



**REPUBLIC OF KENYA**

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

**SUCCESSION NO. 102 OF 2013**

**IN THE MATTER OF THE ESTATE OF KATHARI KATHITU ..... (DCD)**

**MARGARET NJERI PERMINUS.....APPLICANT**

**V E R S U S**

**FRANCIS IRUNGU WANGECHI .....RESPONDENT**

**JUDGMENT**

1. This matter relates to the estate of Kathari Kathitu (deceased) who died intestate. A grant of Letters of Administration were issued to Francis Irungu Wangechi and confirmed on 14/3/2008. The estate of the deceased comprised in land parcel No. Mwerua/Kibiriri/266 was ordered to be distributed as follows:-

- **Francis Irungu Wangechi – 2 Acres.**
- **Damaris Wanjira Kathari - 3 ½ Acres.**
- **Francis Irungu Wangechi & Muthee Wangechi – 3 ½ Acres.**

This is shown to have been in succession Cause No. 40/1993 S.R.M's Court Kerugoya.

2. There seem to be another grant confirmed on 13/8/1996 and issued to Gladys Muthoni E. Njeke showing the distribution of the estate as follows:-

- i) **Margaret Njeri Perminus - 1 Acre.**
- ii) **John Maina Kathiani - 2 Acres.**
- iii) **Peter Kathitu Kathiani – 2 Acres.**
- iv) **Gladys Muthoni Kathiani – 2 Acres to hold in trust for Perminus Muthee & Wambui.**
- v) **Damaris Wanjira Kathiani – 1.9 Acres.**

3. The applicant Margarte Njeri Perminus filed an application dated 07/03/2011 seeking revocation of the said grant. That she was not involved and was denied her share from the estate and the purported order were made in favour of the unlawful beneficiaries leaving out the lawful beneficiaries.

4. That the estate was purchased through contribution of her late husband who was a brother to the deceased. That on 31/07/2006, confirmation of grant of the deceased's estate was issued vide **SRM Succession Cause No.40 of 1993** and she was awarded 1 acre out of the estate. However, on 05/05/2008 another certificate of confirmation was issued omitting and denying the applicant her rightful share. That she has at all material times lived on 1 acre of the estate together with her siblings.

5. The respondent Francis Irungu Wangechi in his response stated that the deceased had two wives Gladys Muthoni Njeke and Damaris Wanjira Kathari who are both deceased. Gladys Muthoni Njeke had only one child Virginia Wangechi Njeke (now deceased) and Damaris Wanjira Kathari had 3 children; Anastacia Wanjiru Kathari, Wangechi Kathari and Wanjohi Kathari (now deceased). That the deceased had a brother Perminus Thigingi (deceased) and the applicant was his wife.

6. That after the deceased died, Gladys Muthoni Njeke instituted **S.R.M Succession Cause No. 40 of 1993** without informing her co-wife. The applicant applied for Confirmation of Grant and Gladys Muthoni Njeke applied for revocation of the said grant which was granted. She proceeded to apply for confirmation but died before the said Confirmation and he was substituted on her behalf. That the title deed of the estate was in the name of the deceased and the same has since been sub-divided and sold.

7. He further depones that Margaret Njeri Perminus applied for Confirmation of Grant secretly. This is the second grant issued on 13/8/1996, annexure FIWI. That Gladys Muthoni was dissatisfied and filed a summons of revocation of grant before High Court Embu Misc Succession Cause No. 135/06. Justice Khaminwa ordered that the grant issued on 13/8/1996 and the distribution be set aside. The Judge further ordered that the Grant issued on 31/7/06 be revoked and set aside and that the application for confirmation of grant be set down for hearing in the presence of all the parties concerned. The order is annexure FIK2.

8. He further depones that the application for confirmation was heard and the distribution of the state was ordered to be as follows:-

- **Damaris Wanjira Kathari - 3 ½ Acres**
- **Francis Irungu Wangechi & Muthee Wangechi - 3 ½ Acres.**
- **Francis Irungu Wangechi - 2 Acres.**

The grant is annexed as FIW 3. This is the grant confirmed on 14/3/2008. He depones that the grant was executed and the land parcel forming the estate of the deceased was subdivided into land parcels Nos. Mwerua/Kabiriri/2377 – 2383. The parcels have since been sold to 3<sup>rd</sup> parties. Mwerua/Kabiriri/2378 has been sub-divided into parcels Nos. 2605-2608. This is supported by annexures FIW-4, Certificate of official search showing the sub-divisions. He depones that since the grant was revoked and another grant issued, the applicant cannot file an application for revocation of the grant. That the applicant being the wife of a brother to the deceased was not a beneficiary and the husband owned land Parcel No. Kiine/rukanga/185 which was sub-divided upon his death and the applicant shared the land with her children, annexure FIW-7-.

9. The court directed that the matter be heard by way of viva voce evidence in court. The applicant adduced evidence that her husband had contributed in the purchase of the land. There was a dispute and her deceased husband was allocated two acres on 21/4/1989. This is what she is claiming from the estate of the deceased.

10. I have considered the application, the evidence tendered and the documentary exhibits. The issue which arises is revocation of grant. **Section 76 of the Law of Succession Act Cap 160 Laws of Kenya** to be referred to as 'The Act' provides:-

***“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;***

***(c) 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.***

It is upon the party seeking revocation of grant who bears the burden to prove the matters pleaded under **Section 76 of the Act**. These are, that the proceedings to obtain the grant were defective in substance, that the grant was obtained fraudulently by making of false statement that the grant was obtained by concealing from the court something material to the case. These constitutes the grounds upon which a grant whether or not confirmed may at anytime be revoked.

11. The applicant has not tendered any evidence to prove that the proceedings were defective or that there was fraud and/or that something material was concealed from the court. **Section 107 of the Evidence Act Cap 80 Laws of Kenya** provides that he who alleges must prove. This burden of proof, it provides:-

***(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he***

*asserts must prove that those facts exist.*

***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

12. The applicant is claiming that her husband was entitled to two acres out of the estate of the deceased. There is no dispute that the deceased was the registered proprietor of the land parcel No. Mwerua/Kibiriri/266. The applicant has stated that they use a portion of the land equal to the size of the court. She is not living on two acres and there are doubts as to whether she is entitled to two acres. Though she said that her husband was allocated two acres, this land was never claimed in the lifetime of the deceased. This raises doubts as to whether her husband was entitled to the two acres.

13. For a person to get a share of the estate, of deceased he/she must prove dependency as provided under section 29 of the Act which provides:-

***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 applicant had no priority in the estate. She had to prove that she was a dependant. She is not claiming as dependant but that the deceased held two acres for her deceased husband. My view is that since her claim is not as dependant, she ought to have filed a suit against the administrator of the estate. This court has no jurisdiction to entertain claims on land. A Succession court is concerned with intestate and testamentary succession and administration of estates of deceased persons.

14. The applicant had filed the succession cause and had obtained a grant annexure FIW. This grant was ordered revoked by Justice Khaminwa sitting at High Court Embu Misc. Succ Cause No. 135/2006. The applicant’s claim in the estate was considered and the Judge found that she had no valid claim in the estate. Thereafter the grant was confirmed and the beneficiaries entitled to the estate got their shares. I find that the claim by the applicant is res judicata as she did not appeal against the decision of Justice Khaminwa. **Section 7 of the Civil Procedure Act** Provides:-

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”***

15. The applicant had obtained a Grant where she was allocated land. Justice Khaminwa set aside the order giving her land and also revoked the grant. So the same claim before this court was litigated before the High Cour and a decision made. This court has no jurisdiction to entertain the claim by the applicant.

16. The evidence tendered has shown that the husband of the applicant owned land parcel No. Kiine/Rukanga/185 which she has distributed to herself and her children. She did not distribute the land to the children of the deceased. She is not destitute. I find that she has no valid claim on the estate of the deceased.

17. The documents which the applicant produced dated 21/4/1987 shows that the deceased had stated that his land belongs to him and only his children can inherit. The clan held that for the welfare of the parties Perminus Thigingi be given two acres. It was purely a land dispute. My view is that the claim falls in the jurisdiction of the Environment and Land Court. The claim by the applicant to the estate of the deceased is res judicata as the applicant did not file an appeal against the Judgment of Justice Khaminwa.

18. The evidence by the respondent shows that the estate of the deceased was distributed to the beneficiaries who have inturn sold to third parties. These third parties were not made parties. A decision to revoke the grant would adversely affect them and so they ought to have been made parties. They have obtained title deeds to the land. Section 93 of the Act provides:-

***“(1) A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.***

***(2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties and legacies of the deceased have not been discharged nor provided for.”***

The third parties bought from the beneficiaries. They were innocent purchasers for value of the deceased’s estate. The provision protects their rights and shield them from losing their titles and interests in the land bought lawfully from the estate of the deceased.

**In Conclusion:-**

Having considered the evidence adduced I find that the applicant has failed to prove any of the grounds provided under **Section 76 of the Act** to warrant this court to revoke the grant.

I order as follows:-

*i) The application lacks merits and is dismissed.*

*ii) I award costs to the respondent.*

**Dated at Kerugoya this 21<sup>st</sup> day of February 2019.**

**L. W. GITARI**

**JUDGE**