



**REPUBLIC OF KENYA**

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

**SUCCESSION CASE NO. 79 OF 2016**

**(FORMERLY NAIROBI SUCC CAUSE 984 OF 2013)**

**IN THE MATTER OF THE ESTATE OF NGUGI NJOROGE ALIAS GEORGE NJOROGE NGUGI (DECEASED)**

**JOSEPH KOORI NGUGI.....APPLICANT**

**VERSUS**

**STEPHEN NDICHU J. MUKIMA.....RESPONDENT**

**R U L I N G**

1. Before me is the Summons for Revocation or Annulment of Grant filed on 24<sup>th</sup> September, 2014 and brought under Section 76 of the Law of Succession and Rule 44(1) of the Probate and Administration Rules. The Applicant sought the following orders: -

**“a. The grant of letters of administration intestate/grant of probate made on 15<sup>th</sup> August, 2013 to STEPHEN NDICHU J. MUKIMA be revoked and/or annulled and all other proceedings and/or orders thereafter be vacated and set aside.**

**b. A declaration do issue that NGUGI NJOROGE alias GEORGE NJOROGE NGUGI(deceased) herein who died on 10<sup>th</sup> April, 2002, died intestate and that his estate be administered as such with the three houses therein each appointing one administrator for purposes of the said administration intestate.**

**c. Pending the hearing and determination of this application, an order of temporary injunction and/or prohibition be issued and/or a preservatory order do issue against the Respondent herein and against any of all the surviving beneficiaries of NGUGI NJOROGE alias GEORGE NJOROGE NGUGI (deceased) through themselves, their servants, advocates, agents and/or representatives from selling off, disposing off, causing to be charged and/or encumbered and/or in any way alienating and/or interfering with all that parcel of land known as KARAI/KARAI/36, NAIVASHA/MARAIGUSHU BLOCK 11/330 (KARAI) and all moveable and immoveable assets belonging to the estate of NGUGI NJOROGE alias GEORGE NJOROGE NGUGI (deceased)”.**

2. The Application is premised on among other grounds that the grant was obtained fraudulently by making of a false statement in particular the presentation of an alleged forged will of the deceased, who was illiterate.

3. **Joseph Koori Ngugi** swore a supporting affidavit to the application. He described himself as a son of the deceased. He deposed that he is aware that his father did not leave a will, that the said deceased was an illiterate person; that the Applicant only learned about this case when it was listed for confirmation of grant and that the Respondent and the deceased's third house are intent on disinherit the other two houses. Further, that only the beneficiaries from the third house attended the confirmation of grant and that the will produced before court was a forgery. The Respondent was said to be an imposter as he is in an amorous relationship with the deceased's third wife.

4. The Respondent in reply swore an affidavit on 14<sup>th</sup> May, 2015. He deposed that the Applicant was aware of the succession cause but chose not to participate. It was his position that the deceased died testate, that as executor, he had commenced administration of the estate and the Applicant's title deed regarding his share was ready for collection. He contended that there was no fraud in obtaining the grant and that distribution of the deceased's estate was done in accordance with the deceased's will. He deposed that that was his duty as an executor. He reiterated that the said will is not a forgery and denied being in a relationship with the **Grace Wambui** the deceased's third wife. He stated that the error in description of the deceased properties' does not invalidate the will. Finally, he denied allegations that the deceased was illiterate.

5. The Applicant filed his further affidavit on 14<sup>th</sup> August, 2018, in reply to the Respondent's replying affidavit. He reiterated that only the beneficiaries from the third house were aware of the proceedings herein and that his late mother **Milka Wanjiru Ngugi** was not aware of the proceedings herein and that his father died intestate. He further stated that his father had in his lifetime attested his documents by way of a

thumbprint and pointing to the alleged misdescription of properties in the impugned will asserted that the deceased could not have made such mistakes. He stated that the confirmed grant was obtained fraudulently.

6. **Moses Njoroge Ngugi** filed his affidavit on 7<sup>th</sup> September, 2018. He deposed that he is the eldest son of the late **Milka Wanjiru** the first wife of the deceased and that the Applicant is his younger brother. He stated that he was aware that his father left a will and appointed the Respondent as the executor thereof and that the Applicant was acting in denial.

7. The Respondent swore yet another affidavit, being the supplementary affidavit filed on 7<sup>th</sup> September, 2018 in reply to the Applicant's further affidavit. He insisted that all the members of the deceased's family were aware that there existed a will by the deceased and later the succession proceedings and that as an executor he has no interest in the estate of the deceased. He stated that the deceased was literate thus able to sign documents. He attached several annexures to that effect.

8. The Summons for Revocation or Annulment of Grant were canvassed by way of viva voce evidence followed by written submissions. Joseph Koori Ngugi testified as PW1. He stated that the Respondent is not known to him. That after his father's death **Grace Wambui** the third wife had an affair with the Respondent and that the proceedings herein were filed without notice to him and other beneficiaries. He stated that the members of the first and the second house had asked him to represent them and the said members confirmed the same in court.

9. Moses Njoroge Ngugi testified as **PW2**. He stated that he is the only child from the second house. He adopted his sworn affidavit. He reiterated that he did not sign any affidavit with Kaburu Miriti Advocates in support of the Respondent. He confirmed that he supports the present application. The Respondent and his counsel did not attend the hearing but subsequently filed submissions.

10. The Applicant submitted that the alleged will is void as it was a work of forgery, together with the signature of the deceased thereon as the deceased was illiterate. It was stated that the properties of the deceased were wrongly described in the said will. According to the Applicant, the will did not meet the requirements set out under Section 11 of the Law of Succession Act. Reliance was placed on the case of **Tyrell vs. Painton and Another (1894)1895)1QB 202, (1891-4) ALL ER** where it was held that the burden of proof lies on the proponent of the will who must satisfy that the will is the last testament of the deceased. Counsel submitted that the Respondent did not attempt to controvert their claim that the alleged will is forged. Counsel further asserted that the proceedings to obtain the said grant were defective in substance as the Respondent did not inform the first and the second houses about the proceedings herein. To support his prayer for revocation, counsel quoted the case of **Samwel Wafula Wasike vs. Hudson Simiyu Wafula (1993) LLR (CAK)** where it was held that a grant obtained without consent of persons with prior right is liable to revocation. Finally, counsel submitted that the Respondent is a busy body who wants to grab and benefit from the deceased's property illegally.

11. The Respondent filed his written submissions through his counsel. It was submitted that the Respondent was appointed as an executor by the deceased himself, the reason why he is not known to some members of the deceased's estate. Counsel contended that all members of the family were notified about the matter of the will of the deceased. Further, that he Applicant was aware of the existence of the proceedings herein but chose to ignore the same.

12. The court has considered the affidavits of the parties, the evidence of the Applicant and submissions by both sides. The summons for revocation was expressed to be brought pursuant to Rule 44(1) of the Probate and Administration Rules which states that:

**“Where any person interested in the estate of the deceased seeks pursuant to Section 76 of the Act to have the grant revoked or annulled, he shall .... Apply to the High Court...”**

13. Thus, the substantive provision governing revocation or annulment of grants Section 76 of the LSA which provides that:

**“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 order or allow; 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”.**

14. The grounds on the face of the summons are inter alia those contained in Section 76 (a) (b) (c) and (e) of the Act. Other grounds are that the deceased herein died intestate and that the will tendered herein is a forgery. There is no dispute that the deceased was a polygamous man and had three wives, the first **Milka Wanjiru Ngugi** being the mother of the Applicant and six other siblings. The said widow died in 2014. The second wife was **Joyce Wanjiru Ngugi**, mother to **Moses Njoroge Ngugi** (we shall call him, Moses Njoroge 'B' for purposes of this ruling) who also supports this application alongside some of the siblings of the Applicant, excluding **Moses Njoroge 'A'** the Applicant's brother. The third and only surviving wife is **Grace Wambui Ngugi** who bore 9 children.

15. The Applicant has maintained on behalf of his siblings, save **Moses Njoroge 'A'** that only the 3<sup>rd</sup> house participated in the institution of the present proceedings and the confirmation of the grant. The executor relies on annexure "SNMI" to his Supplementary affidavit filed on 7<sup>th</sup> September 2018 to shore up his repeated claims that the Applicant and other beneficiaries in the first and second house were aware of the existence of the will since 2003 and that they knew about the institution of these proceedings. There is also an affidavit sworn by one **Moses Njoroge Ngugi 'A'** the brother to the Applicant to that effect. The affidavit was filed on 7<sup>th</sup> September 2018. There is no tangible evidence of one important fact however, namely, that all the beneficiaries who survived the deceased were aware of and participated in these proceedings.

16. It appears that on 16<sup>th</sup> September, 2014, the day the grant of probate was confirmed, only members of the third house namely, **Grace Wambui** (widow), **Moses Njoroge ('C')**, **Esther Wairimu**, **Moses Njunge**, **Simon Mwaura**, **Milka Kabui**, **John Mburu**, **Julius Mugi** and **Peter Nganga** were present before the court. In view of the contention surrounding the will herein, it is doubtful that other beneficiaries would have failed to attend the court had they been aware of the proceedings. Because of the orders I intend to make in this matter, I do not consider it prudent to go into the questions regarding the execution and/or validity of the will deposited into court by the executor. But, suffice to note that there are serious questions raised by the Applicant concerning its execution and validity. These questions could have been tackled before the granting of probate through proceedings to prove the will, had all the houses participated in the proceedings.

17. I note that the parties to the instant application have treated the present proceedings as having been taken for the purpose of proving the will. Indeed, one of the prayers in the summons for revocation seeks a declaration that the deceased died intestate. It would not be proper in the present proceedings, in my opinion to make such a finding. Reviewing all the material that has been placed before me, it is my view that to the extent that only the 3<sup>rd</sup> house was apparently involved in the early stages of this cause, the proceedings were defective for excluding the 1<sup>st</sup> and 2<sup>nd</sup> houses.

18. In the circumstances, the court find it mete and just to revoke the grant of probate and confirmed grant of probate. The court directs that the disputed will be subjected to proof concerning its execution and validity by way of *viva voce* evidence. For this purpose, the executor, beneficiaries and interested parties are directed to file their witness affidavits into court within 45 days of today's date. The matter will be mentioned on 25<sup>th</sup> June, 2019 to give directions as to the date of the probate hearing.

19. While the court is reluctant in the circumstances of this case to grant the prayer for an injunction against the Respondent, it is prudent to ensure that the subject matter of the cause is protected from alienation or dissipation pending the final determination. The court therefore directs that the status quo obtaining as at today's date is to be maintained. The executor Respondent is to serve these orders and directions on all the surviving beneficiaries in the three houses of the deceased within 21 days of this date and to file into court an affidavit of service.

Parties will bear own costs in light of the nature of the dispute.

**DELIVERED AND SIGNED AT KIAMBU THIS 30<sup>TH</sup> DAY OF APRIL 2019**

.....

**C. MEOLI**

**JUDGE**

**In the Presence of:-**

Mr. Kaburu for Respondent

Applicant – Absent

Court Assistant - Kevin