



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC.APPLICATION NO. 118 OF 1991

IN THE MATTER OF THE ESTATE OF KINYANJUI NJATHI (DECEASED)

STEPHEN KAMAU KINYANJUI.....APPLICANT

VERSUS

NGUGI KIRABA.....1ST RESPONDENT

NJATHI KINYANJUI.....2ND RESPONDENT

RULING

1. The application before me is dated 21st April, 1991 filed by Stephen Kamau Kinyanjui (herein referred to as “the applicant”) against Ngugi Kiraba and Njathi Kinyanjui (herein referred to as the “1st and 2nd respondents respectively”) pursuant to Section 76 of the Law of Succession and rule 44(1) of the Probate and Administration rules seeking orders as follows:

(1) That the grant of letters of administration issued to Ngugi Kiraba and Njathi Kinyanjui dated 10th December 1985 be revoked and annulled on the grounds that :

(a) The proceedings to obtain the grant was defective in substance in that the applicant was never notified by the respondents when the application for representation of the deceased’s estate was made and was never served with the citation to accept or refuse the grant of letters of administration to the deceased estate and further he was never served with any application for confirmation of grant.

(b) The applicant had priority over the first respondent in obtaining letters of administration to the deceased’s estate as the first Respondent is not a dependant of the deceased.

(c) The confirmation of the grant was done wrongly in that the issue of the distribution of the estate of the deceased was referred to elders (under order XVL rule 1 of the Civil Procedure Rules) without the consent of the applicant and that the elders’ award was subsequently confirmed without having been served on the applicant.

2. Application is premised on grounds on the face of it and affidavit in support deponed by the applicant on 21st April, 1991. The applicant’s case is to the effect that being a son to the deceased herein he was not served with a citation or notification of any kind by the respondents regarding the pending petition application. He alleged that his consent and that of his mother a wife to the deceased was not sought before petitioning for a grant of representation.

3. The applicant further averred that the referral of the matter to the panel of elders to arbitrate and determine the mode of distribution of the estate was done without his knowledge and that of his mother and that in any event, the court erred by distributing the estate to the respondents as the sole beneficiaries in equal share thus disinheriting the rest of the beneficiaries. He referred to the first respondent as a stranger with no beneficial interest over the estate. The applicant therefore urged the court to revoke the grant dated 10th December 1985 as the same was obtained without his consent and that of other family members.

4. In reply, the 1st respondent Ngugi Kiraba filed a replying affidavit dated 8th May 1991 denying allegations contained in the affidavit in support. He contended that the applicant was duly represented in the entire proceedings by his brother Njathi Kinyanjui the 2nd respondent being his (1st respondent) co-administrator. He stated that the applicant having filed a civil appeal No. 188/1988 relating to this case and the same having been rejected summarily under Section 79B of the Civil Procedure Act, it would be unfair to revive it again under the guise of revocation rules. He therefore prayed that the application be dismissed as it lacks merit and merely intended to delay the course of justice.

5. Before I proceed further, a brief history of this matter would suffice. I wish to state from the outset that this matter has had its own

peculiar history with the original file from Thika Law Courts where the original Grant of representation was made and confirmed and the original high court file for revocation partly heard by Judge Aganyanya disappeared completely never to be found. Every effort to call for the original file from Thika Law Courts bore no fruit as it was allegedly forwarded to the high court where it disappeared together with the original high court file before a skeleton file was reconstructed and these proceedings commenced afresh. In the circumstances, I must state here that this court does not have the advantage of the original petition application including the original grant and allegations of citation proceedings. However, the lower court proceedings and some pleadings were made available when the file was reconstructed.

6. Briefly, the deceased herein Kinyanjui Njathi whose estate these proceedings relate died intestate leaving behind LR No. Kiganjo/Kiamwangi/258 as the only asset for distribution. Since the original petition application disappeared with the original file, I am unable to discern who the listed survivors were. However, the lower court proceedings clearly show that the original petition was filed on 5th August 1985 with the 1st respondent as the sole petitioner.

7. Later, on 9th October 1985, the second respondent Njathi Kinyanjui a son to the deceased Kinyanjui Njathi filed objection proceedings by way of cross-petition. On 10th December 1985, the trial court heard the said objection and issued joint grant of letters of administration intestate to the objector (2nd respondent) and the 1st respondent. Subsequently, the joint petitioners/administrators (respondents) applied for confirmation of the grant.

8. Vide affidavit in support of the application for confirmation sworn on 13th January 1987 by Njathi Kinyanjui (2nd respondent and son to deceased) the following were listed as survivors of his late father's estate:

1. Nyangaru (wife)
2. Njathi Kinyanjui "A" (son)
3. Njathi Kinyanjui "B" (son)
4. Wanjiku (daughter)
5. Ngugi Kiraba – step-son
6. Ezekiel Njathi (step-son)
7. John Kamau (step-son)
8. Wangechi wife of Kiraba

It is in this affidavit that the 2nd respondent prayed for confirmation of grant arguing that he was holding the deceased's estate in trust and for his benefit and that of the survivors (dependents) listed above.

9. Subsequently, the court confirmed the grant on 7th April 1987. Later, on 26th May 1987, for reasons that are not clear from the Court record, the matter was referred for arbitration by elders under Order 45 of the Civil Procedure rules to determine the issue of distribution of the estate. On 9th June 1988, the elders' verdict (A ward) under the chairmanship of the DO Gatundu was filed. A perusal of the copy of the elders award in the court file and the trial court's proceedings reveal that there was a disagreement between the administrators with the 2nd respondent (2nd administrator) challenging the elders award which shared out the estate into two with the administrators representing their fathers' houses. Aggrieved by the elders award, the 2nd respondent appealed to the high court vide Civil Appeal No. 188/1988 Nairobi on grounds that the panel of elders was biased as it was composed of in-laws to the 1st respondent and that he (2nd respondent) was not accorded an opportunity to call his witnesses and tell his part of the story.

10. Confronted with the appeal, the trial court stayed further proceedings pending the outcome of the appeal until 3rd August, 1989, when the court was informed that the appeal had been rejected summarily. The court then proceeded to direct the signing of the necessary transfer forms into the names of the beneficiaries. Indeed, the high court in Civil Appeal No. 188/1988 did reject the appeal summarily on 19th April, 1989 under Section 79B of the Civil Procedure rules stating that there was no ground for interfering with the impugned orders. Meanwhile, the property was sub divided into Kiambaa/Ruaka/1217 and 1218 and then transferred into the administrators' names one Njathi Kinyanjui and Ngugi Kiraba respectively.

11. Dissatisfied with the high court decision, Stephen Kinyanjui the applicant herein filed the instant application for revocation of grant citing the 1st respondent (1st administrator) and 2nd respondent his brother. Subsequently, the hearing for revocation commenced before Judge Aganyanya but the file disappeared together with the original Thika Law Courts file. Vide application dated 14th October 2006, the applicant applied for reconstruction of the file which was allowed and the current file was processed.

12. Following the death of the 1st respondent Ngugi Kiraba on 24th December 2003 and the second respondent Njathi Kinyanjui on 17th July 2005, the applicant herein moved the court vide application dated 19th June 2014 to substitute the two with their sons Peter Kinyanjui Ngugi as administrator of the estate of the 1st respondent and Francis Njoroge Njathi as administrator of the estate of the 2nd respondent. As a consequence, the court allowed the application on 29th Sept. 2014 and the two substituted respondents took over as the respondents. Following the said substitution, the applicant filed an amended summons dated 11th November 2014 for revocation and annulment of grant issued on 10th December 1985 and confirmed on 7th April 1987.

13. In response to the amended summons, Peter Kinyanjui Ngugi now the substituted 1st respondent, filed a replying affidavit deponed on 12th May 2016 challenging the application on the grounds that the applicant's father (deceased herein) was Ngugi Kiraba's uncle since the deceased was a brother to Ngugi Kiraba's father.

14. That Ngugi Kiraba's father and Kinyanjui Njathi (deceased) lived together as brothers in the land in question and that during demarcation before independence, Kinyanjui Njathi was registered as the owner of the land in question in trust and for his benefit and that of his brother Kiraba Ngugi. He asserted that the grant of letters of administration was procedurally issued to Ngugi Kiraba representing his father's house and Njathi Kinyanjui representing his father. Lastly, Peter Kinyanjui contended that the applicant should claim his share from his brother Njathi Kinyanjui in respect of LR 1217 and not from Ngugi Kiraba's share LR 1218 which he has since occupied from the time the grant was confirmed about 30yrs ago.

15. On the other hand, Francis Njoroge Njathi the substituted second respondent a son to Njathi Kinyanjui now deceased and the original 2nd respondent (2nd administrator) filed a replying affidavit sworn on 29th January 2015 supporting the application for revocation of the grant herein.

16. When the matter came up for hearing on 11th May 2017, the 1st respondent did not turn up and a return of service was duly filed confirming service. The matter therefore proceeded exparte. The applicant/objector adopted and reiterated the entire averments contained in his affidavit in support of the application for revocation. The 2nd respondent who adopted his replying affidavit basically supported the applicant thereby seeking revocation of the grant.

17. Mr. Kinuthia Mwangi Counsel for the applicant filed his submissions on 11th July 2017 stating that the deceased herein Kinyanjui Njathi died intestate leaving only three survivors namely, Stephen Kamau Kinyanjui (son), Mr. Njathi Kinyanjui father to the second respondent and Miss Hannah Wanjiku Kinyanjui a daughter who is not a party to these proceedings. Counsel submitted that one Ngugi Kiraba (1st administrator) was not a beneficiary of the estate being a nephew to the deceased hence not entitled in order of priority under Section 38 and 66 of the Laws of Succession to petition for a grant. Mr. Kinuthia contended that the applicant was neither notified of the succession cause nor was his consent sought as required in law.

18. Learned Counsel further submitted that the applicant was not provided for as the land was shared between two beneficiaries alone and that reference of the case for determination of distribution of the estate by a panel of elders under Order 45 was irregular as the said provision is not provided for under rule 63 of the Law of Succession.

19. I have considered the application before me, affidavit in support and replies thereto. I have also considered submissions by counsel for the applicant. Issues for determination are:

- (a) Was the grant issued through defective proceedings and concealment of material information;**
- (b) Was consent sought from all beneficiaries entitled to a share of the estate;**
- (c) Was the petitioner/1st administrator entitled to a share of the estate;**
- (d) Is the applicant a beneficiary of the estate and therefore entitled to a share;**
- (e) Is the decision of the panel of elders relied on by the trial court in distributing the estate legal and binding?**

20. The law governing revocation and annulment of a grant is well captured under Section 76 of the Law of Succession which 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 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.....**
 - ii.....**
 - iii.....**
- (e) That the grant has become useless or inoperative through subsequent circumstances.**

It is incumbent upon the applicant to prove any of the above grounds hence the burden of proof squarely lies on him (**See Lewis Waruiro vs Moses Muriukiki Muchiri (2012) CA 106.**)

21. In the instant case, the applicant is alleging that he had priority over the 1st respondent Ngugi Kiraba now deceased in obtaining letters of administration as he (Ngugi Kiraba) was not a descendant of the deceased. From the averments of the applicant, he does not recognize the late Ngugi Kiraba (1st respondent) as a survivor of his late father's estate.

22. However, in response to the revocation application, the 1st respondent (Ngugi Kiraba now deceased) swore and filed a replying affidavit dated 8th May 1991 and a further affidavit of 27th January 1992 in which he deposed that the applicant Stephen Kamau also known as Njathi Kinyanjui "B" was duly notified of the succession case through a citation. Although the said citation was not availed for perusal because of the disappearance of the original file, the 1st respondent did annex an affidavit sworn on 12th January 1990 by the applicant's mother Mary Wangari Kinyanjui challenging the issuance of the grant before Thika RM's court in which she admitted in paragraph 4 that she and her son Stephen Kamau Kinyanjui and daughter Wanjiku had been served with a citation and that in response they entered appearance on 2nd October 1985. The 1st respondent also attached an affidavit sworn on 10th January 1990 in which he (the applicant Stephen Kamau) and his sister Wanjiku Hannah adopted the averments of their mother in her aforesaid affidavit implying and in essence admitting that they (he, his mother and sister Wanjiku) were served with the citation. It is a requirement under Rule 26(1) of Probate and Administration rules that letters of administration should not be issued unless sufficient notice is given to everybody entitled. (**See RE matter of the estate of Githaiga Gichuki (deceased) (2014) eKLR.**)

23. It is therefore not true and proper for the applicant to allege that they were not notified of the proceedings/petition yet they acknowledged on oath that they were served with the citation which is sufficient notice. In any event, his step brother the 2nd administrator was throughout representing his father's house. The ground of lack of notification cannot stand and it is my finding that the applicant is being dishonest as he was duly served with citation after refusing to consent to the filing of the petition application.

24. Was the 1st respondent properly issued a grant jointly with the applicant's step brother? There is no dispute that the 1st respondent was a son to Kiraba Ngugi a brother to Kinyanjui Njathi a father to the applicant and the 2nd respondent Njathi Kinyanjui. This fact is also reflected in the proceedings held before the panel of elders and the elders verdict in which they held that the applicant's father being a brother to the 1st respondent's father (Kiraba Ngugi) was registered as a trustee on his own behalf and that of his brother hence the order that the land be shared equally between the two brothers and subsequently to their children who are now fighting.

25. It is this verdict upon arbitration before the elders chaired by the DO Gatundu that the trial court relied on in giving ½ share to each house (brother) as represented by their sons with the 1st respondent representing his father's house and the 2nd respondent Njathi Kinyanjui representing his father's house including the applicant.

26. Apparently, the elders finding was challenged on appeal being civil appeal No. 188/1988 which was summarily rejected and dismissed by Justice Shields in his orders dated 19th April 1989 stating that there were no sufficient grounds in interfering with the order. For the applicant to raise the reference of the dispute to a panel of elders as a ground on account of being irregular and offending rule 63 of the Law of Succession which does not provide for arbitration under Order 45 is to say the least an attempt to revive the appeal on that issue which was adequately dealt by Justice Shields and to which I cannot through this application overturn.

27. For those reasons, the 3rd ground challenging the arbitration process by the elders in determining that the deceased and the 1st respondent's father owned the property jointly with the deceased brother registered as a trustee is misplaced. In any event, there was no miscarriage of justice in referring the matter to the elders for arbitration as the court had powers even under rule 49 and 73 of the probate and Administration rules in the interest of Justice to make such orders under the inherent powers of the court even if there was no express provision. I am satisfied that the trial court and Justice Shield having upheld the elders finding which formed the basis for sharing out the estate need not be disturbed. The 1st respondent had a right to petition for a grant of letters of administration in respect of the estate of Kinyanjui Njathi on grounds that he and his siblings were beneficiaries and had a beneficial interest in the estate by trust and therefore having cited those in priority under Section 66 of the Succession Act to petition for the grant and the same having appeared reluctant, he had no choice but to petition for the full grant which he did and later the applicant's step brother (2nd respondent) joined him as co-administrator. The applicant cannot pretend that he was not aware of the proceedings.

28. For those reasons, I do find and hold that the 1st respondent was properly issued with a grant jointly with the applicant's brother after following due process. The proceedings were therefore not defective, fraudulent nor was there concealment of any material information or facts. I therefore do not agree with the submission by Mr. Kinuthia counsel for the applicant that the 1st respondent had no right whatsoever in law to apply for a grant.

29. Having held as above, was/is the applicant entitled to a share of the estate? Unless the contrary is shown, nobody has disputed the fact that the applicant was a son of the deceased and therefore under Section 38 of the Law of Succession entitled to a share. In his affidavit in support of confirmation of the grant before the trial court sworn on 13th January 1987, the 2nd respondent Njathi Kinyanjui (2nd administrator now deceased) listed the following as beneficiaries:

(1) Nyangaru Kinyanjui – wife (mother to the applicant)

(2) Njathi Kinyanjui "A" – son

(3) Njathi Kinyanjui "B" – son

(4) Wanjiku Kinyanjui – daughter

(5) Ngugi Kiraba – step-son

(6) Ezekiel Njathi – step-son

(7) John Kamau – step-son

(8) Wangechi w/o Kiraba

30. In paragraph 7 of that affidavit, Njathi Kinyanjui (2nd respondent/administrator) stated that he was holding the land ref. No. Kiambaa/Ruaka/258 as a trustee for the above survivors. This is further proof that the 2nd respondent (Ngugi Kiraba) and his siblings were not strangers but beneficiaries of the deceased's estate. Nobody has disputed the veracity of the said affidavit and the one sworn by the mother to the applicant.

31. Had the land been registered jointly as tenants in common in equal share in the names of the two brothers, the ideal situation would have been for survivors for each house (brother) to file a separate succession cause to inherit the ½ share of each estate. However, the situation here is to the contrary as children from both houses were treated as survivors of the deceased herein. Since the property was shared out equally between the two brothers, each house shall have to share among themselves equally their ½ share in accordance with Section 38 of the Law of Succession. Failure to provide for the applicant and his sister Wanjiku was irregular and therefore disinheriting the two. To that extent I do agree with Mr. Kinuthia Counsel for the applicants that each family member was and is entitled to a share of his or her father's estate.

32. It therefore follows that, the subdivision of LR No. Kiambaa/Ruaka/258 into 1217 and 1218 and thereafter registered in the names of the administrators as absolute proprietors is unlawful and meant to disenfranchise the rest of their siblings. Failure to provide for some of the beneficiaries is therefore a ground to amend and review the certificate of confirmation of Grant. On that ground alone the confirmed grant should be amended so as to accommodate the beneficiaries left out in this case the applicant, his sister one Wanjiku Kinyanjui and the heirs of the 2nd respondent now deceased one Njathi Kinyanjui so as to share half of their share out of LR no. Kiambaa/ Ruaka/258. The same shall apply to the other siblings in respect of the name of Kiraba Ngugi's share with Ngugi Kiraba's heirs sharing out their father's share with his siblings Ezekiel Njathi and John Kamau.

33. For those reasons, the subdivision of land parcel no. Kiambaa/Ruaraka/258 into Kiambaa/Ruaraka/1217 and 1218 now registered in the names of Njathi Kinyanjui and Ngugi Kiraba respectively be and is hereby cancelled and the same do revert back to the original title for fresh redistribution between beneficiaries in respect of each ½ share according to each house.

34. Accordingly, I do hereby direct that the applicant herein, his sister Hannah Wanjiku Kinyanjui and heir to the estate of Njathi Kinyanjui, do agree within 30 days from the date of delivery of this ruling on how to share their half share in default the court shall share it out equally amongst the three. Equally, the half share of Kiraba Ngugi shall be shared out amongst the survivors of Kiraba Ngugi inter alia Peter Kinyanjui Ngugi administrator representing the estate of Ngugi Kinyanjui, Ezekiel Njathi and John Kamau. They too should agree on how to share out their share within 30 days in default the court will share it out equally amongst the beneficiaries in that house.

35. To that extent I do hold that the application herein seeking revocation of the grant in terms of prayer one based on the grounds advanced is not sustainable. I must however make an observation that, litigation must come to an end. This is an old matter going back as far as 1985. It is not in the interest of justice that we restart the process afresh simply because some beneficiaries were not provided for. The only right thing to do is to accommodate them as of right being beneficiaries of the estate. Equally the two administrators having died, the Grant has been rendered useless or in operative and therefore revoked suo motto pursuant to section 76 (e) of the law of Succession (**see In the matter of the Estate of Peris wanjiku Nduati (deceased) Nairobi High Court succession case no. 2349/2001**). Since the current respondents are already representing the deceased administrators on account of being their sons, I would in the interest of justice and expediency of dispensing justice without undue delay and in exercise of the discretion conferred upon me by section 66 of the succession Act appoint the current respondents Peter Kinyanjui Ngugi and Francis Njoroge Njathi as administrators in place of the deceased Administrators.

36. Accordingly, this court is inclined to make the following orders:

(a) That the grant of letters of administration issued on 10th December 1985 to the late Ngugi Kiraba and Njathi Kinyanjui now deceased be revoked and fresh a Grant of letters of administration Debonis non do issue to the substituted administrators Peter Kinyanjui Ngugi (1st administrator) and Francis Njoroge Njathi (2nd administrator).

(b) That the certificate of confirmation dated 7th April 1987 and issued on 30th September 1988 be amended and or reviewed so as to include beneficiaries left out.

(c) That the administrators are hereby directed to file within 30 days from the date of delivery of this ruling afresh schedule of distribution list in consultation with beneficiaries according to each house.

(d) That beneficiaries from each house shall determine and agree on the mode of distribution of their half share.

(e) That the Land Registrar Gatundu do cancel Title Deeds Nos. Kiambaa/Ruaka/1217 registered in the name of Njathi Kinyanjui and Kiambaa/Ruaka/1218 registered in the name of Ngugi Kiraba so as to revert back to the original Title L.R. No. Kiambaa/Ruaka/258 to facilitate fresh redistribution.

(f) That this being a family dispute there shall be no order as to costs.

SIGNED, DATED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF APRIL, 2018.

J.N. ONYIEGO (JUDGE)

In the presence of:

Mr. Kinuthia.....Counsel for the Applicant

N/AFor the respondents.

Edwin.....Court Assistant