



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CAUSE NO. 108 OF 2016

IN THE MATTER OF THE ESTATE OF MARTHA GATHONI WAIKENYE alias GATHONI WAIKENYE (DECEASED)

VERONICA NJERI MAINA

SAMSON MUREITHI

JACOB KIMANI

SAMWEL MAINA

PAUL NJUGUNA

DAVID NDEGWA

LILIAN MUTHONI MUCHIRI

HANNAH WANGUI

ESTHER WANJIRU

MARY WAHITO

NAOMI WANJIKU.....APPLICANTS

VERSUS

MUIRURI WAIKENYE.....1ST RESPONDENT

PAUL MAINA WAGIKU.....2ND RESPONDENT

RULING

1. Before me is the Summons for Revocation of Grant filed on 22nd January, 2013 brought under Section 76 of the Law of Succession Act and Rules 44, 49 and 73 of the Probate and Administration Rules seeking that the grant issued to **Muiruri Waikenye** and **Paul Maina Wagiku** on 8/7/2010 in **Thika CM's Succession Cause No. 7 of 2009** in respect of the estate of **Martha Gathoni Waikenye** be revoked and that the title in respect of the deceased's land parcel **LR. No. Ndarugu/Kamunyaka/360** be restored.

2. The application is based on the grounds that the proceedings to obtain grant were fraudulent in substance and that the grant was obtained fraudulently by the concealment of material facts. **Veronica Njeri Maina** swore the affidavit in support of the Summons in her own behalf and on behalf of her Co-Applicants who are her siblings. She asserted that the Applicants are children of **Elizabeth Wangari Muchiri** (deceased) who was the only child to the deceased's herein, **Martha Gathoni Waikenye**. She further deposed that their grandfather **Waikenye Kienje** had two wives and that before his demise, he distributed his parcels of land between the two houses, Martha Gathoni Waikenye's house receiving the land parcel **LR. No. Ndarugu/Kamunyaka/360** measuring eight acres. She further stated that the Respondents surreptitiously moved the court in Thika Succession Cause No. 7 of 2009 and were issued with a grant and have since distributed the land that belonged to the 2nd house. And this, after the said Respondents had also benefitted from the estate of their grandfather in respect of the land parcel **LR. No. Ndarugu/Kamunyaka/75** assigned to their house.

3. **Muiruri Waikenye** and **Paul Maina Wagiku** opposed the Summons by their replying affidavit filed on 4th February, 2013. They denied

that the grant was obtained fraudulently. They deposed that they are the son and grandchild respectively, of Waikenye Kienje who was the husband of the deceased herein. They contended that Waikenye Kienje owned both land parcels LR. Nos. Ndarugu/Kamunyaka/75 and Ndarugu/Kamunyaka 360; that while the former parcel was registered in his name the latter parcel was registered in the name of the deceased herein to hold in trust for her husband. That in the 1960s Waikenye Kienje gave the parcel no. 360 to them. They contended that the Applicants' mother was married in 1954 and that land parcel Ndarugu/Kamunyaka/360 had already been shared between the 1st Respondent and his brother Wagiku Waikenye (deceased) which land they have developed. The Applicants' mother was not a dependant of the deceased according to the Respondents as she was already married and as such the Applicants herein are not entitled to any share of the estate of their grandmother. They denied the allegation that the said parcels of land were distributed in favour of the two houses by Waikenye Kienje during his lifetime.

4. The court directed that the Summons for Revocation of Grant be heard by way of viva voce evidence.

5. Veronica Njeri Maina (**PW1**) adopted her supporting affidavit and annexures thereto as her evidence. Under cross-examination she stated that the deceased herein was buried on LR. No. Ndarugu/Kamunyaka/75 but had always resided on Ndarugu/Kamunyaka/360.

6. Paul Maina Wagiku (**RW1**) also adopted his replying affidavit as his evidence and in cross examination stated that land parcel LR. No. Ndarugu/Kamunyaka/360 was given to Muiruri Waikenye and his father Wagiku Waikenye. He confirmed that Ndarugu/Kamunyaka/360 was registered in the name of the deceased but asserted that the Applicants cannot inherit from the deceased herein because their mother was married.

7. Subsequently, parties were directed to file their written submissions. The Applicants submitted that they are legitimate beneficiaries of the deceased in line with their degree of consanguinity with her; that the grant issued to the Petitioners was fraudulently obtained hence as they were not involved and ought to be revoked. Reliance was placed on the cases **In Re Estate of Mirigu Karuiru (deceased) 2008 eKLR** and **Milka Anyango Otieno & Another vs Kennedy Otieno Odeny (2014) eKLR** where grants were revoked on grounds of material non-disclosure. It was submitted that in any case, the value of the suit land being in excess of Kshs. 100,000/= exceeded the pecuniary jurisdiction of the trial court. It was further submitted that the transmission process was fraudulent hence the title deeds generated were equally fraudulent and fit for cancellation.

8. The Respondents submitted that the Applicants were unable to prove the allegations of fraud. They cited the case of **In the matter of the estate of Michael Mwangi Githinji (deceased) 2003 eKLR** to assert that the Applicants were obligated to provide clear evidence on the allegation of fraud which they have failed to do. It was submitted that the Applicants did not produce evidence or a valuation report in respect of land parcel LR. No. Ndarugu/Kamunyaka/360 to prove that its value exceeded Kshs. 100,000/= as claimed; that the deceased held the land parcel LR. No. Ndarugu/Kamunyaka/360 in trust for the Respondents and upon her demise, the trust determined; and that the Applicants did not provide evidence that they were dependants of the deceased. The court was urged to dismiss the Applicants' application for being an abuse of the court process.

9. The court has considered the evidence on record and the parties' respective submissions in respect of the summons for revocation of grant. **Veronicah Njeri Maina** and her siblings (Five brothers and five sisters) are the children of **Elizabeth Wangari Muchiri** (Elizabeth) who died on 22nd September 2008. Elizabeth was the only child born to Martha Gathoni Waikenye (hereafter Gathoni), the deceased herein and her husband Waikenye Kienje. Gathoni was the second wife after **Margaret Wambui** mother to **Muiruri Waikenye** and **Wagiku Waikenye**. Gathoni died on 26th July 1993 and at the time of her death was the registered proprietor of land parcel No. LR Ndarugu/Kamunyaka/360 measuring 8 acres. Her husband Waikenye Kienje had died earlier and a Succession Cause No. 71 of 1997 was filed in the High Court at Nairobi. The declared sole asset of which Waikenye Kienje died possessed, namely land parcel **LR No. Ndarugu/Kamunyaka/75** measuring 18.6 acres devolved upon Muiruri Waikenye and Wagiku Waikenye, the former receiving 10.6 acres and the latter 8.0 acres.

10. Subsequently, in the year 2009, Muiruri Waikenye and Paul Maina Wagiku (son to Wagiku Waikenye) both Respondents herein filed **Succession Cause No. 7 of 2009 of 2009** before the CM's Court at Thika in respect of the estate of Martha Gathoni Waikenye. A grant issued to them and was confirmed on 8th July 2010. The land parcel LR No. NDARUGU/KAMUNYAKA/360 was distributed equally between the two as representatives of and to hold in trust for members of their respective households. These facts are not in dispute.

11. The question to be determined is whether the grant in question was procured through fraud by concealment of facts material to the case, primarily, the existence of the Applicants. 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).....”

12. The Applicants are the children of the Gathoni's deceased daughter while the 1st Respondent Muiruri Waikenye was a stepson to the deceased herein and the 2nd Respondent Paul Maina Wagiku a step grandchild of the deceased. At the time of the death of Martha Gathoni Waikenye in 1993 her daughter Elizabeth, the Applicant's mother was alive. It appears that as soon as Elizabeth died in 2008, the Respondents filed the succession cause in Thika without seeking the consent of the Applicants. By virtue of the provisions of Section 38 as read with Section 41 and 66(b) of the Law of Succession Act, the Applicants rank higher in priority than the Respondents. Under Rule 7 (7) and 26(1) of the Probate and Administration Rules (P & A Rules), the consent of the Applicants ought to have been sought prior to the making of the grant to the Respondent.

13. Under Section 51 of the Law of Succession Act the Respondents were obligated to supply in the petition the names and addresses of all surviving children of the deceased and of any child surviving an intestate's deceased child, that is, grandchildren of the deceased whose parent was a child of the intestate but was deceased. The Respondents in this case not only failed to obtain the consent of the Applicants but also proceeded to distribute the estate without including the Applicants as beneficiaries to the estate of the deceased herein. This was a violation of Rule 40 (4) of the P & A Rules. Moreover, the consent of the Applicants who were persons beneficially entitled, to the confirmation of the grant as required under Rule 40 (8) of the P & A Rules was not obtained.

14. The Respondents' answer concerning these omissions is three pronged: -

- a) that the suit property belonged not to the intestate herein, but she held it in trust for her husband Waikenye Kienje;
- b) that Waikenye Kienje gave the suit property to his two sons Muiruri Waikenye and Wagiku Waikenye in the 1960s; and
- c) that Elizabeth, the mother to the Applicants was married and never occupied the suit land and was therefore not beneficially entitled to her mother's estate.

15. None of these assertions are supported by evidence and if indeed the suit property did not belong to the deceased herein, it begs the question why the Respondents filed the succession cause in Thika and included the said asset as the deceased's property, rather than in the earlier cause in respect of Waikenye Kienje. Moreover, they could have sought to assert title to the land while Gathoni and Elizabeth were still alive. The copy of green card annexed to the Applicants' affidavit as annexure "**VNM III b**" shows that the suit property remained registered in the deceased's name until her death. There is no requirement that occupation of the suit land should qualify the child of an intestate to benefitting therefrom, nor could a female child of an intestate be disqualified from benefitting because she was married. The Law of Succession Act does not distinguish between male and female children. The Applicants, having survived their deceased mother were through the principle of representation entitled to benefit from the estate of the deceased herein.

16. The Respondents proven actions in this case reek of mischief. Having benefitted from 18 acres of land under the Nairobi Succession Cause No. 71 of 1997 in respect of their father and grandfather respectively, they subsequently secretly filed a cause in respect of the deceased herein and shared a further 8 acres of land. The grant herein was clearly procured through fraud and concealment of the existence of the true beneficiaries to the estate of Gathoni. Claims that the Respondents have developed the land hold no water. A party cannot derive a benefit from his own wrongdoing. Notwithstanding the absence of a valuation report, I tend to agree that the value of suit land was probably in excess of the pecuniary jurisdiction of the lower court as at 2010. The grant issued and confirmed in respect of the estate herein cannot stand and is hereby revoked.

17. The land parcel LR No. NDARUGU/KAMUNYAKA/360 was subdivided into two equal parcels pursuant to the certificate of confirmation grant issued on 8th July 2010 and was in 2011 registered in the joint names of the Respondents. An order will accordingly issue to the Land Registrar for the cancellation of the said transfers to the Respondents so that the title reverts to the name of the deceased herein. A fresh grant will forthwith issue in the name of **Veronica Njeri Maina** and her brother **Samson Mureithi**. In view of the age of this matter, the two will be at liberty to apply for the confirmation of the grant before the lapsing of six months.

Parties will bear own costs.

SIGNED AND DELIVERED ELECTRONICALLY ON THIS 23RD DAY OF JULY 2020.

C. MEOLI

JUDGE