



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**SUCCESSION CAUSE NO. 121 OF 2016**

**IN THE MATTER OF THE ESTATE OF WILSON KAMAU ITUME (DECEASED)**

**WILSON KAMAU KINUTHIA**

**FAITH WANJIKU KINUTHIA.....APPLICANTS**

**VERSUS**

**ANN NJOKI KAMAU.....PETITIONER/RESPONDENT**

**RULING**

1. For determination is the Summons for Revocation of Grant filed on 10<sup>th</sup> December 2015 seeking that the Grant of Letters of Administration issued to **Ann Njoki Kamau, Joseph Mwangi Kamau** and **Peter Muigai Kamau** in Thika Succession Cause No. 260 of 2004 on 7/07/2005 and subsequently amended on 9/05/2014 be revoked. Joseph Mwangi Kamau who was a party to the summons withdrew from the summons and also withdrew his affidavit in support of the summons.
2. The application is based on grounds that the proceedings to obtain the grant were defective as the lower court did not possess the requisite pecuniary jurisdiction; that the grant was obtained by the administrators without the Applicants' consent ; and that the grant was obtained fraudulently by the making of false statements and/or concealment of material facts in relation to certain beneficiaries. The application is supported by the affidavit of **Faith Wanjiku Kinuthia** who deposed that her consent to the succession cause was not sought even though she is a grandchild of the deceased; that some of the beneficiaries were left out in the distribution; that the plot at Juja under ballot No. 24 assigned during distribution to Wilson Kamau Kinuthia her co-Applicant was non-existent; and that Ann Njoki Kamau allegedly inherited the largest share of the estate, to the detriment of other beneficiaries. She also states that the lower court did not have the necessary pecuniary jurisdiction to handle the matter as the value of the estate of the deceased was in excess of Sh. 100,000/-
3. The court directed that the affidavit of **ANN NJOKI KAMAU** filed on 12<sup>th</sup> March 2018 be deemed as the response to the summons for revocation. She deposed therein that her brother and co-administrator **Joseph Mwangi Kamau** instigated the filing of the instant summons for revocation after he was ordered in Thika Succession Cause No. 261 of 2004 relating to their mother, to surrender original title documents that he was holding. She denied the allegations made against her by the Applicants and indicated that Joseph Mwangi Kamau participated in sharing the deceased's estate having consented thereto and is therefore estopped from seeking revocation. More so as two plots have already been transferred to him under the confirmed grant. She detailed the poor relationship and animosity between the deceased and Joseph Mwangi and urged the court to order him to surrender all original documents of title to the assets in the confirmed grant.
4. The Summons was heard by way of *viva voce* evidence.
5. **FAITH WANJIKU KINUTHIA (PW1)** adopted her affidavit as her evidence. She deposed that her father was the deceased's son; that she was neither informed of the filing of the succession cause nor her consent sought. Under cross-examination by the Petitioner, she denied the allegation that her brother benefitted from a plot stating that the said plot is non-existent.
6. **WILSON KAMAU (PW2)** equally adopted his affidavit as his evidence. He stated that he was also not informed and/or consulted in respect of the succession cause in respect of his deceased grandfather. Cross-examined by the Petitioner, he reiterated that he was not aware of any plot given to his family.
7. **ANN NJOKI KAMAU (RW1)** adopted her affidavit filed on 12/3/2018 as her evidence. She stated that the Applicants did not try to investigate and/or confirm the existence of the said plot assigned to Wilson Kamau. She contended that with the other administrators she agreed on the mode of distribution but one of them, Joseph Mwangi Kamau also the trustee in respect of the shares due to the children of Peter Muigai Kamau a co-administrator who is now deceased, has instigated the revocation application. It was her contention that Joseph Mwangi Kamau is meanwhile developing his own share of the estate.
8. The court directed the parties to file their written submissions. The Applicants through their counsel submitted that the children of Patrick

Kinuthia Kamau (deceased) a son to the deceased herein, and whose existence was not disclosed in the succession cause, are entitled to a share of the estate through the principle of representation. To support this proposition, counsel relied on the case in **Re estate of Joyce Kanjiru Njiru (deceased) (2017) eKLR** where it was held that children are entitled to inherit the share which their deceased parents would have inherited from their own parents had they not predeceased them. Regarding the alleged Plot at Juja under ballot no. 24 it was asserted to be non-existent there being no evidence of ownership by the deceased. The Applicants also submitted that the value of the estate herein exceeded the pecuniary jurisdiction of the subordinate court. Lastly, that the proceedings to obtain the grant were defective as some of the beneficiaries did not sign the consent. Reliance was placed in **Re Estate of Maora Lolpisia Maisiak (deceased) (2018)**.

9. For her part, the Respondent urged the court to dismiss the summons for revocation as the estate has been administered and beneficiaries have already benefitted from transmissions. It is her contention that the any beneficiaries who were allegedly left out can be accommodated by an amendment of the grant and in any event those complaining of exclusion benefitted from Plot Juja No. 24 whose existence she asserted and other shares under the confirmed grant.

10. The court has considered the evidence adduced by the parties and their submissions. The court has also perused proceedings in Thika CM's Succession Cause No. 260 of 2004. There is no dispute that the deceased herein, **Wilson Kamau Itume** during his lifetime sired six children as follows.

- a) John Itume
- b) Anne Njoki Kamau
- c) Elizabeth Wambui Kamau
- d) Patrick Kinuthia Kamau
- e) Joseph Mwangi Kamau
- f) Peter Muigai Kamau

11. His wife Gladys Wanjiku Kamau appears to have predeceased him. Also predeceasing him were the children in (a); (c); and (d) above. The deceased children were survived by among others Susan Wanjiku Kamau, Wilson Kamau Kinuthia, Faith Wanjiku Kinuthia, Reuben Kamau Wambui and Edward Karanja Kinyua. A son of the deceased, one Peter Muigai Kamau (f above) died after the filing of the cause in the lower court and was survived by several children.

12. The Applicants in this case are Wilson Kamau Kinuthia and Faith Wanjiku Kinuthia (1<sup>st</sup> and 2<sup>nd</sup> Applicants) who, together with Marvin Kamau Mungai are the children of the intestate's son, Patrick Kinuthia Kamau. Wilson Kamau Kinuthia was listed among the persons surviving the deceased and also benefitted from a property described as "plot at Juja No.24". The thrust of the summons for revocation is that the 2<sup>nd</sup> Applicant and the sibling Marvin Kamau Mungai were not disclosed as beneficiaries; that the asset assigned to the 1<sup>st</sup> Applicant was non-existent hence the distribution of assets was not equitable; and that the subordinate court was not clothed with the necessary pecuniary jurisdiction to handle the estate which comprised of several assets.

13. The administrators are Anne Njoki Kamau, appointed together with Joseph Mwangi Kamau, the latter who supported the application for revocation before withdrawing his affidavit. Advisedly so, as the said administrator was a signatory to the entire process leading to the confirmation of the grant in the lower court, before apparently developing a change of heart. Anne Njoki all but admits that the two children of their deceased brother Patrick Kinuthia Kamau (hereafter Patrick) were not enlisted as beneficiaries, but she points out that their brother the 1<sup>st</sup> Applicant was included; that nevertheless a plot No.24 had been allocated to the said family in addition to plot No. 2840 Thika, (Landless) and land parcel LR No.Loc 1/Kigio/331. She asserts that the consent of these children could not be sought as they were minors during the material period. This is not disputed, and in any event, the children of Patrick did not rank equally or higher in priority as envisaged in Rules 7(7) and 26 of the Probate and Administration Rules, as the administrators herein who are children of the deceased.

14. Section 76 of the Law of Succession Act provides for instances when a grant may be revoked. Among the grounds for revocation 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; or that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, whether such allegation was made in ignorance or inadvertently

15. The failure to list all the children of Patrick in the proceedings all the way to the confirmation of the grant offends Section 51 2(g) of the Law of Succession Act which requires an applicant to include information, in cases of total or partial intestacy, of the names of all surviving spouses, children, parents, brothers and sisters of the deceased and of the children of any child of the intestate then deceased. Similarly, for purposes of confirming the grant, the proviso to Section 71(2) states that:

**“Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled, and when confirmed shall specify all such persons and their respective shares.”**

15. The requirement above is repeated in Rule 40(4) of the Probate and Administration Rules. Moreover, Rule 40(8) requires that the consent of all dependants and persons beneficially entitled to be filed at the time of making the application to confirm the grant. In the circumstances, if any of the children of Patrick were adults at the material time, their consent to the confirmation of the grant ought to have been sought. While there is no indication of the age of the children who survived Patrick at the material time, pursuant to the provisions of Section 41 of the Law of Succession Act they were entitled under the principle of representation, to the share of the estate that was due to

their deceased father Patrick.

16. Having looked at the copy of the confirmed grant, the court cannot see any share due to the 2<sup>nd</sup> Applicant herein or Marvin Kamau Mungai. Nor can the omission be rectified through an amendment of the grant as proposed by Anne Njoki Kamau as that would affect shares allotted to other beneficiaries who are not involved in this application. It appears to me that the 1<sup>st</sup> Applicant is unhappy that the plot assigned to him has no documents of title. If indeed the plot does not exist, both Anne Njoki and Joseph Mwangi Kamau are guilty of disinheriting the 1<sup>st</sup> Applicant, and by extension the family of their brother Patrick. And if there was any false statement or concealment of material facts relating to this fact and to the two excluded children of Patrick, both administrators, namely Joseph Mwangi Kamau and Anne Njoki Kamau are equally guilty. This exclusion in my view appears to fall under Section 76(c) of the Law of Succession Act rather than a fraudulent intention as envisaged in subsection (b) of the section.

17. But there is more reason for concern. The deceased's estate was relatively vast, and although only a few properties were declared at the time of the filing of the Petition for grant, the certificate of confirmation of grant issued on 5<sup>th</sup> October 2006 reflects at least 8 landed assets, a few of them within Thika Township. Prior to the amendment of Section 48 of the Law of Succession Act in 2016, the pecuniary jurisdiction of subordinate courts in respect of estates of deceased persons was capped at KShs.100,000/=. Looking at the assets comprising the deceased's estate as at 2006 and even earlier in 2004, it is evident that the subordinate court at Thika was not clothed with the requisite pecuniary jurisdiction to entertain the succession cause in respect of the estate of the deceased herein. In terms of the provisions of Section 76(a) of the Law of Succession Act therefore the proceedings to obtain the grant as filed in the lower court were defective in substance.

18. In the circumstances, the court will allow the application filed on 10<sup>th</sup> December 2015 by revoking the grant issued and confirmed to Anne Njoki Kamau and Joseph Mwangi Kamau. A fresh grant however will issue forthwith in the joint names of Anne Njoki Kamau, Joseph Mwangi Kamau, and two grandchildren of the deceased namely Reuben Kamau Wambui and Wanjiku Muigai. These two grandchildren were randomly selected, because the court did not deem it prudent to appoint the present Applicants who appear aligned to the administrator Joseph Mwangi Kamau, and their appointment could potentially tilt the balance of power in favour of Joseph Mwangi Kamau.

19. In light of the age of this dispute, the court directs further that within 3 months of the issuance of the fresh grant, an application to confirm the grant, be made by any two or all of the administrators. Such summons will include all the assets of the estate and identify all the persons beneficially entitled to the estate of the deceased and indicate the proposed mode of distribution. Such application will be served on all the beneficiaries of the estate who will be at liberty to propose their preferred mode of distribution. The grant issued by order of this court will be liable to being revoked if the administrators fail to move the court as herein directed, within 6 (six) months of this ruling.

20. In the meantime, the court hereby issues an order to prohibit any dealings in the assets listed in the confirmed grant issued and amended in Thika CM's Succession Cause No. 260 of 2004, whether transmission has been effected to beneficiaries or not. Counsel for the Applicants will extract the orders arising from this ruling and serve them on all beneficiaries and persons beneficially entitled within 30 days of this ruling and file an affidavit of service. Parties will bear own costs considering the nature of the dispute.

**DELIVERD AND SIGNED ELECTRONICALLY THIS 7<sup>TH</sup> DAY OF AUGUST 2020**

**C. MEOLI**

**JUDGE**