



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 223 OF 2013

IN THE MATTER OF THE ESTATE OF NYAGA MANGA (DECEASED)

GACHONI NJIRU.....1ST APPLICANT

MERCY IKONYI MUGUA.....2ND APPLICANT

VERSUS

GRACE MBITI NJERU.....RESPONDENT

J U D G M E N T

A. Introduction

1. The deceased in this case died on the 19th December, 1984 at Gangara village in Mbeere North of Embu County.
2. The administrator/respondent in these summons filed this cause in her capacity as the daughter in-law according to the documents presented to court. The cause was gazetted on 22/11/2013.
3. In Form P&A.5, the respondent included the following as survivors of the deceased: -
 - a) Gaconi Njiru - Daughter in law
 - b) Patrick Njeru Njeru - Grandson
 - c) Peterson Ileri Njeru - Grandson
 - d) Benard Ngari Njeru - Grandson
 - e) Benson Kariuki Njeru - Grandson
 - f) Janesio Muriuki Njoka - Grandson
 - g) Nancy Ndegi Kibuti - Purchaser
 - h) Stephen Ileri Nyaga - Purchaser
 - i) Njeru Ngandu - Purchaser
4. The letters of administration intestate were issued to the respondent on 6/02/2014. The grant was confirmed on 8/10/2015 in favour of the following as the beneficiaries: -

Grace Mbiti Njeru)

Patrick Njeru Njeru)

Bernard Ngari Njeru) Embu/Gangara/1648 Equal

Peterson Ireri Njeru) Shares

Benson Kariuki Njeru)

Benson Kariuki Njeru) Embu/Gangara/2064 Wholly

Jenesio Muriuki Njeru) Embu/Gangara/2154 Wholly

Gaconi Njeru) Embu/Gangara/2337 Wholly

Patrick Njeru Njeru)

Benard Ngari Njeru) Embu Kithunthiri/1380 Jointly

Peterson Ireri Njeru)

5. In the summons dated 17/09/2018 the applicants sought the following orders: -

a) That the honourable court do cancel the transfer made in favour of the land parcel EMBU/GANGARA/1648 vide the grant made on 8th October 2015.

b) That the grant of letters of administration to GRACE MBITI NJERU made on 8th October 2015, be revoked [or annulled].

B. Applicants' Case

6. The applicants testified that they are the daughters of the deceased and the surviving children. It was their testimony that the respondent was a wife of a member of the deceased's clan. She had no relationship with the deceased, but filed this succession cause and proceeded to distribute the deceased's estate to herself and her children.

7. The applicants further testified that the respondent had not informed them of the filing of the case and neither did she share any part of the deceased property with them save for the 1st applicant who was not involved in the case.

8. PW2 a neighbour testified that the deceased was the father to the applicants and that the respondent was not a blood relative to the deceased. It was his testimony that the respondent invaded the deceased's estate with her children a few years after the passing on of the deceased.

9. PW3 testified that he had been sold L.R. Embu/Gangara/2272 by one Stephen Nyaga Ireri a beneficiary of the deceased's estate, who was working with the respondent in the succession cause. It was much later that PW3 learnt that the land was stolen from the rightful beneficiaries by the respondent and the vendor.

C. Respondent's Case

10. The Respondent testified that She knew the applicants as daughters of the deceased and that the deceased was her late husband's son though not biological.

11. She further testified that she informed the applicants that she was filing the succession cause and only the 2nd applicant was interested to whom she gave LR. Embu/Gangara/2337 as her inheritance.

12. DW2 testified that the respondent's late husband was a brother to the deceased and that the parcels of land subject of this suit were left to the respondent by the deceased for the deceased had bequeathed the parcels of land to the respondent's late husband. She further testified that the 2nd applicant had received a share of the deceased's estate after the respondent filed the succession cause. Finally, she testified that the applicants were not entitled to the deceased's estate as they were married at the time the deceased died.

D. Analysis & Determination

13. This application has two major prayers; revocation of grant and cancellation of the transfer made in favour of the land parcel EMBU/GANGARA/1648 vide the grant made on 8th October 2015.

14. The circumstances in which a grant may be revoked or annulled are set out in **Section 76 of the Law of Succession Act** on the following grounds: -

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.*

15. The issues for determination in this case are the following: -

a) *Whether 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; or*

b) *Whether the applicants are beneficiaries of the deceased's estate.*

c) *Whether any of the parties will be condemned to pay costs.*

16. **Rule 26 (1) & (2) of Probate & Administration Rules** that provides: -

“Letters of administration shall not be granted to any applicant without notice to every other person entitled to the same degree as or in priority to the Applicant.

An application for a grant where the Applicant is entitled in a degree equal to or lower than that of any other person shall in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality and priority, be supported by an affidavit of the Applicant and such other evidence as the Court may require.”

17. It is not in dispute that the applicants are the surviving children of the deceased. The respondent and her witness DW2 admit this fact but argue that the two daughters were married at the time of the deceased's death and as such are not entitled to inherit his property. although DW2 did not disclose in his evidence in chief that he was a beneficiary, he admitted in cross-examination that he inherited LR. Embu/Gangara/2154 wholly in the grant. He too is not a relative of the deceased.

18. The respondent's claim the estate in her capacity as the daughter in law of the deceased. She testified that her late husband one Njeru Mukithi was a son of the deceased but not a biological one. Her witness DW2 said that the respondent's husband was a brother to the deceased. In Form P&A5, she refers to herself as the daughter in law. This evidence is obviously contradictory.

19. The applicants adduced evidence to the effect that the respondent was married to a member of deceased's clan one Njoka Muruatetu. Later, the respondent married one Njeru Mukithi who was not a relative but a clan member of the deceased.

20. The respondent herself said she sired two children with the deceased and were neighbours of the deceased. She further testified that when the deceased died, he left his parcels of land to her husband. After the death of her husband, the respondent took over the deceased's property. She said she cultivates three (30 of the deceased's parcels.

21. It is not in dispute that neither the respondent nor her husband Njeru were blood relatives of the deceased. The respondent as well as the applicants were very clear on that in their testimonies.

22. Section 66 of the Law of Succession Act ranks in priority the persons who should administer the estate of a deceased person as follows: -

i. The surviving spouse or spouses;

ii. Other beneficiaries entitled on intestacy;

iii. The public Trustee; or

iv. Creditors

23. The deceased was survived by two of his children who are entitled to inherit his estate in intestacy. The law recognizes the applicants as heirs of their late father's estate under **Section 38 of the Act** which provides: -

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.

24. In this cause, the deceased was survived by his two children but no spouse and Section 38 is therefore applicable.
25. Section 38 treats all the children of the deceased equally whether married or single. The argument of the respondent that the applicants are not entitled to inherit their late father's property because they are married is not supported by the relevant law.
26. In regard to Section 76 of the Act, I have already stated that the respondent has no right whatsoever to file this succession cause. The applicants were very categorical in their evidence that they were not informed when the cause was filed in 2013 which is seven years ago. It was their evidence that they came to learn of what the respondent had done when she started selling out the land to strangers and filed this application in October 2018.
27. The evidence of PW3 was one of the buyers but developed cold feet when he learnt that the land he was buying did not belong to the seller.
28. Although the first applicant was given a parcel of land in the grant being LR. No. Embu Gangara/2337, there is no evidence that she was consulted or informed at the stage of filing this cause.
29. It is an affront of justice for the Chief of Karambari Location, Mbeere North to take the law in his hands by purporting to share out the estate of the deceased to the respondent and other beneficiaries who have no entitlement. In his letter dated 18/03/2013, he purported to share out six (6) parcels of land to several beneficiaries mostly made of the respondents and her children. The chief has no place in the Succession Act and his role remains restricted to assisting the court in identifying the survivors of the deceased for purpose of filing a succession cause.
30. It is my finding that the applicants have established before this court that the grant issued to the respondent and confirmed on 8/10/2015 was obtained fraudulently by making a false statement that the respondent was a daughter in law of the deceased. The respondent is guilty of non-disclosure in that she did not inform the court that the deceased was survived by his two daughters. Had the court received that information, I am of the considered view that it would not have issued the grant to the respondent.
31. I find that the applicants have proved their case that the grant in this case was obtained fraudulently. Any transmission that may have been done to the fake beneficiaries named in the grant is null and void in law.
32. In effect, I allow the application dated 17/09/2018 in the following terms: -
- a) That the grant issued to the respondent on 27/01/2014 and confirmed on 8/10/2015 is hereby revoked.***
 - b) That the applicants are hereby appointed as the administrators of the deceased's estate.***
 - c) That any registration procured under the grant issued to the respondent are void ab initio and shall be deleted from the register forthwith.***
 - d) That the applicants do file an application for confirmation of grant within 45 days.***
 - e) That there will be no order as to costs in this application.***

33. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF MAY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

2nd applicant

Respondent