



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NUMBER 142 OF 2007

IN THE MATTER OF THE ESTATE OF WANJA KAMITHI (DECEASED)

CAVENDISH MACHARIA KAMITHI.....APPLICANT

VERSUS

JOYCE WAMBUI THUO.....RESPONDENT

RULING

1. This ruling is in respect of the summons dated 28/2/2011. Vide that summons, Cavendish Macharia Kamithi (the applicant) seeks orders;

1. THAT the grant of letters of administrations and the certificate of confirmation of grant issued to JOYCE WAMBUI THUO by the Hon. Court on 1/8/2007 and 11/02/2011 be respectively revoked.

2. THAT this honourable court be pleased to include the applicant's name as a co-administrator with the petitioner herein.

3. THAT the cost of this application be provided for.

2. The application is premised on four (4) grounds as seen on the face thereof namely;

a) THAT the petitioner JOYCE WAMBUI THUO obtained the Grant letters of administration secretly and concealed the correct information regarding this succession cause from the applicant and the court.

b) THAT the petitioner left the applicant and the applicant is the beneficiary in the estate of the deceased.

c) THAT the petitioner forged the signature of the applicant herein and purported that he has signed the consent forms in this cause.

d) THAT the petitioner herein filed this cause in bad faith with intention of denying the applicant his right of inheritance.

and is further supported by the applicant's affidavit sworn on 28/2/2011.

3. In a nutshell, the applicant's case is that Joyce Wambui Thuo (the respondent) obtained a grant of letters of administration secretly and concealed the correct information regarding the succession cause from the applicant and the court.

4. It is averred that the applicant is a beneficiary in the estate of the deceased herein and the signature of the applicant on the consent form was a forgery. The applicant was been denied his right to inheritance.

5. The applicant denies that he ever consented to the mode of distribution of land parcel number Bahati/Bahati Block 1/874 (the deceased's estate). The respondent and one Charity Wanjiku are widows of the applicant's brothers Githaiga Kamithi and Kariuki Kamithi respectively and they shared out the property equally leaving the applicant without a share.

6. The application is opposed and Charity Wanjiku with authority of Joyce Wambui Thuo has sworn and filed a replying affidavit.

7. It is the respondent's case that the petition was filed with the applicant's knowledge, he however refused to sign the consent or any other document relevant to the petition. It is denied that the applicant's signature was forged and it is urged that the applicant is not entitled to land Bahati/Bahati Block 1/874 as this land had been allocated to Githaiga Kamithi and Kariuki Kamithi during their lifetime and the two had occupied their respective portions until their demise.

8. In another affidavit sworn by Joyce Wambui Thuo, she depones at paragraph 6 that the applicant signed all the documents of consent and mode of distribution. The allegation of forgery is not true unless the applicant deliberately signed differently, so that he could later on claim his signature was forged.

9. In a further affidavit in answer to the two (2) affidavits, the applicant denies signing the consent. He asserts that if the land was given to the brothers, it ought to have been registered in their names. He highlights the contradictions in the replying affidavits with Charity Wanjiku stating in paragraph 5, 6 and 7 of her affidavit that the applicant did not sign the consent and Joyce Wambui Thuo stating at paragraph 7 of her affidavit that the applicant signed the consent.

10. Mwangi Kabiru Kamithi has sworn an affidavit supporting the respondent's case. He avers that land Bahati/Bahati Block 1/874 was left by the deceased to his (Mwangi's) brothers. The applicant who is also a brother was given land at Location 20 Kabirwa.

11. The applicant denies this in a further affidavit and avers that the Kabirwa land was never in the deceased's names.

12. In yet another affidavit (with leave of court) the applicant states that the deceased left the following beneficiaries;

(a) Esther Wanjiru Kamithi (deceased)

(b) Mwangi Kabiru Kamithi

(c) Dedan Kariuki Kamithi (deceased)

(d) Cavendish Macharia Kamithi

(e) Patrick Githaiga Kamithi (deceased)

13. He avers that Esther Wanjiru Kamithi (deceased) and Mwangi Kabiru Kamithi were allocated land by the deceased as a gift *inter vivos* in Njoro and Molo respectively.

14. Dedan Kariuki Kamithi (deceased) and Patrick Githaiga Kamithi (deceased) and the applicant did not get any gift *inter vivos* from the deceased. Land parcel number Bahati/Bahati Block 1/874 was allocated to the three (3) to share equally.

15. The petitioner and Charity Wanjiku discreetly filed the petition taking advantage of the applicant who resides in Murang'a,

16. He avers that he owns land parcel number Murang'a/Kambirwa/945 which he bought sometime in 1974 from Miri Kahungura. He annexes a copy of green card. He denies knowledge of the owner of land parcel number Murang'a/Kambirwa 362.

17. The parties canvassed the application through written submissions. Suffice to note that the applicant has filed various versions of the submissions some even in Kiswahili language and others completely unintelligible. I attribute this to the fact that he is acting in person and is limited in knowledge in so far as the legal requirements for submissions are concerned. Nevertheless, the court has, despite the noted difficulties, has been able to appreciate his representations and his case.

18. The question for determination is whether the applicant has achieved the threshold for revocation of a grant as clearly set out under **Section 76** of the **Law of Succession Act**.

Section 76 of the **Law of Succession Act** provides;

"76. 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 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.”

19. There is no dispute that the applicant is a son to the deceased in this matter. Neither is there a dispute that the petitioner and Charity Wanjiku are wives of the late brothers of the applicant.

20. To that extent, therefore, the legal expectation would be that the applicant had every right to participate in the filing of the petition and the administration of the estate.

21. In the **form 38** of the **probate and administration forms** on record (*the consent to the making of a grant of administration intestate to a person of equal or lesser priority*), the applicant is shown as having signed that consent.

22. The applicant denies this and avers that he was not aware of the filing of the petition. He asserts that the same was filed secretly.

23. In answer to the applicant’s denial, the petitioner and Charity Wanjiku have sworn two (2) contradictory affidavits. Charity Wanjiku asserts in her affidavit that the applicant refused to sign the consent or any other document relevant to the petition.

24. The petitioner (Joyce Wambui Thuo) in her affidavit and in a strange twist depones at paragraph 6 that the applicant signed all the documents of consent and mode of distribution and the allegation of forgery is not true.

25. These are material contradictions which go to the root of the petition herein. They give credence to the applicant’s averments that he was not notified of the filing of the petition. By indicating in **form 38** that the applicant signed the consent to the making of the grant and in view of the glaring contradictions set out above, the logical deduction is that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant.

26. There is also the concealment of the fact that the applicant had not consented to the making of the grant.

27. It is also clear that the applicant did not sign the consent to the confirmation of grant and this is readily seen in the summons for confirmation of grant. From the record of court of 11/2/2011, it is apparent that this fact was not brought to the attention of the court. The confirmation of the grant was thus based on material non-disclosure.

28. The petitioner in the instant cause did not rank higher than the applicant in priority in seeking a grant of letters of administration intestate and was required before the making of the grant to furnish this court with information to satisfy the court that the applicant being a child of the deceased had renounced his right generally to apply for letters of administration or had consented to the making of the grant to the petitioner or that the applicant had been issued with a citation calling upon him to either renounce such right or to apply for a grant.

29. The petitioner therefore acted contrary to the mandatory provisions of **rule 7(7)** of the **Probate and Administration Rules**. The grant thus is one for revocation for non-disclosure (see **In the matter of the estate of Teresia Auma (deceased) 2016 eKLR**).

30. From the foregoing, and without going into the merits or demerits of whether the applicant is entitled to a share of land parcel Bahati/Bahati Block 1/874, I come to the inevitable conclusion that the applicant has achieved the threshold for revocation of grant within the meaning of **Section 76** of the **Law of Succession Act**.

31. I accordingly allow the summons for revocation of grant in terms of prayer 1 thereof and make the following orders;

1. **The grant of letters of administration made to Joyce Wambui Thuo on 1/8/2007 is hereby revoked.**
2. **A grant of letters of administration do issue forthwith jointly to the applicant and Joyce Wambui Thuo.**
3. **A summons for confirmation of the said grant be lodged in court within the next 45 days.**
4. **Each party to bear its own costs.**

Dated and Delivered at Nakuru this 29th day of January, 2019.

A. K. NDUNG’U

JUDGE