



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

SUCCESSION CAUSE NO. 425 OF 2008

IN THE MATTER OF THE ESTATE OF PELITA WANJIRA NJIRU (DECEASED)

ROSELIA WANJIKU.....1ST APPLICANT

PETER KARIUKI.....2ND APPLICANT

SILAS KINYUA NJERU.....3RD APPLICANT

FELISTA WANJA.....4TH APPLICANT

VERSUS

VIRGINIA WARIIMI MUYATHITHIA.....1ST RESPONDENT

NASALENA WEVETI NJIRU.....2ND RESPONDENT

PATRICK IRERI NDWIGA.....3RD RESPONDENT

RULING

A. Introduction

1. This ruling pertains to the application dated 22/10/2009 in which the applicants seek for orders revocation of the grant confirmed on 24/9/2009 in favour of the respondents.
2. It is the applicants' case that being beneficiaries of the deceased, the deceased's estate comprised LR. GATURI/NEMBURE/5106 which has been utilised by the applicants. It was also stated that the 3rd respondent is not a beneficiary of the deceased but a purchaser who was erroneously appointed as an administrator.
3. During the hearing of the case PW1 testified that the 2nd - 4th applicants were grandchildren of the deceased whereas the 1st applicant was a daughter in law to the deceased. PW1 further testified the 3rd respondent was not a grandson as alleged in the form P&A 5 use by the respondents in their petition but a purchaser of the suit property.
4. PW2, the 4th applicant testified that she is the granddaughter of the deceased while the 1st and 2nd respondents were the daughters of the deceased. The 3rd respondent was said to be a purchaser of the suit property. PW2 further testified that the respondents had not consulted her when they applied for the grant. It was her testimony that the deceased had handed over the title deed of the suit property before she died as she took care of her prior to her death.
5. In rejoinder vide a replying affidavit sworn on the 15/02/2010, the respondents deposed that the summons by the applicants was an afterthought as the applicants failed to object to the making of the grant and further that the deceased was their mother and grandmother to the applicants. The 2nd respondent further deposed that the 3rd respondent was a grandchild of the deceased and not a purchaser as alleged by the applicants. It was further deposed on behalf of the respondent that the deceased had died intestate and left the applicants land parcel No. GATURI/ NEMBURE/1289 and the suit land to the respondents. The 1st respondent had since passed away and her children expressed before court that they had no interest over the estate of the deceased.
6. DW1, the 2nd respondent testified that the 2nd - 4th applicants were grandchildren of the deceased as the 1st applicant was married to her deceased brother, son of the deceased. DW1 further testified that his late brother had predeceased the deceased herein.

7. DW1 further testified that she did not inform the applicants about her petition for grant as they were not entitled to inherit from the deceased. However, the 1st applicant had a right to inherit given that she was married to the deceased's son and that the 1st applicant had been given one (1) acre of land at Kavote belonging to the deceased. The 2nd respondent further testified that the 2nd – 4th applicants were only entitled to inherit from their parents and not the deceased.

8. DW2, the 3rd respondent testified that he was not a grandson of the deceased but a purchaser for value of the suit property from the 1st and 2nd respondent. It was his testimony that the court order that he either get the land he had paid for or a refund of the money as he had not used the land since paying for it.

9. The parties filed submission to dispose of the matter.

B. Applicants' Submission

10. The applicants submitted that the 1st applicant who is a sister to the respondents was not consulted during the institution of the succession proceedings and that the claim by the respondents that the 1st applicant had been given land at Kavote was unsubstantiated.

11. The applicants further submitted that the grant herein was obtained by making a false statement specifically that the 3rd respondent was a grandson to the deceased and or by the concealment from the court of something material to the case and the same ought to be revoked.

C. Respondents' Submissions

12. The respondents' submitted that at various stages they had called the applicants to discuss the succession proceedings but the applicants had been unresponsive. Consequently, the respondents submitted that the court share the suit property and GATURI/NEMBURE/1289 equally among 3 houses i.e. the 1st respondent's beneficiaries, the 2nd respondents and the 1st applicant and that ½ share to the 3rd respondent

D. Analysis & Determination

13. The status of the parties before me is undisputed. The 1st and 2nd respondents are daughters of the deceased herein. The 1st applicant is a daughter in law to the deceased and the 2nd - 4th applicants are the deceased's grandchildren.

14. The question therefore is whether the 2nd – 4th applicants were dependants of the deceased immediately prior to the demise of the deceased. The 4th applicant maintains that she took care of the deceased prior to her death and she used her own finances to take care of her hence the deceased gave her the title deed to the suit property. In counter, it is the respondents' case that the applicants being grandchildren are not entitled to inherit from the deceased's estate.

15. The submission that a grandchild can only access the estate of his/her grandparent after the demise of the child's parents is backed by the decision of this Court (W. Musyoka, J) in the matter of **In Re Estate of John Musambayi Katumanga – (Deceased) [2014] eKLR** where it was stated that:

“ 36. The available literature appears to place her under Mary Musambayi. I suspect that she is a daughter of the said heir, and therefore a granddaughter of the deceased. She is described in one of the papers as a dependent of the deceased. The said Laura Mesitsa is not entitled to a share in the estate of the deceased. There are two reasons for this. She is not an heir of the deceased, for grandchildren are not entitled to inherit from their grandparents so long as their own parents, the children of the deceased, are alive and themselves taking a share in the estate. Secondly, she is not a dependant of the estate. She did not apply, as she should have, for provision under Section 26 of the Act, and there is no court order making her a dependant of the deceased. Under Section 29 of the Act, a grandchild can be a dependent of her grandparent, but for her to qualify as such she must demonstrate to the court in an application properly brought under Section 26 of the Act that she was dependent on the grandparent immediately before his death.”

16. The applicants alleged that the respondents obtained the grant by making a false statement specifically that the 3rd respondent was a grandson to the deceased and further that the respondents did not involve any of them in the succession proceedings.

17. The issue which arise is the revocation of grant. **Section 76 of the Law of Succession Act** makes provision of factors which may lead to the revocation of grant. The section 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;

(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.

18. For the grant to be revoked, the party must prove that the proceedings were defective in substance, were obtained fraudulently or through concealment from court of something material to the case or by means of making untrue allegation of fact which essential in point of law justifying the making of grant.

19. The respondents in this case misled the court by citing the 3rd respondent as the deceased's grandson. The 2nd respondent repeated this blatant lie in her replying affidavit dated 15/02/2010. Further, the respondent have now introduced LR. No. GATURI/NEMBURE/1289 as being part of the deceased's estate whereas the same was not disclosed during the proceedings in pursuit for grant. Failure to disclose to court matters which were material to the making grant is sufficient ground for this court to order the grant to be revoked. The conduct of the respondent shows that she deliberately concealed from the court something material to the case and by means of untrue allegation of a fact essential in point of law to justify the grant.

20. Turning to the status of the 3rd respondent, it is noteworthy that the courts have said time and again that any person who without the authority of the Law of Succession Act or any other written law or grant of representation, takes possession or disposes of, or otherwise intermeddle with the free property of the deceased is guilty of a criminal offence and is answerable to the rightful executor or administrator of the extent of the assets he has intermeddled with.

21. The applicants allege that the 1st and 2nd respondents sold the suit property to the 3rd respondent. The respondents alleged that they included the 3rd respondent to settle a debt they incurred from the 3rd respondent. The 3rd respondent alleged that he paid value for money for the suit property. That notwithstanding, this grant is yet to be confirmed and as such the restriction on distribution of estate's capital or immovable properties under **Section 55 and 82(b) (ii) of the Law of Succession Act** applies.

22. Accordingly, there is nobody yet with authority to sell the estate property herein to any person. Accordingly, the sale to or acquisition of the immovable property of the estate by the 1st and 2nd respondents to the 3rd respondent is completely in violation of the law, and therefore null and void. See **GLADYS NKIROTE M'ITUNGA v. JULIUS MAJAU M'ITUNGA [2016] eKLR** that held;

“Whereas the law of succession does not define what intermeddling with the property of the deceased is, there is ample judicial decisions on acts which may amount to intermeddling. For instances, in the case of BENSON MUTUMAMURIUNGI vs. C.E.O. KENYA POLICE SACCO & ANOTHER [2016] eKLR the court observed that:

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”

23. The above analysis leads me to the conclusion that the grant was obtained fraudulently and upon non-disclosure of facts material to the proceedings. I find that the applicants have satisfied the requirements of Section 76 of the Law of Succession Act.

24. The application dated 22/10/2009 is hereby allowed in the following terms: -

a) That the certificate of confirmation of the grant confirmed on 24/09/2009 is hereby revoked.

b) That any transmission under the said grant specifically in regard to LR. No. Gaturi/Nembure/5106 to the 3rd respondent is hereby nullified and to revert to the name of the deceased.

c) That a fresh grant do hereby issue to Nasalina Weveti Njiru the 2nd respondent and to Felista Wanja the 4th applicant jointly.

d) That the administrators or any of them to file an application for confirmation of grant including all the assets of the deceased within sixty (60) days.

e) That each party to meet their own costs of this application.

25. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF JULY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muriithi for R. Njeru for Applicants

2nd Respondent present