



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 1676 OF 2013

IN THE MATTER OF THE ESTATE OF GRACE GACIKU

GACHERU ALIAS GRACE GACHIKU GACHERU – (DECEASED)

JOYCE NGOMBI THIONG'O.....APPLICANT

VERSUS

PAUL CHEGE GACHERU.....RESPONDENT

RULING

1. The Application coming for consideration is the summons for Revocation dated 21.9.2018 seeking the following orders:

i. THAT the matter be certified as urgent.

ii. THAT service of this application be dispensed with and the same be heard exparte in the first instance.

iii. THAT Grant of Letters of Administration and Certificate of Confirmation of Grant issued to the Respondent on 10th June, 2014 be revoked and annulled.

iv. THAT a Preservatory Order be issued in relation to the Deceased's Parcel of land Number GITHUNGURI/GITHUNGURI/1207 pending the hearing and determination of this Application and/or until further Orders of this Honorable Court.

v. THAT in the alternative, an order be issued restraining the Respondent from transferring, disposing and/or doing any other acts of waste on the said parcel of Land Number GITHUNGURI/GITHUNGURI/1207 until the hearing and final determination of this Application and/or until further orders of this Honorable Court.

vi. THAT the Chairman, Land Control Board, Githunguri be restrained from issuing Consent Form for Sub Division and Transfer of the aforesaid Land Number GITHUNGURI/GITHUNGURI/1207 pending the outcome of this matter.

vii. THAT the Land Registrar Kiambu be restrained from making any entries and/or registering any applications or dealings by the Respondent or his Agents on the aforesaid LAND No.GITHUNGURI/GITHUNGURI/1207 before this matter is heard and determined.

2. The Summons is supported by the Affidavit of Applicant of even date in which she had deposed that she is a daughter in-law of the deceased and that the Respondent who is the sole administrator of the estate of the deceased secretly filed the Petition without involving her on the other lawful beneficiaries of the deceased with an intention of disinheriting or dispossessing them of their rightful shares of the estate.

3. The Application also stated in the said Affidavit that the Respondent who has obtained the letters of administration and certificate of confirmation is in the process of seeking consent to subdivide and transfer land parcel no. GITHUNGURI/GITHUNGURI/1207 (hereafter referred to as the suit property)

4. It is further stated that prior to the demise of the deceased, she curved out a share for HANNAH NJOKI KABUA who is a married

daughter and yet the Respondent has included her as a heir of the Estate of the Deceased.

5. The Applicant stated that she has been disinherited and dispossessed by the Respondent as evidenced by the Certificate of Confirmation dated 10.6.2014 in the distribution of the estate of the deceased without any colour of right or lawful justification

6. The Respondent filed a Replying affidavit dated 28.9.2019 to the Application for annulment in which he deposed that the Applicant in the Application dated 21.9.2018 is a stranger to the Petitioner and not a beneficiary of the Estate of the deceased.

7. The Respondent said the other daughters in- law were recognized and given a share in the estate but the applicant is not known to the Respondent as to the other beneficiaries.

8. The Respondent stated that the applicant who purports to be the wife of one Mungai Gacheru (deceased) is an impostor as she did not even attend the funeral of the deceased and she is not a wife of MUNGAI GACHERU (Deceased)

9. The Respondent also stated that the Applicant did not take care of MUNGAI GACHERU (Deceased) and she did not feature in his funeral program which is annexed to the Replying Affidavit.

10. The Parties filed written Submissions in the Summons dated 21.9.2018. The Applicant filed submissions dated 30.10.2019 while the Respondent's Submissions are dated 31.10.2019.

11. The issues for determination in the application dated 21.9.2018 are as follows:

i. Whether the Applicant is a beneficiary of the Estate of the deceased.

ii. Whether the grant of Letters of Administration herein was fraudulently obtained.

iii. Whether the grant of letters of administration and the Certificate of Confirmation should be revoked.

iv. Who pays the costs for the Application.

12. On the issue as to whether the Applicant is a beneficiary of the Estate of the deceased, I find that the Applicant describes herself as a daughter in- law of the deceased.

13. It is trite law that he who alleges a fact is duty bound to prove the fact.

14. Section 107 of evidence Act succinctly states:

“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.

And **Section 108** of Evidence Act, further states thus:

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

15. In the case of **Dave .vs. Business machine Ltd [1974] E.A.**, of where the Court held:

“Now if an appearance had been entered and the defence filed and if only failure on the Defendant's part had been failure to appear, either personally or through his advocate on the day the suit was called on for hearing, then I think the plaintiff ought to have been called upon formally to prove his claim, that is to say, to prove everything the burden of proof of which, on the pleadings, lay on him in order to establish his claim.”

16. I find that this issue requires ventilation by way of evidence and the same cannot be determined by Written Submissions.

17. I accordingly direct that the Application dated 21.9.2018 be canvassed by way of viva voce evidence.

18. The determination of the other issues will await the oral hearing of this case.

19. The Applicant is accordingly directed to file and serve Witness statements within 14 days of this date.

20. Thereafter the Respondent will also file and serve witness statements within 14 days.

21. The matter will be mentioned on 16.12.2019 for compliance and for hearing date.

22. The interim orders are extended pending the hearing and determination of this suit.

DELIVERED, SIGNED AND DATED IN OPEN COURT THIS 22ND DAY OF NOVEMBER, 2019

ASENATHONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.