



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

SUCCESSION CAUSE NO. 4 OF 2018

IN THE MATTER OF THE ESTATE OF JEDIEL NJERU PETER (DECEASED)

BETH GICUKU PETER.....APPLICANT

VERSUS

CECILY WANJIRU KARIUKI.....1ST RESPONDENT

PETER NJAGI NJERU.....2ND RESPONDENT

J U D G M E N T

A. Introduction

1. This is the application dated 13/01/2015 seeking for revocation of grant issued to the respondents on 13/08/2010 and confirmed on 31/05/2014.
2. The applicant states that she is the mother of one Kaburachi Peter whom she claims died in 1964 and left land LR. Kyeni/Kigumo/1211 registered in his name.
3. She further claims that the respondents secretly filed Succession Cause No. 140 of 2006 and obtained the grant which was later confirmed in their favour. The land was later registered in the name of the 1st respondent.
4. This application was first heard and concluded by Bwonwonga, J. who in his ruling delivered on 10/04/2016 granted orders for revocation of the grant.
5. The orders were later set aside by the judge in his ruling delivered on 11/10/2016 based on an application for review by the respondents. The judge in his ruling said that both parties should be given a chance to be heard on the application for revision.
6. Earlier, the applicant was heard alone after the respondents failed to attend court.
7. The case then came before me for hearing. The parties filed their witness statements and were heard with cross examination of witnesses.
8. The grounds supporting the summons are that the respondents obtained the grant fraudulently and failed to disclose that one Kaburachi Peter, who had died in 1964 was the registered owner of land parcel number Kyeni/Kigumo/1211 and that Kaburachi Peter is not the deceased herein as falsely misrepresented by the respondents.
9. It is the applicant's case that Jadel Njeru Peter was never known by the alias name of Kaburachi Peter as asserted by the respondents but rather the two names were for two different persons both of whom were the sons of the applicant.
10. The applicant identifies the 1st respondent as the wife of the deceased Jadel Njeru Peter whereas the 2nd respondent is the eldest son of the 1st respondent. The applicant further states that the land LR. Kyeni/Kigumo/1211 was adjudicated by the Ngai clan and registered in the names of the late Kaburachi Peter on 9/08/1961 at a time when the deceased herein was around 2 years.
11. The applicant further states that the late Kaburachi Peter died without a wife or children and as such the applicant being the mother was entitled to apply to administer her son's estate but not the respondents. The applicant further states that the respondents filed the Succession

Cause No. 140 of 2006 secretly and without her knowledge and that they falsely swore Form P&A 5 to the effect that the deceased was also known as Kaburachi Peter with the sole intent of defrauding her.

12. In rejoinder, the 1st respondent on her own behalf and of that of the 2nd respondent deposed that the application for revocation was not properly before court and ought to be dismissed. In another replying affidavit deposed by the 1st respondent on the 19th December 2016, the 1st respondent stated that she petitioned the court for letters of administration and was duly issued with a confirmed grant after which she was registered as the owner of the suit land herein.

13. In cross examination the 1st respondent denied knowing the date the suit land was registered. She stated that the deceased herein changed his name sometime during their marriage but failed to change the name registered on the suit land. This was corroborated by DW2, Josiah Nyaga Njue who stated that the deceased was called Kaburachi as a nickname.

14. The parties filed submissions to dispose of the matter.

B. Applicants' Submissions

15. It is submitted that despite the respondents' knowledge that the deceased herein and Kaburachi Peter were two different persons, they caused to be advertised in Kenya Gazette Volume 2343 a Gazette Notice with the title "The Estate of Jadel Njeru alias Kaburachi Peter of Embu" and as such the said succession cause was based on fraud.

16. It is also submitted that the respondents also swore falsely in P&A 5 that the deceased herein was also called Kaburachi Peter and that he left an estate comprising of land parcel No. Kyeni/Kigumo/ 1211. Further it was submitted that the court has not been shown any document to show that the deceased herein had the name of alias Kaburachi Peter whereas the land herein was registered on the first registration on the 9/08/1961 in the name of Kaburachi Peter.

17. It is submitted that Kaburachi Peter died without a family and as such the applicant herein ranks the highest in petitioning for grant of letters of administration as provided under section 66 of the Law of Succession Act and thus the distribution of Kaburachi Peter to the respondents herein was blighted by fraud.

C. Respondents' Submissions

18. It is submitted that the applicant had failed to prove that she had two sons as she alleges as she has not provided any evidence of the same as firstly she has not provided a death certificate or chief's letter or affidavit to prove the same.

19. It is further submitted that the applicant did not include the 1st respondent herein when she distributed her deceased's husband estate as she knew that the respondent who was at the time residing on the suit land herein was the potential owner of the suit land. Further it is submitted that there is no legal requirement for the applicant to be informed of the succession proceedings of the deceased's estate as she was not a child or a dependant of the deceased.

20. The respondents further submit that if the deceased herein could not acquire land during adjudication by virtue of age then the alleged Kaburachi Peter could also not acquire land as he was similarly of minor age.

21. It is submitted that it was upon the applicant to produce evidence of the names of her deceased sons as she alleged and not upon the respondents to do so and that the failure by the deceased to correct his name in the green card does not prevent his successors from using two names of the deceased as he was known to them.

22. The respondents submit that they have proved their case on a balance of probabilities as compared to the applicant and as such the summons for revocation of grant ought to be dismissed.

D. Analysis & Determination

23. The issue for determination is whether the Applicant meets the threshold for the revocation of a grant within the meaning of **Section 76** of the **Law of Succession Act**.

24. **Section 76** states;

"Section 76: 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.

25. The applicant has a duty to prove any grounds set out in **section 76 of the Law of Succession Act** before the court considers revoking the grant. The applicant's case is that the grant was fraudulently obtained her detriment. She contends that that the respondents failed to disclose to court that one Kaburachi Peter, who had died in 1964 was the registered owner of land parcel number Kyeni/Kigumo/1211(hereinafter called the suit land) and not the deceased herein as falsely presented to court by the respondents. She further states that the deceased, Jadiel Njeru Peter, was never known by the alias name of Kaburachi Peter as asserted by the respondents but rather were two different persons both being sons of the applicant.

26. On her part, the 1st respondent deposed that the deceased herein changed his name sometime during their marriage but failed to change the registration of the land. She called a witness DW2, Josiah Nyaga Njue who stated that the deceased was popularly known as Kaburachi which was a nickname.

27. I have perused the record and I note that the land herein was registered in the name of one Kaburachi Peter on 9th August 1961. The applicant on her part provided proof of Kaburachi Peter having existed and subsequently died as the letter dated 30th December 2014 that acknowledge the death of Kaburachi Peter before the commencement of the compulsory registration of death within Embu County. Paragraph (c) provides that, *"This letter as sufficient evidence of the death of the late Kaburachi."* I do take cognizance of the fact that on her part, the applicant has provided proof of the late Kaburachi Peter having existed and having been the registered owner of the suit land.

28. On their part, the respondents allege that the deceased herein was also known as Kaburachi Peter and that they used to live on the suit land with him. DW2, Josiah Nyaga Njue corroborated the 1st respondent's statement however despite asserting to know the applicant's family well. He was at a loss to identify the land parcel he claimed belonged to the deceased. In contradiction to the applicant, the respondents were not able to produce any document to support their claim that the deceased was also known as Kaburachi Peter. I also note that the letter dated 18/5/93 by the Chief of Kyeni South location introducing the 1st respondent to the registrar of Births and Deaths Meru referred to the deceased under the names Jediel Njeru Peter only.

29. I also note that the initial registration over the suit land was done on the 9th August 1961 in favour of Kaburachi Peter. The deceased herein died sometime in 1993. The respondents have not in my considered view explained why for 32 years the deceased herein did not take any measures to have the suit land reflect his name of Jediel Njeru Peter.

30. Accordingly, it is my considered view that the deceased herein did not go by the name Kaburachi Peter but that the respondents herein falsely presented to court that the deceased herein was also known as Kaburachi Peter and that he was the registered owner of the suit land.

31. **Section 76 (b) of the Law of Succession Act** provides as follows:

"A grant of representation whether or not confirmed may at any time be revoked or annulled at any time if the court decides either on Application by any interested party or of its own motion 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." (emphasis added.)

32. Statutory law is therefore quite clear that concealment of material facts from the court is a ground for the revocation of a grant which had been issued to a party in a succession matter. The court in the case of Jamleck Maina Njoroge v Mary Wanjiru Mwangi (2015) eKLR at paragraph 11 of its ruling in revoking a grant reiterated the grounds upon which a grant can be revoked. It stated as follows: -

"11. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court's own motion 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 false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law." (emphasis added.)

33. The respondents also failed to disclose to court that one Kaburachi Peter, who had died in 1964 was the registered owner of land parcel number Kyeni/Kigumo/1211(and not the deceased herein).

34. **Section 24 of the Land Registration Act, 2012** provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and that the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

35. It was not denied that the applicant has always lived on the suit land LR. Kyeni/Kigumo/1211 with her late husband and with her children. At the time this succession cause was filed, it is not in dispute that the applicant was still living on the said land. These facts were within the know ledge of the respondents even as they petitioned for issue of the grant and pursued its confirmation culminating in taking the land for themselves in exclusion of the applicant.

36. As such the applicant being the surviving mother of the late Kaburachi Peter ranked in priority to the respondents to be an administrator of his estate and as such the respondent ought to have notified her of the same as provided in rule 26 of the Probate and administration rules that provide, ***“(1) Letters of administration shall not be grated to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.”***

37. It is not disputed that the property in issue was solely registered in the name of Kaburachi Peter and it was therefore part of the free property of his estate available for distribution in accordance with intestate succession rules. Having died without a wife or child, the same was to devolve in accordance with section 39 of the Law of Succession Act that provides that the net intestate estate devolves, where the deceased has left no surviving spouse or children, to;

“the father, or if dead

the mother, or if dead

brothers and sisters.....”

38. It is my finding that the applicant has proved her case on the balance of probabilities as required by the law.

39. It is hereby ordered that the grant issued on 13/08/2010 and confirmed on 31/05/2010 be and is hereby revoked.

40. Any transactions under the revoked grant are hereby declared null and void.

41. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF DECEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muriuki for Ithiga for Applicants

Both parties present