



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO.43 OF 2012

IN THE MATTER OF THE ESTATE OF EVAH WANGUI GITHAE (DECEASED)

ALBERT NJERU GITHAE.....APPLICANT

VERSUS

SIMON WAIRAGU GITHAE.....RESPONDENT

R U L I N G

The only issue for determination in this matter is whether the grant of letters of administration *ad litem* issued to Albert Njeru Githae on 23rd February 2012 with respect to the Estate of Eva Wangui Githae (deceased) ought to be revoked.

According to the Summons for Revocation of grant filed on 2nd May 2014 by Symon Wairagu Githae the respondent applied for the said grant without the involvement/consent of the other members of the family and even the purpose for which he made the application i.e. to recover Gatarakwa/Gatarakwa/Block 111/487 from their brother Wilson Kimotho Githae was not agreed upon.

The respondent's position is that the applicant and his siblings were all along aware that he had filed for the limited grant but they did not support the same. That they were all under the false belief that their mother had bequeathed the said parcel of land to their brother.

During the hearing of the application, the respondent alleged that the said Wilson Kimotho Githae had fraudulently transferred the parcel of land to himself hence prompting him to file this matter.

I have perused the submissions filed by each counsel and the rival affidavits. The applicant relies on

1. Anthony Njeru vs Thomas Njeru [2014] eKLR

In this case the court affirmed that Rule 26 of the P&A rules applies to Temporary grant. The rule states in part:

(1) 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.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

See also in Re Matter of the Estate of Moraji Bhanji Dhanak (Deceased) [2000] eKLR

2. Mossy Muchanga Nang'endo vs Hudson Nyongesa Juma [2016] eKLR;

Where the court stated that the current practice with regard to the documents required to file a petition in succession proceedings. This includes a letter from the chief identifying all the survivors or beneficiaries and consents from all beneficiaries. The respondents did not file any of these documents with his application.

I have considered the authorities cited by the applicant.

Rule 26 (1) of the P&A Rules stands out – the requirement for notice to all the beneficiaries. This was not done, the law does not recognize awareness- it recognizes actual notice in the requisite forms.

The authorities cited state that the requirement for consents applies to limited grants as well. Clearly the respondent did not comply with the procedure.

The respondent testified that he proceeded as he did because there was fraud in the transfer of the estate of the deceased to his brother. Fraud is in itself a serious offence. Two wrongs would not make a right. Clearly fraud cannot be cured through flawed succession proceedings; it will be cured through the appropriate criminal proceedings under s. 43 of the Law of Succession Act or any other criminal proceedings.

In each case the proper procedure ought to be followed rendering the proceedings defective in substance, obtained without the consent of or notice to the other persons entitled to obtain the same, sending it into the view of section 76 of the Law of Succession Act.

Let the parties sort out the issues arising out of their mother's estate in the proper manner.

In my view, having considered the application, rival affidavits, evidence on record and the submissions by counsel, the application for revocation of the grant must succeed.

The same is allowed. The grant issued to the respondent herein is revoked. No orders as to costs.

Dated, delivered and signed in open court this 12th day of April, 2018.

Mumbua T. Matheka

Judge

In the presence of:-

Court Assistant-Atelu

Mr.Mshila Advocate for Respondent

Ms. Nancy Nderitu on record for applicant.

Mumbua T. Matheka

Judge