



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

SUCCESSION CASE NO. 26 OF 2016

**IN THE MATTER OF THE ESTATE OF NYAMBURA MWENDA ALIAS LILIAN NYAMBURA
(DECEASED)**

PETER MWANGI MUIGAI.....APPLICANT

VERSUS

JOSEPH NGANGA MUIGAI.....1ST RESPONDENT

JULIA MUTHONI KAMAU.....2ND RESPONDENT

RAKELI WANJIKU RIUNGE.....3RD RESPONDENT

JOYCE WAMBUI GITAU.....4TH RESPONDENT

R U L I N G

1. Before me is the Further Amended Summons seeking revocation of grant, filed on 25th May, 2016, and brought under Section 76(a) and (b) of the Law of Succession Act and Rules 44 and 73 of the Probate and Administration Rules. The prayers in the summons seek orders that :-

a) the confirmed grant issued herein on 15th day of April, 2013 to **Julia Muthoni Kamau** be revoked or annulled.

b) the registration of **Joseph Ng'ang'a Muigai** as the proprietor of land parcel no. **Loc 16/Ndunyu Chege/414** be cancelled and the property be registered in the name of **Joseph Hongo Gacia**.

2. Although no affidavit appears to be attached to the above application, the amended application filed earlier had been supported by the affidavit of **Peter Mwangi Muigai**, the Applicant, who is a grandson to the deceased herein . He deposed that the 2nd and 3rd and 4th Respondents who are daughters of the deceased had jointly with the 1st Respondent, another grandson to the deceased, colluded amongst themselves and filed Thika Succession Cause no. 99 of 2012 without the knowledge of the other family members.

3. He contended that the 1st Respondent, **Joseph Nganga Muigai** had benefitted from the succession cause and inherited the sole asset of the estate, and in furtherance of the collusion, intended to dispose of it and to share the proceeds with his co-Respondents. He deposed that the grant had been obtained

fraudulently by concealment of material facts as to the existence of other beneficiaries.

4. **Julia Muthoni Kamau**, the Administrator and 2nd Respondent filed a replying affidavit in opposition to this application. She deposed that she was the Petitioner in Thika Succession Cause number 99 of 2012, with the consent of her sisters **Rakeli Wanjiku Riunge** and **Joyce Wambui Gitau**; that the three sisters were the only children surviving the deceased; that the 1st Respondent **Joseph Ng'ang'a Muigai**, is a son to **Mwangi Mwenda** a son to the deceased who predeceased her, while the Applicant was a son to another one of the intestate's son, one **Muigai Mwenda**, who also predeceased her.

5. She further contended that the said **Muigai Mwenda** was settled in Njoro-Rare by their father, using proceeds from the sale of the share of land in Murang'a that was due to the 1st Respondent's father, and that in execution of the deceased's wishes, the daughters to the deceased agreed that the sole estate asset devolves upon the 1st Respondent

6. On 27th January, 2017, the Applicant filed a further affidavit, wherein he stated that the deceased had six children including his deceased father but that only three survived her; that land parcel number **Loc.16/Ndunyu Chege/414** had been given to his mother's family as her dowry by the deceased, and that although the transfer was never effected, the property did not form part of the estate of the deceased; and that the said parcel of land was fraudulently given to his brother (cousin) **Joseph Ng'ang'a Muigai** exclusively, and without notice to other family members, through the impugned succession proceedings.

7. The Further Amended Summons for Revocation of Grant was heard by way of oral arguments. Miss Wachanga, arguing on behalf of the Applicant that the Applicant being the deceased's grandson has *locus standi* in the matter on behalf of his father's estate. Relying on the Applicant's supporting affidavit and further affidavit, she submitted the impugned grant wrongly included a property that had been given away as dowry, thus not part of the deceased's estate.

8. That **Joseph Hongo Gacia**, the Applicant's maternal uncle was the rightful owner of the said property as it had been given to him by his family. She contended that the grant was confirmed pursuant to the fraudulent concealment of these material facts. Further that, both the 1st Respondent and Applicant as grandsons of the deceased were entitled to shares in the property if available for distribution. Counsel stated that the Applicant had no personal interest in the suit property which should in his view be given to his maternal uncle.

9. Mr. Kamiro, submitted on behalf of the Respondents that the deceased was survived by only three daughters as both her sons are deceased. He argued that the Applicant is a son to **Muigai Mwenda** who was settled by his parents in Njoro where the Applicant is also settled. Further, that upon confirmation of the grant, the only asset of the deceased, land parcel number **Loc. 16/Ndunyu Chege/414** devolved upon **Joseph Ng'ang'a Muigai**. Noting that the Applicant disclaimed personal interest in the estate asset, Counsel asserted that in any event, a first registration cannot be defeated by mere allegations of dowry payment.

10. In a quick rejoinder, Miss Wachanga, restated that the parcel of land herein was given as dowry in 1960 and contended that **Joseph Hongo Gacia** had since been in peaceful occupation thereof. That the Applicant's only interest is that the ownership of the disputed parcel of land remains in his mother's family. She emphasized that the grant ought to be revoked because key beneficiaries were excluded in the distribution of the estate.

11. The court has considered the material canvassed in respect of the application for revocation of grant. The Further Amended Summons for revocation filed on 25th May 2016 is expressed to be premised on Section 76(a) and (b) of the Law of succession Act and Rules 44 and 73 of the Probation Rules, and purports to be supported by the annexed affidavit of **Peter Mwangi Muigai**. However, no such affidavit is annexed. Thus, the court surmised that the affidavit in support is the one filed on 27th January 2015 and the Further affidavit.

12. Two grounds raised in the said affidavit material are that:

a) that the sole asset of the estate herein namely **Loc 16/Ndunyu Chege/414** was not part of the free assets in the estate of the deceased, having been given away by the deceased as a dowry payment to the family of the Applicant's mother, **Florence Wathithi Muigai**, and that the Applicants' maternal uncle, **Joseph Hongo Gacia** as the son surviving the Applicant's maternal grandfather, is the person properly entitled to the suit property

b) that the Applicant's family was not involved in the succession cause in respect of the deceased, filed by her three surviving daughters, namely, **Julia Muthoni Kamau, Rakeli Wanjiku Riunge** and **Joyce Wambui Gitau**.

11. There is no dispute that the Applicant is a grandson to the deceased by virtue of his being a child of the intestate's deceased son **Muigai Mwenda**. The latter is deceased and seemingly pre-deceased the deceased herein. It is not in dispute that the 1st Respondent **Joseph Ng'ang'a Muigai** is also a grandson of the deceased, on account of being a child of the intestate's son **Mwangi Mwenda** who also pre-deceased the deceased herein. And that the 2nd to 4th Respondents are the surviving children of the deceased herein. That upon the intestate's demise, the said children of the intestate applied for and obtained a grant which was subsequently confirmed, and that the sole asset of the estate devolved upon **Joseph Nganga Muigai**.

12. There is further no dispute that at the time of filing of the succession cause, the suit land was registered in the name of the deceased herein, but was subsequently transferred in 2014 to the 1st Respondent, pursuant to the confirmed grant. (see the copy of search in the Petition filed in the lower court and the copy of search annexed as "**PMM2**" to the Applicant's first application filed on 2nd July 2014).

13. Section 108 of the Evidence Act provides that:

"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".

14. Of the alleged disposition of the suit property by the deceased as a dowry payment to the Applicant's maternal family, the Applicant did not adduce any evidence. The alleged maternal uncle **Joseph Gacia** did not file any affidavit either. The Applicant made no attempt to establish this ground at all. According to the copy of search in the Petition filed in the lower court, the suit property was registered in the name of the deceased at the time of her death. That title cannot be defeated by flimsy and unsubstantiated allegations of disposition thereof. The court finds that the suit land was the free property of the deceased at the time of her death, as envisaged in section 3 of the Law of Succession Act.

15. On the second issue, Section 76 of the Law of Succession Act provides that a grant may be revoked or annulled if the court determines that the proceedings to obtain the grant were defective in substance. Or that the grant was obtained fraudulently by the making of a false statement, or concealment from the court, of material facts or where the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant. The Applicant complains that the 2nd Respondent and her two sisters who filed the cause in the lower court, did not involve the Applicant's family in the proceedings.

16. According to the introduction letter by the Chief Kihingo location, dated 21st December 2011, and filed with the Petition the deceased was survived by:

- a) Julia Muthoni Kamau - daughter
- b) Rakeli Wanjiku Riunge - daughter
- c) Joyce Wambui Gitau - daughter

d) Joseph Nganga Muigai - grandson

17. These are also the beneficiaries listed in the Affidavit in Support of Petition for Letters of Administration Intestate (Form P.A. 5) in the Petition. The relevant consent was also given by the said parties. From the Applicant's material, it is not clear as to whether his father **Muigai Mwenda** was alive in 2011 when the cause was filed. However, the Replying affidavit of **Julia Muthoni Kamau** indicates that the said Petitioner and her sisters were the only children surviving the deceased at the time of her death. Pursuant to Section 51(1) (g) of the Law of Succession Act, the Petitioners ought to have included the names of the children of the intestate's deceased children who pre-deceased her. In this case only one of them, the 1st Respondent herein was named.

18. Thus, whereas the Petitioner and her sisters herein stood higher in priority than the Applicant and the 1st Respondent by dint of Section 66 of the Law of Succession Act in applying for the grant, they were under a duty to disclose the existence of the children of the deceased children of the intestate who had pre-deceased her. From their affidavit, it seems the said Respondents believed, albeit mistakenly, that the wishes of the deceased and undisputed settlement of certain property in favour of the father of the Applicant during the life time of the deceased, obviated such inclusion.

19. That the Applicant herein having severally confirmed that he has no personal interest in the sole asset of the deceased's estate appears to confirm the latter statement. Indeed, by his affidavits and through oral submissions the said Applicant stated that he desired only that the suit property be granted to his maternal uncle, asserting that he himself had no interest therein. The uncontroverted depositions at paragraphs 4 and 5 of the Replying affidavit are to the effect that the 1st Respondent's father had died in 1952 and that the deceased and or her husband had sold a parcel of land in Murang'a that had been earmarked for the said son in order to settle the 1st Applicant's father in the Njoro area, where the said intestate's son settled.

20. Apparently to compensate for this, the deceased's alleged wish was that the 1st Respondent as the son of her deceased son **Mwangi Mwenda** should benefit from the sole asset of her estate. These depositions were not controverted, but in any event the onus of proof of his case lay with the Applicant.

21. The Applicant herein appeared to suggest that in addition to himself, there are other grandchildren or beneficiaries of the deceased herein who were not involved in the succession cause. These persons are not before the court. The Applicant neither named these supposed beneficiaries nor explained why he did not enjoin them in his application. Moreover, the claim that the asset herein was not part of the deceased's property at death was already found to be unproven, and therefore the Applicant's pleas on behalf of his maternal uncle have no basis whatsoever.

22. The sole purpose and object of succession proceedings is the administration and succession of estates of deceased persons, principally culminating with the distribution of such estates. The Applicant having disclaimed any personal interest in the sole asset of the estate herein, the revocation of the grant as sought herein would therefore be an order in vain and an exercise in futility.

23. It seemed to me that the Applicant was probably motivated by cynical or other ulterior motives in making this application. It is telling that in his initial application for revocation filed on 2nd July, 2014 the same Applicant had deposed in the Supporting affidavit that the suit property was occupied by members of the family of the deceased herein, (not Joseph Gacia) and did not at all refer to the dowry allegations introduced subsequently. In the circumstances of this case, I cannot find any merit in the application for revocation as presented, and will dismiss it. In view of the nature of the dispute, each party will bear its own costs.

24. As the suit property is located in Murang'a which falls within the jurisdiction of the High Court of Kenya at Murang'a, I direct that this cause be transferred to that Court for any further action.

DELIVERED AND SIGNED AT KIAMBU THIS 21ST DAY OF NOVEMBER 2019.

C. MEOLI

JUDGE

In the presence of:

Miss Kimani holding brief for Mr. Waihanga for Applicant

Respondents – In person

Court Clerk - Kevin