



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

HIFCH COURT SUCCESSION CAUSE NO. 456 OF 2008

IN THE MATTER OF ESTATE OF DAVID NJUE GICHECHE M'TURI

(DECEASED)

RAYMOND KITHINJI M'TURI.....1ST OBJECTOR/ APPLICANT

EVA WANJUE NJERU.....2ND OBJECTOR/ APPLICANT

VERSUS

CHELESTE NJIRU GICHECHE.....ADMINISTRATOR/RESPONDENT

R U L I N G

A. Introduction

1. This ruling relates to the Summons for Revocation of Grant dated 4/04/2017 and filed in court on 5/04/2017 under certificate of urgency and wherein the applicants prayed for the following orders: -

i. *That one Hillary Nyaga M'turi the beneficiary of Plot Number Nairobi/ Block 96/123 do render full account of all the revenue and rental income he has collected from Plot referred to and known as Plot Number Nairobi/ Block 96/123 in Civil Servant's Estate along Komarock Road.*

ii. *The confirmed Grant issued on 29/05/2014 by this Honourable Court to **CHELESTE NJIRU GICHECHE** the Administrator be revoked.*

iii. *The Grant and/ or allocation of LR No. Evurori/ Nguthi/1628 to Cheleste Njiru Gicheche be revoked and the transfer of the said property in favour of to Cheleste Njiru Gicheche be annulled and the title reverts to the name of the deceased.*

iv. *That the allocation of LR No. Kyeni/ Kigumo/2692 and Plot Number Nairobi/ Block 96/123 situated in Komarock Estate Nairobi to Hillary Nyaga M'turi be revoked and in the event of any transfer has been done to Hillary Nyaga M'turi or any other third party, the same to be annulled and be reverted back to the name of the deceased.*

v. *That EVA WANJUE NJERU and RAYMOND KITHINJI M'TURI be appointed administrators of the estate of the deceased.*

2. The application was premised on the grounds on the face of the record was further supported by the affidavit by Raymond Kithinji. In a nutshell, the applicant's case was that the proceedings to obtain the grant were defective in substance, the grant was obtained fraudulently by making false statements and concealment of material information and further by means of untrue allegations of facts and in collusion between Cheleste Njiru Gicheche and Hillary Nyaga M'turi who had greatly benefited from the estate. Further that the Respondent substituted their late mother the original administrator without consulting the applicants herein. That he only consulted one Hillary Nyaga M'Turi who ended up being the greatest beneficiary.

3. It was further stated that the respondent failed to disclose to the court the fact that he was not a beneficiary nor a dependant of the estate and the same ought to have been shared equally amongst the children of the deceased. That he proceeded to transfer LR. Evurori/Nguthi/1628 into his names notwithstanding that he was not a dependant nor a beneficiary therein and he together with the said Hillary Nyaga M' Turi ended up benefitting more to the disadvantages of other beneficiaries. Further that mode of distribution of the property was different from the proposed mode in the affidavit in support of summons for confirmation of grant and the property allocated to the applicant's herein does not exist. As such they were apprehensive that the Respondent and the said Hillary M'Turi might dispose the property hence disinheriting the applicants thus suffering irreparable harm.

4. The respondent opposed the application vide his replying affidavit sworn on 8/10/2018 wherein he urged this court to dismiss the application with costs. He deposed that the deceased was his close friend and confidant and some months before his death, he had told him as to how he wished his property to be distributed in the event of death. Further that he was substituted as an administrator of the estate pursuant to discussion and agreement of all beneficiaries including the applicants herein and wherein they agreed on the mode of distribution of the estate and the mode of distribution reflected the wishes of the beneficiaries and their deceased parents.

5. It was his disposition further that LR Evurori/Nguthi/1628 was given to him by the deceased just before he passed on in 1996 and this was a fact known to the family and the clan and that after he was given the land, he took possession of it in 1997 and has been in peaceful occupation thereof and has developed the same. Further that the estate was not shared unequally and the original administrator wrongfully indicated LR. Kyeni/ Kigumo/2120 wrongly as LR Kyeni/ Kigumo/2170 but which mode of distribution the applicants herein did not have objection thereto as the 1st applicant had already taken over LR Kyeni/ Kigumo/2120.

6. It was his position that he had done his best as an administrator and attempts to transmit the land to the applicants has been rendered futile by themselves. Further that he never had any intention to defraud the applicants because on the day of the confirmation of grant, he called the applicants who gave their consent on the mode of distribution verbally.

7. The 1st applicant filed his further affidavit wherein he controverted the contents of the respondent's replying affidavit and reiterated the content of his application.

8. The application proceeded by way of *viva voce* evidence wherein the 1st applicant PW1 adopted his witness statement and the list of documents as his evidence in-chief and further gave sworn evidence to the effect that the respondent herein was a brother to the deceased and further that he together with his sister the 2nd applicant were never informed and neither did he participate in the proceedings leading to the issuance of grant into the names of the respondent and subsequent confirmation of the grant. That the respondent allocated himself most of the deceased's estate. He prayed that the grant be revoked so that distribution may be done afresh. In cross examination the 1st applicant said that the respondent was never a beneficiary and neither was he included by their deceased mother in the mode of distribution that she had filed. Neither was he aware of any authority given to the respondent by their mother. Further that the deceased might have given the respondent only one (1) acre out of LR Evurori/Nguthi/1628 as opposed to the whole parcel.

9. The respondent (DW1) adopted his witness statement as his evidence in-chief and gave sworn evidence to the effect that the applicants were his brother's children and further that when their mother died in 2007, he applied to be substituted as the administrator of the estate and he was so appointed. In cross examination, he testified that he was nominated by the children of the deceased as the administrator of the estate. He said he further informed the applicants via phone calls as to his filing of the application for substitution but he never served them with the necessary documents. He further stated that he served the hearing notice of the said application to the applicants through someone and that he called the 1st applicant on phone but he didn't call the 2nd applicant. It was further stated that the respondent allocated himself LR. Evurori/Nguthi/1628 which is 2.2 hectares and to Hillary- a son of the deceased- LR No. Kyeni/ Kigumo/2692 and LR. Nairobi/ Block 96/123 and which according to him were equitable shares of the estate.

10. The parties herein then proceeded to file written submissions supporting their respective arguments as presented in the pleadings and the oral evidence herein.

B. Issues for determination

11. I have considered the pleadings herein, the oral evidence herein and the rival written submissions by the parties herein and in my considered view, the following are the issues for determination; -

- i. Whether the Grant of Representation issued to the Respondent and confirmed on 29th May 2014 ought to be revoked.*
- ii. If so, whether the transmission of any property forming part of the estate ought to be nullified.*
- iii. Whether the Applicants herein ought to be appointed as the administrators of the estate in the place of the Respondent.*
- iv. Whether one Hillary Nyaga M'turi ought to be ordered to give and render full and accurate account for rental income derived from Plot Number Nairobi/ Block 96/123 in Civil Servant's Estate- Komarock Road, Nairobi.*

C. Analysis and determination

i. Whether the Grant of Representation issued to the Respondent and confirmed on 29th May 2014 ought to be revoked?

12. The grounds upon which a grant can be revoked are provided for under Section 76 of the Law of Succession Act Cap. 180 Laws of Kenya. According to this section, 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 to proceed diligently with the administration of the estate; or 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.

13. In the affidavit in support of the application, the 1st applicant deposed that when he perused the court file after conducting the search of three of the land parcels forming part of the estate of their deceased father, he discovered that the respondent had made an application to be substituted in place of their mother and in which application he misled the court into believing that all the beneficiaries had consented to the substitution. It was his case that that was not the position as the respondent only consulted their elder brother whom the respondent colluded with to disinherit them. However, the respondent averred that he was nominated by all the beneficiaries after the death of their mother.

14. It is not in dispute that the deceased died intestate in 1996 and was survived by several beneficiaries. The death certificate attached to the application indicates that he died on 30/09/1996. As such representation to his estate is, therefore, subject to administration in accordance with the provisions of the Law of Succession Act. The persons who qualify to apply for administration in intestacy are set out in Section 66, which gives an order of priority to guide the court in exercising discretion in the matter of appointment of administrators. The said order is as follows: -

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.

15. Part V of the Act consists of Sections 35 to 40 and sets out the order of priority in entitlement to shares in the estate of the deceased. The beneficiaries are listed in order of priority starting with the surviving spouse, followed by the children of the deceased, the parents of the deceased in the event that the deceased was not survived by a spouse or child and other relatives. Therefore, upon the demise of the applicant's mother, it was the children of the deceased who ought to have been appointed as administrators of the estate according to the law unless they voluntarily gave up their rights to another relative.

16. However, the respondent averred that beneficiaries, who included the applicants nominated him as the substitute administrator. This is the position which the applicant's refuted and averred that they were never consulted and that there was no consent filed in court to that effect. I have perused the court records and I note that the respondent at the time of applying for issuance of grant as a substitute administrator attached a letter by one Hillary Nyaga M'turi dated 15/10/2008 wherein the maker indicated that the members of the family had agreed that the respondent be substituted as administrator. The said letter was only signed by the said Hillary alone. When he was put to task to explain the same, he could not produce any evidence as to the meeting where the beneficiaries consented to him being the administrator. Further despite the application having proceeded by way of *viva voce evidence*, the respondent did not call the said Hillary as his witness.

17. It is my view that the said letter was not sufficient to serve as a consent of all the beneficiaries giving away their rights to the respondent administer the estate. The use by the respondent of the said letter as a basis of obtaining the grant herein amounted to obtaining the grant fraudulently by the making of a false statement or by the concealment from the court of something material to the case. The respondent made a false statement to the effect that all beneficiaries had consented to him being substituted as an administrator in place of their deceased mother. The respondent concealed to the court the fact that all the beneficiaries had not consented to surrendering their legal rights to him and which fact was material to the case.

18. The respondent admitted not having served the 2nd applicant with the said application but testified that he called the applicants on phone. An affidavit of service to the effect that the hearing notice was served upon the applicants was therefore false.

19. Under Rule 26 of Probate and Administration Rules, letters of administration shall not be granted to any applicant without notice to every person entitled in the same degree as or in priority to the applicant. As I have noted elsewhere, the Respondent herein acquired the grant pursuant to the said application for substitution. As such, failure to serve the applicants herein in my opinion makes the procedure of obtaining the grant of letters of administration defective in substance. As Koome J (as she then was) held in **Re Ngaii Gathumbi alias James Ngaii Gatumbi (deceased) Succession Cause 783 of 1993**, which I find persuasive, an application to obtain grant is considered defective and irregular if a person who is entitled to apply is not notified by the petitioner of that intention to apply and that person's consent to the petitioner's application is not sought and that such grant is in breach of Section 76 of the Law of Succession Act and may be revoked.

20. In the case of **Simiyu Wafula Samwel Wafula Waseke v Hudson 1993 KLR CA** the court held that *a grant obtained on the strength of false claims without obtaining the consent of persons who had prior right to the grant and on the basis of facts concealed from the court is liable to revocation.*

21. Considering all the foregoing, it is my considered opinion that the applicants have made a case for revocation/annulment of grant issued to the respondent and that the necessary orders ought to issue.

ii. If so, whether the transfer of any property forming part of the estate ought to be revoked?

22. The applicants also sought for orders for grant and allocation of LR No. Evurori/Nguthi/1628 be revoked and transfer of to Cheleste Njiru Gicheche be annulled and the same do revert back to the names of the deceased. They annexed a copy of title deed for the said land parcel which indicates that the same is registered in the names of the respondent. The respondent admitted having gotten the ownership thereto pursuant to the succession of the deceased' estate.

23. It has been established that the grant was obtained fraudulently and as such it is incapable of conferring a valid title to the respondent in respect of LR. No. Evurore/Nguthi/1628. The same case applies to the titles for LR. No. Kyeni/ Kigumo/2692 and Plot Number Nairobi/Block 96/123 to Hillary Nyaga M'turi. The end result of the said fraudulent deals ought to be the annulment of the respective transmissions which were based on fraud or by concealment of facts material to the case.

iii. Whether the Applicants herein ought to be appointed as the administrators of the estate in the place of the Respondent?

24. The applicants herein sought for orders that they be appointed as co-administrators of the estate of the deceased. As I have opined above, despite the court having discretion as to the persons to be appointed as an administrator under Section 66 as read together with Part V of the Law of Succession Act, the children of the deceased rank higher in priority with regard to the entitlement to the administration of the estate. The applicants being children of the deceased therefore rank higher than the respondent who is a brother of the deceased.

iv. Conclusion

25. It is noted that the applicants did not enjoin Hilary Nyaga M'turi with this application. He is not a party and there is no evidence of service on him. Every party has a right of being heard by the court. As such, the court declines to grant any order in this regard.

26. I hereby find the application dated 4/04/2017 merited and allow it in the following terms: -

a) That the grant issued to the respondent and confirmed on 29/05/2014 is hereby annulled.

b) That a fresh grant is hereby issued in favour of the applicants Raymond Kithinji M'turi and Eva Wanjue Njeru as co-administrators.

c) That the registrations for LR. Nos. Evurore/Nguthi/1628, Kyeni/Kigumo/2692 and Nairobi Block 96/123 in the names of the respondent Cheleste Njiru Gicheche and Hilary Nyaga M'turi resulting from the revoked grant are hereby nullified and the titles thereof shall revert to the name of the deceased.

d) That the administrators in consultation with all the beneficiaries are hereby directed to file summons for confirmation of grant within sixty (60) days.

e) The prayer in respect of Hilary Nyaga M'turi being ordered to account for income for LR. Nairobi Block 96/123 is hereby struck out.

27. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF AUGUST 2020.

F. MUCHEMI

JUDGE

Ruling delivered through Video-Link in presence of Ms. Kinyua for the Applicant