



**REPUBLIC OF KENYA**

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

**MISC. SUCC. CAUSE NO. 8 'B' OF 2015**

**IN THE MATTER OF THE ESTATE OF THE LATE KAROBOTI NGUMI**

**AURELIA MUTHONI KAGAI.....APPLICANT**

**VERSUS**

**STELLA WANJIRU.....1<sup>ST</sup> RESPONDENT**

**JANET WANGUI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The matter pending before this court is a summons for revocation of grant dated 12<sup>th</sup> March 2015. The Applicant **AURELIA MUTHONI KAGAI** claims that the proceedings to obtain the grant were defective in substance and that the grant was obtained by making false statements and concealment of material facts. It is also alleged that the administrator failed to include all the beneficiaries.

2. In support of the application the applicant swore an affidavit on 12<sup>th</sup> March 2015. She depones that she was the original petitioner in *Kerugoya Principal Magistrate's Civil Case No.32/2002* in which she sought representation for the estate of the deceased and was issued with grant of administration on 19<sup>th</sup> September 2020 and was confirmed on the same date. That the grant was subsequently revoked in *Misc. Succession Cause No.84/2005* by an order dated 6<sup>th</sup> February 2008. Later the grant was issued to the Respondent on 18<sup>th</sup> February 2009 and confirmed on 26<sup>th</sup> March 2008. Her claim is that the Respondent failed to disclose that she was a dependant in the estate. She depones that she is the widow of one Kangangi Ngari alias Kagai Ngumi Ngari who died on 3<sup>rd</sup> December 1994 and is a one of the deceased Karoboti Ngumi. The Respondent Stella Wanjiru filed a replying affidavit sworn on 9<sup>th</sup> June 2015. Her claim is that she is a child of the deceased Karoboti Ngumi. That the Applicant has lied that her husband was son of the deceased whereas she had sworn an affidavit that her husband was a step- brother to Karoboti Ngumi. She depones that the deceased had three wives and eleven children who are his dependants and lawful heirs. That Kagai Ngumi who was the Applicant's husband lived and worked in Mombasa all his life and upon his retire was given shelter in the home of deceased. Upon his death the applicant remarried to one Murithi together with her children. She further depones that the applicant had filed succession claiming to be the wife of Karoboti Ngumi.

3. The Respondent avers that she did not commit fraud nor did she conceal material facts from the court. She prays that the application be dismissed.

4. The matter proceeded by way of oral evidence in court. The parties reiterated the averments in their affidavits. The issue which arises to determination is revocation of grant. The grant which the applicant seeks to revoke was issued to the Respondent after a grant which was issued to the applicant was revoked. The Respondent is a child (daughter) of the deceased. The estate of the deceased comprises of land parcel No. Kabare/Nyangati/555. In her affidavit in support of the summons for revocation of grant, the respondent listed the beneficiaries as Stella Wanjiru Karoboti, Felista Wanjiku Karoboti, Jane Wangui Karoboti and Julieta Kathimu, who are all daughters of the deceased.

They signed a consent on the distribution of the estate of the deceased as follows:

- (a) Stella Wanjiru Karoboti - 4 ½ Acres
- (b) Felista Wanjiku Karoboti - 4 ½ Acres
- (c) Jane Wangui Karoboti - 3 Acres
- (d) Julieta Kathimu - 2 Acres

The grant was confirmed and the estate was distributed as per the consent.

5. The Applicant claims that the Respondent made false statements, concealed material facts and the proceedings were defective. Her contention is that she was not served with the application for confirmation of grant. The Respondent did not disclose her existence. Her claim is that her deceased husband is the son of the deceased and they had eight children. These facts were not disclosed by the Respondent.

6. The issues for determination are:-

- (i) Whether the applicant is a dependant of the estate of the deceased.
- (ii) Revocation of grant

**i. Whether the applicant is a dependant**

In her testimony in court the Applicant testified that the deceased was a brother of her husband. She testified that she was living on the land of the deceased. That they were however chased from the land in the year 2002. Her claim is therefore based on allegation she had lived on the land for a very long time. In cross-examination the applicant stated that she was claiming land because her mother brought up Karoboti. She admitted that her averment in the supporting affidavit that her husband was a son of the deceased is not true. She admitted that her deceased husband used to work in Mombasa and was supporting her and his children. The applicant denied that she remarried. The Applicant admitted that the deceased had a wife and children. She further stated that the land is clan land.

7. In her submissions filed by Nderi & Kiringati Advocates the Applicant submits that the Applicant was a dependant and the property is clan land which is bound by customary law rights. That the registered owner had never tried to evict the applicant in his lifetime. That the applicant could not be wished away unless ordered by the court. It is argued that failure to serve the applicant is sufficient reason to revoke the grant. That the applicant's claim is inter-connected with the subject matter of the estate either as a dependant, trustee or one entitled under adverse possession to warrant the revocation of grant.

8. As for the Respondent she adduced evidence that she did not inform the applicant when she filed succession. She testified that the deceased and Kagai who is the applicant's husband were step -brothers. The land is registered in the name of Karoboti Ngumi. Kagai had lived in Mombasa and when he came, he was given a place to stay, and a piece of land measuring one acre. That the applicant and her family had left the land of deceased even before he died. She told the court that the applicant cannot get a share of the land as it belongs to the children of Karoboti. She testified that when she filed succession, she did not inform the applicant as she is not a child of Karoboti. DW2 further told the court that the applicant left with her lover one Murithi. She testified that the Applicant and deceased had lived in Mombasa.

9. In her submissions filed by her advocate Ms Anne Thungu, she submits that the applicant is not supposed to inherit the estate of the deceased she is not a child of deceased nor was her husband. She relies on **Section 38** of the **Act**. She submits that the applicant did not lay claim that the deceased was a trustee of her husband. That under Kikuyu customs one could not hold land in trust for a step-brother and therefore since Kagai and deceased were not born of the same mother he could not have registered as a trustee. That Kagai never claimed land from the deceased in his lifetime.

10. The Respondent submits that the Applicant was not a dependant as her husband who worked in Mombasa used to support her. The respondent relies on **Section 29 of the Act** and the case of **Beatrice Ciamutua Rugamba -vs- Fredrick Nkari Mutegi & others, Chuka Succession Cause No. 12 of 2016 UR** where the court held that a dependant under **Section 29(b)** and **(c)** must prove he was being maintained by the deceased immediately prior to his demise. It is not mere relationship that matters. The Respondent further submits that the Applicant has peddled lies in court that her husband was a son of deceased while in **Embu Misc Cause No. 84/2015** she deponed that her husband was a step brother of Karoboti. That the applicant is not a forthright person and has not come to court with clean hands. It is submitted that the applicant re-married and went to live with her husband Muriithi at Kimbimbi. The applicant admitted that Karoboti had warned her about bringing the man to reside on the suit land. That the Applicant is not related to the deceased and she has no claim known in law over the estate of the deceased. That she could not claim through her husband as she has no capacity having not obtained letters of administration in his estate. It is further submitted that the applicant did not prove the Respondent prosecuted the cause fraudulently.

11. I have considered the evidence tendered, the averments in the affidavits and the submissions. The **Act at Section 29** defines a dependant. It states:-

***“29 (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;***

***(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and***

***(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”***

The applicant was not a first line dependant who are defined under **Sub-section (a)**. If anything she can only fall under **Sub-section (b)**. A claim under this Sub-section is not automatic. There is a condition precedent which a person has to prove. That is, **“he was being maintained by the deceased prior to his death.”**

The Applicant is excluded as a child of the deceased as she admitted that she was not. The applicant has not proved that she was being maintained by the deceased immediately prior to his death. She admitted that her husband Kagai used to work in Mombasa and was supporting her and their children. This is prove that the applicant and her children were not dependants of the deceased. The applicant and her children were not dependant of the deceased.

12. There is no dispute that the land in dispute Kabare/Nyangati/555 is registered in the name of the deceased. Though the applicant submits that the land is bound by customary law (sic) rights, the applicant has not based her claim on trust. Initially she had filed succession fraudulently claiming to be the wife of the deceased. The grant was revoked and **Justice Khaminwa** in her ruling stated that the applicant had made false statements to court to obtain the grant. In the present application she had deposed in her supporting affidavit that her husband Kangangi Ngari alias Kagai Ngumi Ngari (deceased) is the son of Karoboti Ngumi the deceased herein. This despite the fact that she stated on oath in court that she had sworn that the deceased is her husband being the brother to her husband. The applicant did not plead trust. Even when she testified in court she never alleged that the deceased was registered in trust. The husband of the applicant never claimed land from the deceased. I find that the applicant has not established any customary law claim over the estate of the deceased.

The claim by the applicant is the claim under adverse possession as provided in **Section 13 and 38 of the Limitation of Actions Act** as she was occupying the land for over twenty years. Adverse possession is the process by which a person can acquire a title to someone else's land by continuously occupying it in a way that is consistent with the right of the owner. The prerequisites for a claim of adverse possession are provided in ***Virginia Wanjiku Mwangi v David Mwangi Jotham Kamau [2013] eKLR*** set out the five conditions for adverse possession, they include:-

*a. Open and notorious use of the property*

This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about.

*b. Continuous use of the property*

The adverse party must, for statute of limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned.

*c. Exclusive use of the property*

The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's property, and the owner then uses the barn, the adverse party cannot claim exclusive use.

*d. Actual possession of the property*

The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses.

*e. Non-Permissive, hostile and adverse use of the property.*

The actions of the adverse party must change the state of the land, as by **clearing, mowing, planting, harvesting fruit of the land, logging or cutting timber, mining, fencing, pulling tree stumps, running livestock and constructing buildings** or other improvements.

The adverse party entered or used the land without permission. Renters, hunters or others who enter the land with permission are not hostile. The adverse party motivations may be viewed by the court in several ways: **Objective view**—used without true owner's permission and inconsistent with true owner's rights. **Bad faith** or intentional trespass view—used with the adverse possessor's subjective intent and state of mind. **Good faith** view where the party mistakenly believed that it is his land. The law requires that the adverse party openly claims the land against all possible claims.

The respondents claim that the applicant left the property as she remarried one 'Muriuki'. The applicant in her viva voce states that the deceased warned her against bringing this man to his land. I therefore find that it is true that the applicant was possibly remarried/ cohabiting with this new person, and was not evicted but left. I find that the applicant's claim of adverse possession fails as it fails to meet the five prerequisites.

The Respondent has demonstrated how the applicant came to be on the land. It was with the consent of the deceased. The claim for adverse possession cannot stand as her deceased husband was given a portion to use.

13. The applicant was playing a game of cards by testing which one would win. That is why one time she deposed that the deceased was her husband and later that he was the father of husband. It is only when cornered during cross-examination that she dropped the claims and admitted that the deceased was a step-brother to the deceased. That relationship does not entitle her to inherit the estate of the deceased without prove that she was being maintained by the deceased immediately prior to his death. I find that the applicant, her husband and children were not being maintained by the deceased prior to his death. They were not dependants as the applicant admitted that she and her children depended on her husband for their livelihood, he educated his children and met all her needs. The applicant has failed to prove that she is dependant of the deceased as defined under **Section 29 of the Act**.

14. The applicant is a child of the deceased and therefore a beneficiary. **Section 38 of the Act** provides-

**“ 38. Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.”**

The Respondent obtained a grant of letters of administration and the grant was confirmed. The estate was distributed by consent to all the surviving children of the deceased. The respondent complied with the law to the letter.

I find that the applicant did not prove that she was a dependant. I find that the Respondent was not under any obligation to inform the applicant when she filed succession or to involve her in the succession proceedings. The upshot is that the applicant has not proved that the respondent concealed material facts from the court when she obtained the grant of letters of administration. The applicant did not prove that the proceedings to obtain the grant were defective in substance.

15. Revocation of grant.

The grounds for revocation of grant are set out under **Section 76 of the Law of Succession Act** include;

- “ (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.”*

*In **Jamleck Maina Njoroge vs Mary Wanjiru Mwangi [2015] Eklr-*** The court stated; The circumstances that can lead to the revocation of grant have been set out in **Section 76 Law of Succession**. For a grant to be revoked either on the application of an interested party or on the court’s own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.

The applicant lied that her husband was a son of the deceased when filing this application. She had filed succession behind the back of the family using lies that deceased was her husband. She displayed herself as liar who cannot be trusted. The Respondent gave evidence that the applicant had lived in Mombasa with her husband and children and they only came to live on the land after her husband was old and had nowhere to build. The respondent also adduced evidence that the applicant re-married and cohabited with one Murithi. I have no reason not to believe the respondent. The applicant has failed to prove that the respondent concealed material facts or that she has a legitimate claim to the estate of the deceased. She has failed to demonstrate any of the grounds set out under **Section 76 of the Act**. In the end I find that the application for revocation of grant has no merits. I dismiss it with costs.

Signed by:

**HON LADY JUSTICE LUCY GITARI**

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Dated, signed and delivered at Kerugoya by; HON. JUSTICE this 12<sup>th</sup> day of November 2020.