***any time be revoked or annulled…" (Emphasis added).***

The use of word "may" undoubtedly connotes that when all is said and done, the court reserves the discretion to either nullify or revoke the grant, on the one hand, or to sustain it, on the other hand. Whichever course the court takes, the ultimate test is whether the discretion has been properly and, in any event, judiciously exercised.

Narrowing down to the applicant's summons, one obvious question that emerges and whose answer should guide me on the proper direction to take in determination of the applicant's summons is whether the whether the respondents or any of them would be eligible for appointment as administrators of the deceased's estate. The answer is equally obvious and it is this: under section 66 of the Act, both or either of them could properly be appointed in the positions they hold irrespective of whether or not the applicant was included in the petition. A fortiori, in the absence of any evidence of fraud, bad faith or any sort of misconduct on the respondent's part, their reappointment in the same capacity would still be valid assuming the grant which they hold is revoked.

In these circumstances it would not serve any useful purpose or, at the very least, serve the ends of justice, if the grant was revoked or annulled merely for the sake of revoking or annulling it.

Another important factor to consider is that as at the time the applicant filed his application in 2016 this cause was almost seventeen years old in this court. It was his own evidence that he became aware of the cause in 2014, two years earlier. Considering that the whole basis of the applicant's application is that he was a close-knit member of the deceased's family, I doubt that he would have been in the dark of the goings on in that family and, in particular, the affairs of the deceased's estate for fifteen years. The grant, as noted, had been confirmed and the estate distributed in 2009, seven years before he filed his summons for revocation of grant. Were it not for what I gather are underlying squabbles between one of the deceased's children and his siblings, the estate would certainly have been transmitted and dissipated at the time the applicant filed his application; in other words, there would be no estate all.

But if we were to give it to the applicant and assume, as he suggests, that he was not aware of this cause until a decade and a half later, the question that ought to concern the court is not so much whether the applicant was aware of the petition but whether the requisite notice of the petition was published as prescribed.

Rule 26 (1) of the Probate and Administration Rules envisages such a notice; it says as follows:

> ***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.***

The Rules do not prescribe the shape or form the notice referred to in this particular takes but I suppose it is the same notice prescribed in section 67 of the Act. That section reads as follows:

> ***67. (1) No grant of representation, other than a limited grant for***
>
> ***collection and preservation of assets, shall be made until there has been***
>
> ***published notice of the application for the grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.***
>
> ***(2) A notice under subsection (1) shall be exhibited conspicuously***
>
> ***in the court-house, and also published in such other manner as the court***
>
> ***directs.***

This notice under section 67 would serve not just to invite objections to the application for grant of letters of administration but it also serves to inform all and sundry that the process of administration of a deceased's estate which eventually culminate in the distribution of the estate has commenced.

If, peradventure, the notice referred to in rule 26. (1) has nothing to do with that contemplated in section 67 (1) of the Act, the rule 27 suggests that it is not fatal after all not to serve such a notice; it states as follows:

> ***27. Nothing in rule 26 shall operate to prevent a grant being***
>
> ***made to any person to whom a grant may be made, or may be required to***

be made, under the Act.

That said, it has not been alleged or even suggested that neither section 67 of the Act nor rule 26 of the Probate and Administration Rules was complied with; and in the absence of any evidence to the contrary, it is safe to proceed on the presumption that the notice was certainly published as prescribed and if that be the case the respondents cannot be blamed that it had to take the applicant fifteen years to realise that there was a petition in court in respect of the deceased's estate.

The point I am making is this: The extent of the delay in making an application for revocation or annulment of grant particularly for the reason that the applicant was unaware of the petition is a factor that the court will take into account in exercising its discretion, one way or the other. Where such delay is unreasonable and there is no plausible or justifiable cause why such an application could not be brought much earlier, the court should be disinclined to exercise its discretion in favour of the applicant. What is unreasonable delay will, of course, depend on the circumstances of each particular case.

I am conscious that under section 76 of the Act, a grant of representation may be revoked at any time, regardless of whether or not it has been confirmed; however, I am also of the humble view that one of the reasons why it is the discretion of the court to revoke or not to revoke the impugned grant that ultimately counts is to guard against the abuse of this provision of the law and generally, the abuse of the process of court to the detriment of not only the administrators or the beneficiaries of the estate in issue but also innocent parties who may have, in the course of time, acquired some interest in what used to be a deceased person's estate. On this last point, I must add that it certainly cannot have been the intention of the legislature to expose such parties to an indefinite and ever looming threat of litigation by "any interested party" on an application for revocation or annulment of grant; where the cause has been contentious, as is the case here, there must be an end to litigation at some point.

Turning back to the applicant's application, I am not satisfied with his explanation that he was not aware of the existence of this cause for fifteen years and therefore he could not seek the revocation or nullification of grant at the earliest possible opportunity or within such a reasonable time after it was made. Again, even if it was to be assumed that the applicant was only made aware of the cause in 2014, he has not offered any reason why he had to wait until 2016, almost two years later to file the present application; the obvious lethargy on the part of the applicant goes to show that he was not always keen on this application. A copy of the letter from the chief which he exhibited on his affidavit suggests that he was always aware of this cause but for whatever reason, he chose to intervene seventeen years after it had been filed. The letter dated 26 October 2014 and addressed to the Deputy Registrar of this Court by the Chief of Kirimukuyu location reads in part as follows:

> ***"It has come to my notice that the deceased had a dependant and brought him up and educated him. By the time the succession was being initiated he never showed up."***

No reason was given in that letter or by the applicant himself why "he never showed up" when it mattered. In short, the conduct of the applicant militates against this honourable court's exercise of discretion in his favour. And so his application ought to be dismissed.

If I have to, I need to reiterate that the dismissal of the applicant's application does not in any way suggest that he does not deserve a share of the deceased's estate; having held as I have that he is, legally speaking, one of the deceased's children, he has the right of inheritance. But that is all I can say as far as that subject is concerned; the application before me has nothing to do with the distribution of the estate; it has everything to do with whether the grant made to the respondents ought to be revoked. That application is dismissed. Parties will bear their respective costs. It is so ordered.

Dated, signed and delivered on 24 July 2020

Ngaah Jairus

JUDGE