



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 108 OF 2009

IN THE MATTER OF THE ESTATE OF THE LATE KAMAU KINGORA

MARGARET KAMAU WANJIRU.....1ST APPLICANT

ALICE NYAMBURA KAMAU.....2ND APPLICANT

VERSUS

ESTHER NUNGA KAMAU.....1ST RESPONDENT

KING'ORA KAMAU.....2ND RESPONDENT

RULING

The applicants filed a summons for the revocation of a grant dated 14th February 2018. The summons seeks the revocation of a grant dated 13th July 2009. The application is supported by the applicants' affidavits sworn on 14th February 2018.

The application is set out on the grounds that the grant was obtained fraudulently by making of a false statement or by concealment from the Court that the deceased had two more daughters namely Kamau Margaret Wanjiru and Kamau Alice Nyambura. Further, that the grant was obtained by means of an untrue allegation that the deceased had only five children.

APPLICANT'S CASE

The applicants submit that the respondents herein conspired to conceal material information from this court and thereby obtained the said certificate of grant fraudulently. The respondents went to the extent of perjuring themselves under oath in their conspiracy to defraud the applicants. The following facts have been conceded by all parties herein.

Prior to the deceased marrying the 1st respondent he was married to Jecinter Wanjiru Kamau in 1988 under Kikuyu Customary law. The marriage was blessed with three issues, the 2nd respondent and the applicants herein. However, the deceased and Jecinter parted ways whereby the deceased took custody of the 2nd respondent while the applicants were left in custody of their mother.

After the said separation the deceased settled with the 1st respondent and took with him into the new union, the 2nd respondent. Applicants would visit their father and brother in the new home with the 1st respondent. At all material times, the respondents knew of the applicants and their status of being biological daughters of the deceased.

At the time of the death of the deceased the applicants were minors. The respondents took advantage of this fact and conspired to disinherit them by concealing their existence. They moved to the area Chief's office at Lembus Mosop Location and obtained a letter dated 10th July 2008 that falsely claimed that the only dependants of the deceased were the ones listed in the said letter. They entrenched this falsification further by lodging for summons of letters of administration and subsequently a confirmation thereof with the said erroneous and falsified information.

The respondents were not remorseful about their perjury. Vide her affidavit dated 11th February 2019, the 1st respondent controverted under paragraph 2, the deceased's first marriage to Jecinter Wanjiru. She asserted that the deceased had only one child out of wedlock, the 2nd respondent. Even though the affidavit was withdrawn the averments are critical in demonstrating the respondents' conduct of bad faith, ill motive and insincerity.

In a total about turn to their previous assertions the 1st respondent recedes from her previous position in her affidavit sworn on 26th October 2020 and concedes under paragraph 4,5 and 6 of her knowledge of the previous marriage between the deceased and Jecinter Wanjiru and that both the 2nd respondent and applicants are biological issues of the said previous marriage.

The two positions cannot be reconciled with the truth. They demonstrate clearly that the respondents intentionally lied to the court but also misled the court with a view to perpetuate fraud against the applicants.

The applicants are dependants within the meaning of *Section 29(a)* of the *Law of Succession Act* and are entitled to the deceased estate as a matter of right. Further, pursuant to *Section 35* as read together with *Section 40* of the *Act*, the applicants are entitled to an equal share as the respondents and the beneficiaries listed under the impugned certificate of grant.

The applicants refers to *Section 76* of the *Law of Succession Act* and the case of **Re Estate of Joseph Kilonzo Musyoka (Deceased) [2018] eKLR** on revocation of grant. Where a certificate of grant has been obtained through concealment of material facts courts have held that such concealment renders the process of acquisition of the grant defective. The applicant cites the case of **Ibrahim v Hassan & Charles Kimenyi Macharia, Interested Party [2019] eKLR** in support of their submission on revocation.

In the present matter, a differential treatment on the account of gender seems to have informed the exclusion of the applicants from the estate of their late father. The courts have frowned against discrimination of women in matters of succession. He cites the case of **In Re Estate of Mbui Mutari – Deceased [2017] eKLR** in support of this submission.

The respondents are guilty of concealment of material facts, non-disclosure, and giving false information that renders the process of taking out the impugned grant untenable in law. A certificate of grant obtained through such a process cannot be allowed to stand. The grant is suitable for revocation.

In terms of *Section 76* of the *Law of Succession Act*, the applicants have met the legal threshold for the revocation of the certificate of grant dated 13th July 2009. On the issue of laches, a plain reading of *Section 76* of the *Law of Succession Act* does not limit the time within which a grant may be revoked. Further, this Court will take Judicial notice of the fact that by the time of the death of their late father and lodging of the Petition of letters of administration, the applicants were still minors. The applicant cited the case of **Re Estate of Joseph Kilonzo Musyoka (deceased)(supra)** the grant was revoked 18 years after it had been confirmed. There is no justification why the certificate of grant that is merely a decade old should not be revoked.

There is no evidence of the claims that the properties have been appropriated as claimed by the 1st respondent. The respondents admitted in Court that the said properties are still intact and the Court issued conservatory orders against disposal of the same.

If there is any evidence that the same had been disposed of, the 1st respondent having obtained the certificate of grant fraudulently could not have passed a good title. They cited the case of **Ibrahim vs Hassan & Charles Kimenyi Macharia, Interested Party (supra)** on this submission.

The applicants have sufficiently demonstrated that they are deserving of the orders sought in the summons for revocation of grant.

1st RESPONDENT'S CASE

The Respondent submits that the applicants are total strangers to the 1st respondent. The applicants have never lived with the deceased and have never been dependants. They have never visited the deceased and never participated in any family gatherings or occasions. The 1st Respondent did not conceal any material facts by leaving out the names of the applicants because she does not know them.

The Applicants by being total strangers to the 1st Respondent, have the onus of proof that they are indeed daughters of the deceased.

The current application has been brought nearly a decade after the certificate of confirmation of grant was issued on 14th July 2009, not less than 8 years after the applicants had attained the age of majority. The application is statute barred and offends mandatory provision of the law. There is limitation of time within which a claim for dependency can be filed. The Respondent cites *Section 30* of the *Law of Succession Act*. She also cites the case of **In Re Estate of Mambo Ngala also known as Mumbo Ngala Chitu (Deceased) [2020]** where the Court had dismissed summons for revocation of grant as it had been filed four years later and was statute barred by dint of *Section 30* of the *Law of Succession Act*. She also cited the case of **In Re Estate of Ndui Kibau (Deceased) [2020] eKLR.**

The Applicant cites *Section 29* of the *Law of Succession Act* and submits that the Applicants have not proved dependency and fulfilled other requirements for the Court to make an order in relation to the issue of dependency.

The Respondent submits that the application has failed to meet the legal requirements to warrant revocation of grant under section 76. The application is devoid of merit.

ISSUES FOR DETERMINATION

- a. Whether the application is time barred
- b. Whether there was concealment of material information

c. Whether the grant should be revoked

WHETHER THE APPLICATION IS TIME BARRED

The 1st Respondent cited *Section 30* of the *Law of Succession Act* and claims that this summons is time barred by dint of the provisions of the said section. *Section 30* of the *Law of Succession Act* provides;

No application under this Part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by section 71.

This Section applies to applications for reasonable provision in the grant. It does not bar the application for revocation in any way, but bars an application for reasonable provision from the estate after confirmation of grant. The application is therefore not time barred.

WHETHER THERE WAS CONCEALMENT OF MATERIAL INFORMATION

The applicants' contention is that the respondents concealed that the applicants were children of the deceased.

The applicants refer to the respondents' further affidavit dated 26th October 2020, however I find that the same is not on record.

The court of appeal in the case of *Matheka and Another vs Matheka [2005] 2 KLR 455* laid down the following guiding principles.

"i. A grant may be revoked either by application by an interested party or by the Court on its own motion.

ii. Even when revocation is by the court upon its 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 the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate."

In order for the Court to determine that there has been concealment of material facts there must be evidence adduced to prove the same.

If indeed the affidavit dated 26th October 2020 contains an acknowledgment of the 1st and 2nd respondent as issues, it would amount to material information that was previously concealed. However, as per now the only presence of such affidavit is contained in the reference to the same by the applicant.

The other evidence of dependency are the birth certificates of the applicants and the affidavit of 10/7/2009 which shows the 1st applicant as a dependant of the deceased.

Section 29 of the *Law of Succession* defines a dependant for purposes of provision as follows:

"For the purposes of this Part, "dependant" means—

(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 affidavit sworn by the 1st Respondent in support of summons for confirmation of grant, dated 10/7/2009, shows in paragraph 5 that Margaret Wanjiru was a survivor/beneficiary. Margaret Wanjiru is the first Applicant. It is evident that the 2nd Applicant, Alice Nyambura Kamau was left out. The Respondents are not therefore honest in denial that they were not aware of existence of the two Applicants who are sisters to the 2nd Respondent. They were disinherited because they were minors and girls, of which is against the Law. Their birth certificates show clearly their father is Simeon Kamau Kingora, the deceased herein.

Under *Section 29* of the *Law of Succession Act*, them being Children of the deceased are dependants whether or not they were maintained by the deceased immediately prior to his death.

I therefore find that the grant was obtained by concealment from the Court of a material fact that the 2nd Applicant, Alice Nyambura Kamau was a child of the deceased, and therefore a beneficiary of his Estate. The grant made on 13/7/2009 is therefore, hereby revoked.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 22nd day of December, 2020.

In the presence of:-

Mr. Kipkurui for the Respondent

Mr. Keter for the 1st and 2nd Applicants

Gladys - Court Assistant