



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**SUCCESSION CAUSE NO.867 OF 2012**  
**(CHIEF MAGISTRATE'S COURT AT KIAMBU, SUCCESSION CAUSE 39 OF 2008)**  
**JAMES NGUGI NG'ANG'A.....APPLICANT**  
**VERSUS**  
**RACHEL WAMBUI KUNG'U.....RESPONDENT**  
**IN THE MATTER OF THE ESTATE OF HANNAH WAMBUI MURIGI (DECEASED)**

**RULING**

The Deceased died intestate on the 12<sup>th</sup> October of 1997.

Rachael Wambui Kung'u, on 7<sup>th</sup> March 2011 petitioned the Court for Grant of Letters of Administration intestate. The same was gazetted vide gazette notice number 3694 as **Probate and Administration Cause No. 39 of 2008**.

On 30<sup>th</sup> April 2012, James Ngugi Ng'ang'a, a son of the deceased and a beneficiary of the suit estate, moved the Court by summons and affidavit in Support seeking to have the grant of letters of administration intestate made to the Respondent revoked on the grounds that:

- 1. The proceedings to obtain the grant were defective in substance;**
- 2. The grant was obtained fraudulently by the concealment from the Honourable Court of material information to the cause.**

The Deceased was survived by the following:

- 1. JAMES NGUGI NGANGA SON ADULT**
- 2. LUCY WAIRIMU MIRALA DAUGHTER ADULT**
- 3. RACHAEL WAMBUI KUNGU DAUGHTER-IN-LAW ADULT**
- 4. MARGARET NJERI NJOGU DAUGHTER ADULT**

The full inventory of the assets that were listed as those left by the Deceased were:

- 1. KIAMBU/LARI/158**
- 2. KIAMBU/LARI/125**
- 3. KIAMBU/LARI/156**
- 4. SHARES WITH BARCLAYS BANK**
- 5. SHARES GAKENIA WOMEN GROUP**

## 6. LARI MAENDELEO WOMEN GROUP NO.107

The Deceased had no liabilities at the time of her demise.

The Grant of Letters of Administration Intestate were issued on 6<sup>th</sup> June 2008 and later confirmed on 28<sup>th</sup> July 2010.

In the Consent to Grant of Letters of Administration filed on 29<sup>th</sup> February 2008, three of the beneficiaries appended their signature/thumb print save for the Applicant who was under the impression that negotiations on the mode of distribution were still ongoing.

The Applicant alleged that he had not been made aware that the Grant of Letters of Administration had been issued to the Respondent thus unable to file any objections.

The Applicant vide an affidavit dated 2<sup>nd</sup> May 2012, under Paragraph 14 stated that when he was summoned to court for the hearing of the Application for the Confirmation of the grant, he objected to the mode of distribution and in fact submitted a hand written list of all the properties in the estate and it was rejected.

The Applicant averred that the Petition and subsequent Application leading to the orders of the Court were based on misrepresentation of facts regarding the estate's assets, the beneficiaries and their respective shares. In this regard, it was his case that the Grant of Letters of Administration issued to the Respondent is revoked and the Grant be issued to him instead for the benefit of all beneficiaries.

### HEARING

The hearing was to proceed on the 19<sup>th</sup> of September 2017. On the hearing date, Mr. Kamau, Counsel for the Applicant was present in court and was ready to proceed. However, neither the respondent nor his counsel was present in court, despite being served with a hearing notice on 13<sup>th</sup> July, 2017. An affidavit of service as proof of service of the notice was filed on the 2<sup>nd</sup> of August, 2014. As the matter had been in court severally, the witness statements filed by the Applicant were adopted as evidence in this suit.

James Ngugi Ng'anga, through his witness statement filed on the 2<sup>nd</sup> of November 2015, deponed that he was the first born son of the deceased and had three other siblings. Prior to the deceased's demise, she had distributed two of her properties to Benson Kung'u (deceased) and the Applicant herein. One of the plots, (L.R. NO. Kiambu/Lari 158), was however sold when the deceased was still alive. The remaining plot, (L.R.No. Kiambu/Lari 158) was then supposed to be subdivided between James Ngugi and the estate of Benson Kung'u, which was done. The Applicant further subdivided the land and allocated it to his sons.

In 2006, James attempted to petition the Court for grant of letters of administration intestate in relation to the deceased's estate. He suggested to the Respondent if she could become the co-administrator which she declined. Unknowingly, the Respondent applied for the grant of the estate of the deceased, which was issued to her on the 6<sup>th</sup> of June 2008. She later applied for confirmation and James was summoned to court for the hearing of the application where he objected to it, particularly the mode of distribution which did not include all property belonging to the deceased. In support of his objection, he submitted a hand written list indicating all the properties in the estate and it was rejected. The grant was later confirmed on the 28<sup>th</sup> of July 2010.

On the 1<sup>st</sup> of February 2012, he was informed by a Land Surveyor that LR No. Kiambu/Lari 158 was being subdivided. He proceeded to lodge a caution against the land since he was of the view that the grant had not been confirmed as the matter did not proceed. Further, he had neither consented to the mode of distribution nor the Respondent being appointed as administratrix. For this reason, the Applicant prayed that the grant of letters of administration issued to the Respondent be revoked.

Peter Ng'ang'a Ngugi and Daniel Mwangi Ngugi, vide their witness affidavits filed on 16<sup>th</sup> January 2017 and 30<sup>th</sup> November, 2016 respectively, deponed that they are the sons of the Applicant and the grandsons to the deceased. They also submitted that LR. No Kiambu/Lari 158 was to be divided equally between the uncle and father as per the grandmother's wishes. The subdivision was carried out by Benson's children alongside them and their siblings in order to avoid any disputes. The land was further subdivided among them and their brothers. In relation to the division of the land, they prayed that an order be issued directing the surveyor to divide the land equally in accordance with their grandmother's wishes.

### ISSUE

The main issue for determination is whether the grant issued to the Respondent should be revoked and who it should be issued to if the same is revoked.

### DETERMINATION

The Court is guided by **section 76 of the Law of Succession Act** when deciding on whether to revoke a grant. It provides that:

**A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by an 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 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 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 Supreme Court of India in *Anil Behari Ghosh vs SMT. Latika Bla Dassi & Others* ({1955} AIR 566, [1955] SCR (2) 270) interpreting their equivalent of Section 76 (a) held:-

**"the expression "defective in substance" ....means that the defect was of such a character as to substantially affect the regularity and correctness of the previous proceedings"**

Further, Rule 26(1) of the Probate and Administration Rules provides that:

**"Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant."**

As evidenced by the above provisions, consent from **ALL** the deceased's beneficiaries must be availed as to the appointment of the administrator and an application for grant of Letters of Administration is granted. The Applicant herein contends that the Grant issued to the Respondent is defective in substance. This is attributed to the lack of written consent from the Applicant who is a beneficiary of the estate by virtue of being the deceased's son.

**In The Matter Of The Estate Of Ngaii Gatumbi Alias James Ngaii Gatumbi (H.C. Succession Case No. 783 Of 1993).** The court held that:

**'A grant will be revoked where a person who is entitled to apply is not notified by the petitioner of his intention to apply and that person's consent to the petitioner's application is not sought'**

From the evidence on record, the Consent to the making of the Grant was signed by three of the beneficiaries instead of four. The Applicant has not appended his signature or thumbprint alongside his name as done by the other three beneficiaries. For this reason, the grant is defective in substance as the Applicant did not consent to the issuing of the said grant to the Respondent.

The laws applicable when distributing the estate of the deceased are the laws of intestacy **under Part V Law of Succession Act Cap 160 Laws of Kenya and the Probate and Administration Rules.**

The Law of Succession Act gives preference to certain persons to administer the estate of a deceased who died intestate under **Section 66**. The order of preference is the surviving spouse, children, father, mother and all relatives who are in the nearest degree up to and including the 6<sup>th</sup> degree of consanguinity. In this case, the daughter in law has not been expressly provided for by this provision.

The Respondent applied for the grant of Letters of Administration to administer the deceased's estate. The same was issued and later confirmed. The husband to the Respondent also died seven months prior to the deceased herein. The Respondent, in accordance to **section 66** of the Law of Succession Act ranks in priority to all other family members when taking out the Letters of Administration of her husband's estate. It is therefore prudent for the Respondent to take out the grant of Letters of Administration for the husband's estate only and the other children of the deceased to take out the letters of administration for the estate so as to avoid commingling the two estates' assets. This position was also held in *Winfred Nyambura Karugu & another v Magdalene Nyokabi Guandai* [2015] eKLR, where the Court stated as follows;

**"the Court has taken into account the fact that the Applicants are administrators of their respective husbands' estates. They would not effectively discharge their duties under section 83 of the Law of Succession Act Cap 160 as administrators without commingling the properties of the 3 deceased's' members of the 3 separate but related families. It is best that Applicants remain administrators of their respective husband's estate and the other children of the deceased have one of their own as administrator."**

## **COURT ORDERS**

This Court therefore finds as follows:

- a. The Applicant's application is allowed.
- b. The Grant of Letters of Administration intestate issued to the Respondent on 6<sup>th</sup> June 2008 and confirmed on the 28<sup>th</sup> of July, 2010 is hereby revoked
- c. The Certificate of Confirmation of Grant issued on 28<sup>th</sup> July 2011 be revoked.
- d. That I appoint James Ngugi Ng'anga, Lucy Wairimu Mirala and Margaret Njeri Njogu as co-administrators of the estate of the deceased and a grant of letters of administration intestate shall be issued to them accordingly;
- e. The Administrators shall apply for a confirmation of grant upon obtaining consents from all the beneficiaries equal in

priority on the mode of distribution.

f. The mode of distribution of the estate shall also be agreed on failure to which the court shall determine upon all parties submitting their preferred modes of distribution.

g. The Respondent shall obtain grant to the estate of her late husband so as to access her late husband's share from the deceased's estate

h. No order as to costs

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 16<sup>th</sup> DAY OF APRIL, 2018

M. W. MUIGAI

JUDGE OF FAMILY DIVISION OF THE HIGH COURT

*In the presence of:*

MR ONDARI FOR THE APPLICANT

MR KAMUYU FOR THE RESPONDENT