



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 245 OF 2015**

**IN THE MATTER OF THE ESTATE OF JOSEPH KARIUKI NYAMU (DCD)**

**V E R S U S**

**WALTER NYAMU KARIUKI.....PETITIONER**

**JUDGMENT**

1. This is a very old matter which has seen better days in the corridors of justice since 1999 when a citation to accept or refuse letters of administration was filed on 15/1/1999 by Walter Nyamu Kariuki as Succession Cause No. 50 of 1999. The matter relates to the Estate of Joseph Kariuki Nyamu, deceased who died intestate on 29/8/1985.

2. A petition for Letters of Administration intestate was filed by Raphael Muriithi Nyamu and Walter Muriithi Nyamu in the estate of Joseph Kariuki Nyamu alias Joseph Kariuki.

3. In the affidavit in support of petition for Letter of Administration Form P & A 5, the following were listed as the persons surviving the deceased:-

- a) Perisia Mukubi Kariuki – Wife
- b) Charity Ruguru Kariuki – Wife
- c) Raphael Muriithi Nyamu – Son
- d) Beatrice W. Kariuki – Daughter
- e) Josephine M. Kathuri – Daughter
- f) Buttex Naftaly Gutu – Son
- g) Walter Nyamu Kariuki – Son
- h) Jacinta Nyawira Kariuki – Daughter
- i) Samson Njogu Kariuki - son
- j) George Ndigwa J. Kariuki – Son
- k) Marion B. Wanjiku Kariuki – Daughter
- l) Michael Broad Gutu – Son
- m) Jane Muthoni Rugano – Daughter
- n) Samuel Mburia Kariuki – Son
- o) Sophia Gatitu Rugano – Daughter

- p) Sarah Wanjiru Rugano – Daughter
- q) Wilson Muturu Kariuki – Son
- r) Mary Njeri Rugano – Daughter
- s) Leah B. Wanjiku Rugano – Daughter
- t) Victor B. Mwai Kariuki – Son

4. The full inventory of all the assets were listed at Para six as follows:-

- a) Ngariama/Ngiriambu/1116
- b) Ngariama/Ngiriambu/1118
- c) Ngariama/Ngiriambu/1120
- d) Ngariama/Ngiriambu/1122
- e) Ngariama/Ngiriambu/1124
- f) Ngariama/Ngiriambu/1126
- g) Ngariama/Ngiriambu/1128
- h) Ngariama/Ngiriambu/1130
- i) Ngariama/Ngiriambu/1132
- j) Ngariama/Ngiriambu/1134
- k) Ngariama/Ngiriambu/1117
- l) Ngariama/Ngiriambu/1119
- m) Ngariama/Ngiriambu/1121
- n) Ngariama/Ngiriambu/1123
- o) Ngariama/Ngiriambu/1125
- p) Ngariama/Ngiriambu/1127
- q) Ngariama/Ngiriambu/1129
- r) Ngariama/Ngiriambu/1131
- s) Ngariama/Ngiriambu/1133
- t) Ngariama/Ngiriambu/1135

There were no liabilities listed.

5. Victor Mwai Kariuki and Charity Ruguru entered appearance upon being served with citation to accept or reject letter of administration. They filed on objection to the making of the grant based on the ground that their consent and all the family members was not sought and obtained. It is also alleged that Raphael Nyamu Kariuki colluded with Perisa Mukuli Kariuki and applied for a Limited grant and lured Charity Ruguru Kariuki into signing documents who purpose and significance he did not know. That Raphael Nyamu Kariuki had applied for Letters of Administration secretly and named as the only administrator. That Raphael Muriithi Kariuki obtained a grant which was confirmed on 7/4/1989 and he has failed to account for the dealings in the estate.

6. The objectors listed their interests as follows:-

- a) Ngariama/Ngiriambu/1116

- b) Ngariama/Ngiriambu/1118
- c) Ngariama/Ngiriambu/1120
- d) Ngariama/Ngiriambu/1122
- e) Ngariama/Ngiriambu/1124
- f) Ngariama/Ngiriambu/1126
- g) Ngariama/Ngiriambu/1128
- h) Ngariama/Ngiriambu/1130
- i) Ngariama/Ngiriambu/1132
- j) Ngariama/Ngiriambu/1134
- k) Ngariama/Ngiriambu/1117
- l) Ngariama/Ngiriambu/1119
- m) Ngariama/Ngiriambu/1121
- n) Ngariama/Ngiriambu/1123
- o) Ngariama/Ngiriambu/1125
- p) Ngariama/Ngiriambu/1127
- q) Ngariama/Ngiriambu/1129
- r) Ngariama/Ngiriambu/1131
- s) Ngariama/Ngiriambu/1133
- t) Ngariama/Ngiriambu/1135
- v) Ngariama/Ngiriambu/672
- w) Ngariama/Ngiriambu/878
- x) Ngariama/Ngiriambu/927
- y) Gichugu Settlement Scheme/103
- z) Plot No. 51 Makutano Market
- Aa) Embu Township Plot No. 41.
- Ab) HFCK Account Number MK 8251
- Ac) Kirinyaga District Co-operative Account Number [xxxx]
- Ad) Postbank No. [xxxx]
- Ac) Kenya Commercial Bank Account No. [xxxx]
- 110 – [xxxx]
- 110 – [xxxx]
- 100 – [xxxx]

Ad) Fixed Deposit Receipt No. [xxxx]

Ag) Barclays Bank Account Nos. [xxxx]

7. By a consent dated 28/5/1999 Letters of Administration were issued to Raphael Nyamu, Walter Kariuki and Victor Mwai jointly. It was also agreed that the petitioners and the respondents do file a comprehensive report on the distribution of the estate and the identities of share of each beneficiary within (90) days together with full inventory of assets, accounts and liabilities.

8. A grant of Letters of Administration was issued to Raphael Muriithi Nyamu, Walter Nyamu Kariuki and Victor Mwai Kariithi on 30/11/1999 and later confirmed on 17/11/2000. The estate was distributed as follows:-

- a) Raphael Muriithi Nyamu - Ngariama/Ngiriambu/927
- b) Walter Nyamu Kariuki -Ngariama/Ngiriambu/878
- c) Buttex Naftari Gutu - Ngariama/Ngiriambu/1012 Equal shares
- d) Samuel Njogu Kariuki - Ngariama/Ngiriambu/672
- e) Michael Broad Gutu - Ngariama/Ngiriambu
- i) George N. J. Kariuki - Gichugu/Settlement/Scheme/103 - 3 Acres.
- ii) Samuel Kariuki “ “ “ “ - 3 Acres.
- iii) Wilson Muturi Kariuki “ “ “ “ - 3 Acres.
- iv) Victor Mwai Kariuki “ “ “ “ - 3 Acres
- v) Walter Nyamu Kariuki Gichugu/Settlement/Scheme/103 To be jointly registered over
- vi) Raphael Muriithi Nyamu “ “ “ “ One acre covering the
- vii)Victor Mwai Kariuki “ “ “ “ homestead and 0.25 acres

covering the common burial site.

viii) Victor Mwai Kariuki - Inoi/Thaita/515 - Whole.

- **Mukarara shop** - To be sold with immediate effect and proceeds applied for administration process.

**FAMILY ASSET** - Njuki-ini shop & Embu Town Shop - To be transferred to Nyamu Kariuki Estate Ltd.

- B.A.T Kenya Ltd - A/C NO. [xxxx] - To be registered under the name of

- E. A. Breweries - A/C NO. [xxxx] Nyamu Kariuki Estate Ltd and all money to be

-H. F. C. K. Savings -A/C NO. [xxxx] banked in the Company Account.

- Nairobi Shop

- Kutus Shop To be registered under Nyamu Kariuki Estate Ltd.

- Kerugoya Shop

**FAMILY ACCOUNTS**- Post Office Bank Embu – [xxxx]

- Barclays Bank Embu A/c No. [xxxx]

- National & Grindrays Bank A/C No. [xxxx]

- K.C.B. Embu A/C No. [xxxx]

- K.C.B Embu A/C No. [xxxx]

To be registered under the

Name of Nyamu Kariuki Estate Ltd.

- K.C.B. Kerugoya A/C No. [xxxx]

Fixed A/C No. [xxxx], [xxxx].

- Kenya Farmers (KGGCU) A/C No. [xxxx].

Branch 46 Bank 386

- Housing Finance Savings A/C No. [xxxx]

9. What is now pending before this court is an application dated 25/10/2018 seeking an order of revocation or annulment of grant filed by Sofia Gatitu Machamba, Marion Wanjiru Kariuki, Jane Muthoni Rugano. The application is based on the following grounds:-

a) 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 and more specifically that the dependants of the estate of the late JOSEPH KARIUKI NYAMU more specifically one of the wives to the late Joseph Kariuki Nyamu namely Charity Ruguru Kariuki and children namely Sophia Gatitu Machamba, Marion Wanjiku Kariuki and Jane Muthoni Rugano had not consented to the proposed administrators and or the mode of distribution of the said estate.

b) That we as beneficiaries have not consented to the distribution of the estate as presented by the administrators in particular allocation of a substantial part of the Estate of Nyamu Kariuki Estate Limited which Company we are strangers to.

c) That we have had several family meetings upto including the month of September 2018 as regards the distribution of the Estate of our late father Joseph Kariuki Nyamu and an agreement is yet to be reached by the beneficiaries s to the mode of distribution.

d) That the grant was obtained by means of an untrue allegation of a fact essential on point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

10. The application is supported by the affidavit if Sophia Gatitu Machamba. She depones that she is the daughter of the deceased. That the grant was issued to persons of lesser priority and without the consent of other beneficiaries of the estate. That the grant was obtained fraudulently, by making of a false statement or by concealment from court of something material to the case.

11. That they had not consented to the distribution as presented by the administrators in particular and not limited to the allocation of a substantial part of the estate to Nyamu Kariuki Estate to Nyamu Kariuki Estate Limited a Company to which they are strangers.

12. The Petitioner, Walter Nyamu Kariuki opposed the application and filed a replying affidavit sworn on 21/11/18. He depones that the applicants have always been present in the family meetings and were also agreeable to the mode of distribution and the confirmed grant shows they were well considered. That the applicants enjoys the fruits of the properties of the deceased herein as per the requirement of the Law of Succession Act. That the applicant conforms that they have attended family meetings. That one of the administrators, Victor Mwai Kariuki was appointed by the applicant for their own interests in the succession cause. He further depones that the deceased had three wives and each house was represented as there were three administrators. He depones that the summons has not disclosed grounds for revocation of grant which are provided under Section 76 of the Law of Succession Act.

13. The parties agreed to proceed by way of written submissions. The counsel for the applicant filed submissions. The respondent did not file submissions.

14. The applicant submits that under **Rule 40(4) of the Probate and Administration Rules** the applicant shall satisfy the court the identification and shares of persons beneficiary entitled to the estate have been ascertained and determined. It is submitted the proposed mode of distribution must be consented to by all the beneficiaries. He relies on **Rosemary Njeru Njamura –v- Samuel Kimani Njamura & 4 Others (2017) eKLR**. The applicants contend that they have not consented to the mode of distribution of the estate by the Administrators and allocation of a substantial part of the estate to Nyamu Kariuki Estate Limited. That no citation was issued to the applicants in the absence of their consent as required under the Law in the absence of their consent.

15. The applicant relies on **Section 76 of the Law of Succession Act**. They also rely on **Nyaga Cottelengo Francis –v- Pius Mwaniki Karani (2017) eKLR and Matheka & Another –v- Matheka (2005)1 E.A 251**.

16. That the court should find the grant a nullity due to an illegality of misleading this court and thus fraud. The applicant relies on Succession Cause No. 32 of 2014 in the matter of the Estate of Doto Owino deceased between **Milka Anyango Otieno & Another –v- Kennedy Otieno Odeny 2014 eKLR** where it was stated that the identities of the beneficiaries and their interest in the estate are material facts and once it is established that their interests were concealed the grant of representation issued is flawed. They submit that the applicants shall suffer an injustice who had not consented to the proposed administrators and the mode of distribution of the estate.

17. I have considered the applications, the averments in the affidavits and the submissions. The issue which arises for determination is revocation of grant. The law on revocation of grant is under **Section 76 of the Law of Succession Act** ( to be referred to as the Act).

***“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;”***

The rules also gives the procedure on the application for revocation of grant. **Rule 44(1) of the Probate and Administration Rules** provides:-

***“(1) Where any person interested in the estate of the deceased seeks pursuant to the provisions of section 76 of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that resident magistrate’s registry.”***

18. These provisions provide the ground and facts upon which the grant maybe revoked. The grant may be revoked on an application by a party or by the court on its own motion. In either situation there must be evidence and not mere allegations that:-

a) The proceeding to obtain the grant were defective in substance.

b) The grant was obtained fraudulently by making of a false statement or by concealment of something material to the case.

c) The grant was obtained by means of untrue allegations of facts essential on a point of law.

d) That the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration.

19. These are the circumstances that can lead to the revocation of grant. For the grant to be revoked by the court there must be evidence that the proceedings to obtain the grant were defective in substance or that the grant was obtained fraudulently by making of a false statement or by concealment of something material to the case. Where the applicant proves one or a combination of these grounds, the court will order revocation of grant. These was also stated in the cases cited by the applicant above.

20. The applicants have stated that their consent was not obtained by the administrator and more so that of the wife Charity Ruguru Kariuki.

21. Where the consent of a party is not obtained, it may be construed that the party may have acted fraudulently, however this must be considered together with the actions of the administrator thereafter, the administrators proceeds to distribute the estate to the persons entitled and the beneficiaries are satisfied, failure to obtain the consent does not affect the grant as there is nothing to prove that by failing to obtain the consent he had an ill motive. Failure to obtain consent of all the beneficiaries is not one of the grounds under **Section 76 of the Act**. Where the distribution by the administrator is in line with the provisions of the Act, failure to obtain the consent becomes a procedural technicality which should not affect the grant. What the court will consider is whether justice has been done to all the parties. This should be the concern of the court as the **Constitution at Article 159(2)(d) on Judicial Authority** provides:-

***“In exercising Judicial Authority the Courts and tribunals shall be guided by the following principles – justice shall be administered without undue regard to procedural technicalities.”***

22. The case cited by the applicant **Rose Mary Njeri Njamura –v- Samuel Kimani Njamura, Supra**. The facts are distinguishable but the Court confirmed that the revocation of grant is under **Section 76 of the Act**.

**Rule 40(4) of the Probate & Administration Rules** provides:-

***“where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons beneficiary entitled to the estate have been ascertained and determined”.***

The Act further provides **Under Section 71(1)** of as follows:-

***“(1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.”***

23. The record shows that a consent was entered on 28/5/1999 appointing the administrators. The administrators were ordered to file a comprehensive report on distribution of the estate and the identified share of each beneficiary. An application for confirmation of the grant was filed and grant was confirmed. An application for rectification of grant was filed and the grant was rectified to include other properties of the deceased which were also distributed. No consent of the beneficiaries was attached. However the averment by the respondent that the three administrators represented the three houses of the deceased and that there were family meetings where the applicants attended and were agreeable to the mode of distribution has not been denied. Indeed the applicant has confirmed at Para – 8- of her supporting affidavit have deponed that they had had several family meetings. My view is that the families were represented and the three representative of each family consented to the mode of distribution.

24. From the confirmed grant, the applicants were catered for as they were given shares of the estate. This was way back. This was way back in the year 2000 and they have therefore enjoyed the fruits of the estate for the last Nineteen years. Had there been any fraudulent dealing or that their interests were not considered. They would have come to court expeditiously. Though under **Section 76 of the Act** there is no limitation in filing the application, the court will decline to order revocation unless for very good reason.

There is limitation under **Section 30 of the Act** which provides:-

***“No application under this Part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by section 71.”***

25. The applicant are not claiming that no provision was made for them. There is no allegation that some beneficiaries were left out or that there were no provisions made for them. The identities of the beneficiaries and their interests are paramount facts in a succession cause. As such these are material facts and were beneficiaries and their interests are concealed the court will not hesitate to annul the grant. This however is not a fact alleged by the applicants.

26. The applicant has alleged that some properties were registered under Nyamu Kariuki Estate Limited. This appear to be in the name of the deceased. If it is for the deceased’s estate the applicants who are beneficiaries are entitled just like any other beneficiaries unless the contrary is proved. The applicant’s have not discharged the burden to prove that the said Nyamu Kariuki Estate Limited is a stranger to the estate.

27. The administrators can be called to account for the assets and liabilities without necessarily calling for revocation or annulment of grant. **Section 83 of the Act** provides for the duties of personal representatives, **Section 83(h)** provides:-

***“Personal representatives shall have the following duties-***

***to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;”***

28. From Form P & A5 there are a total of Twenty (20) beneficiaries. Only four of them have applied for revocation of the grant. There is no evidence that they have been served. An order for revocation of grant would affect them adversely without giving them an opportunity to be heard. **Rule 44 (5) of the Probate and Administration Rules** requires service on person to be affected by the grant.

**Section 29 of the Act** defines dependants and it 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.”***

Distribution of an intestate who was polygamous is as provided under **Section 40 of the Act**.

It provides:-

***“ (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.***

***(2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in sections 35 to 38.”***

There is no dispute on the list of dependant and there is no dispute on the mode of distribution.

29. It would be a violation of the rules of natural justice to revoke the grant when the majority who are contented with the mode of distribution have not been given an opportunity to be heard.

30. The applicants have faulted the substitution of Raphael Muriithi Nyamu by Buttex Naftaly Gutu. It is not clear how this falls under **Section 76 of the Act**. It is also noted that Charity Ruguru the 4<sup>th</sup> applicant had filed an objection with Victor Mwai dated 28/1/1999. Subsequently, Victor Mwai consented to be one of the administrators. The two were represented by Kariuki Muigua & Co Advocates who is the same Advocate who signed the consent to after the consent was signed the said Victor Mwai abandoned the objection. The averment by the applicant at Para-6- of the supporting affidavit cannot possibly be true as Charity Ruguru was aware of the proceedings.

31. The applicant has not supported with any facts that the grant was obtained by means of untrue of allegation. Further more at para 10 of the Supporting Affidavit the applicant depones that the grant ought to be reviewed and set aside. She fails to disclose the grounds for revocation of grant.

32. A perusal of the record shows that there are pending applications for rectification of grant to add some properties which were not included. Though this may not be done in an application for rectification, but review, this means there will be an opportunity for the application to raise issues on distribution.

33. I find that having considered the application, and the record, the applicant has not been proved that the grant was obtained fraudulently or through concealment of material facts. Fraud is a serious allegation which ought to be proved with particulars. This has not been done. There is no prove that some beneficiaries were left out or provision was not made for some of them. The majority of the beneficiaries are contented with the grant. I find that the applicant has not proved, the grounds set out under **Section 76 of the Law of Succession Act** to warrant this court to set it aside. The application lacks merits and is dismissed with costs.

**Dated at Kerugoya this 24<sup>th</sup> day of July 2019.**

**L. W. GITARI**

**JUDGE**