



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
SUCCESSION CAUSE NO. 2889 OF 2002
IN THE MATTER OF THE ESTATE OF KEZIA NJOKI GITAU (DECEASED)

RULING

1. This Matter comes before the Court pursuant to an Application for Revocation or Annulment of Grant. The Application is brought by June Wangari Gitau. She is the daughter of the Deceased and is acting as a Litigant in Person. The Application was filed on 24th August 2017.

2. The Application seeks an Order that the grant of probate (Letters of Administration) to Philip Mwatha Gitau and Christine Wanjiru Gitau made on 10th February 2003 be revoked. The Grounds relied upon are that:

a) “the Grant was obtained fraudulently because my signature was forged. The same was reported at Karen police station under O.B. Number 35/22/8/2017

b) The Grant was obtained by means of omitting some assets namely Land in Limuru, Land in Ruaka, Kenya Airways Shares and status of Deceased’s Bank Account at National Bank of Kenya.”

3. In the circumstances, **Section 76** of the **Law of Succession Act** applies. It 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 order or allow;

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.

4. The Application is supported by the Affidavit of the Applicant filed on the same day. In the Affidavit Exhibits the Deponent informs the Court that she is the youngest daughter of the Deceased. She was born on 17th June 1980. The Deceased passed away on 17th February 1995 (Death Certificate Serial No. particulars withheld). At that time she would have been about 15. Her two siblings Christine Wanjiru Gitau and Philip Mwatha Gitau Petitioned for Letters of Administration. From the Court file it can be seen that the Petition was filed on 19th November 2002. The Letter from the Chief for Kariobangi South Location confirmed that the Deceased was survived by four children, those already named and Alice Wanjira who is married and the Eldest. In his letter dated 4/9/2001 he records that the Applicant was then aged 21 years old. Also attached to the Petition is **Form 38 (Under Rule 26(2))** purporting to record the Consent to the Grant of Letters of Administration. It refers to the Applicant and is said to be signed by her. She denies that is her signature. There was also an attempt to obtain a certificate of confirmed grant by filing a summons for confirmation. Again the signed consent of the Applicant there is said to be a forgery.

5. The Applicant bases her application on the fact that she did not sign the documents she is purported to have signed during 2002/2003. So adamant is she that she did not sign them that she reported the Matter to the Police. The Police conducted an inquiry and made a preliminary finding of forgery in relation to the signatures. They further charged Philip Mwatha Gitau with forging a signature to benefit from the Estate (according to his Advocate). The hearing will be in March 2018.

6. The Replying Affidavit is sworn by Philip Mwatha Gitau and drafted by the Advocates representing him when he filed the Summons said to contain the forgery. It was eventually filed on 18th January 2018. In it he confirms that the Letters of Administration were not confirmed. He says that his advocates on record have advised him that the Summons is bad in law, premature and misconceived. The Deponent of the Replying Affidavit states that prior to the hearing date (not filing date) the Applicant executed the consent. She denies that. Neither the Respondent nor his Advocates brought before the Court any witness (including themselves) who could say they saw her signing the consent. In fact the Respondent's Advocate in his Submissions suggests she was away at school. By way of defence to the charge, the deponent makes two points firstly that his co-administrator has not been charged. It is unclear if that is an admission of collusion. It is also said that if he had been the one doing any intermeddling he would have done a better job of disposing of the assets.

7. The Respondent/Administrator also confirms that the Parties lived in the House in Kariobangi South at LR No 12062 immediately before and after the demise of their mother. He confirms that the Applicant left. He says it was voluntary. She says she was excluded from the home and made to leave. Since then the Respondent and his family have occupied the property without confirmation of grant or distribution to the heirs of the Deceased.

8. The Petition Lists the following properties:

- a) LR No 12062/247 House in Kariobangi South
- b) 33 Shares in Kenya Breweries Ltd
- c) NSSF Benefits – Membership No [particulars withheld]

d) LR No 131673/127 Githurai

The Applicant also complains that the assets listed in the Petition and which are the same as those listed in the Summons for Confirmation omit various assets namely, the land in Limuru, the land in Ruaka, the Deceased's Bank Account in National Bank of Kenya. It is clear at least some of these assets existed because the Public Trustee has opened a file on this Estate although the full details have not been provided to the Court.

9. If what is said by the Applicant is true, it is clear that the Administrators have failed to identify and collect in the assets of the Estate. That has been the position for nearly 15 years. The response to that in the Replying Affidavit is that "*the Applicant erroneously thinks the assets... belong to the Estate of the deceased which is not the case*". There is no supporting evidence nor any reasons given for (a) not making the inquiry, nor (b) is there a reason why the statements are untrue. Given that this Deponent has already said that he could do a better job of dissipating assets, a bare denial is not convincing.

10. The Offence of intermeddling is defined in the ***Law of Succession Act*** at ***Section 45*** as:

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

It is clear that the Philip Mwatha Gitau has taken de facto possession of the property in Kariobangi south with his family. That was confirmed by his Counsel at the hearing on 22nd January 2018. There is no certificate of confirmed grant, therefore there is no legitimate distribution. In the circumstances, he and his family are guilty of intermeddling – on his own admission. Section 55 provides;

(1) No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets, or to make any division of property, unless and until the grant has been confirmed as provided in section 71.

(2) The restriction on distribution under subsection (1) does not apply to the distribution or application before the grant of representation is confirmed of any income arising from the estate and received after the date of death whether the income arises in respect of a period wholly or partly before or after the date of death.

11. In relation to the Applications, the Report of the Document Examiner's Report from the Directorate of Criminal Investigations dated 1st November 2017 the Examiner (Martin Kitayi) states that in his opinion the signatures were made by different authors. Given the passage of time, it could be possible that an individual's signature changes. The Examiner states that he "*also considered all the possibilities of natural variations resulting from the time span...*". That deals with that concern.

12. Against that scenario, the Letters of Administration issued on 10th February 2003 cannot stand. The Administrators have failed to act in accordance with their duties and responsibilities to identify and collect in the assets. They have also failed to account for any use without the benefit of a confirmed grant. In addition, the Applicant has placed before the Court evidence that the signatures purported to be hers were not. Further, that they were forgeries. In view of the use to which those documents were put, it is clear that the insertion of that signature was (a) deliberate, (b) intended to mislead the court and (c)

used in court proceedings for such purpose.

13. The two sisters Christine Wanjiru and Alice Wanjira have not participated in these proceedings.

14. The Court therefore Orders that:

- a) The Letter of Administration and any consequential powers given to the Administrators be and are hereby revoked forthwith.
- b) The Administrators are forbidden from attempting to make any future applications for letters of administration
- c) The Public Trustee be and is appointed Administrator of this Estate forthwith
- d) Leave to use the evidence in this file for the Criminal proceedings already instituted
- e) File to be referred to the Director of Public Prosecutions to consider whether anyone, and if so who, should be charged with perjury
- f) Respondents to pay the Applicants costs, taxed if not agreed.

Order accordingly,

FARAH S. M. AMIN

JUDGE

Dated, Delivered and Signed at **NAIROBI** this 22nd day of February 2018.

In The Presence of :

Court Clerk: Patrick

Applicant June Gitau in person

Counsel for Respondents : Kinyua holding brief for Mr Muchoki