



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**SUCCESSION CAUSE NO. 112 OF 2016**

**IN THE MATTER OF THE ESTATE OF JOHNSON NJOGU GICHOHI (DCD)**

**WINFRED NJERI NJOGU.....ADMINISTRATRIX**

**V E R S U S**

**LUCY WANGITHI MUGERA.....OBJECTOR**

**JUDGMENT**

1. This matter relates to the estate of Johnson Njogu Gichohi (deceased) who died intestate on 13/7/2011. A petition for Letters of Administration intestate was filed by Winfred Njeri Njogu and Nathan Ndiga Njogu who are daughter and son of deceased respectively.

2. In the affidavit in support of the petition, they listed the following as the beneficiaries:

1<sup>st</sup> House:

- (1) Oscar Ngai Njogu – ID. NO. 30622055 (Son)
- (2) Winfred Njeri Njogu – ID. NO. 134725506 (Daughter).
- (3) Edith Njoki Njogu – ID. NO. 21127797 (Daughter)
- (4) Patrick Munyi Njogu – ID. NO. 32017159 (Son)
- (5) Nathan Ndiga Njogu – ID. NO. 23265862 (Son)
- (6) John Muriithi Njogu – ID. NO. 25590435 (Son)

3. The petitioners listed the following as the full inventory of all the assets of the deceased.

- (a) Rice field 5 Acres 2569 in Thiba Section – Kshs 500,000/-.
- (b) Land Parcel No. 0.81 Ha. in Maruno/917 – Kshs 150,000/-
- (c) Wang'uru Plot Reg/wrg/PT.B158 – Kshs 500,000/-.

4. The Petitioners having obtained Letters of Administration on 10/6/14 moved the court vide an application dated 1/12/2015 for the confirmation of the grant.

5. The objector Lucy Wangithi Mugeru moved the court to have the grant revoked and she be joined in as a co-administrator. Her contention is that she is a wife of the deceased who had two houses whereby the administratrix was the child of the 1<sup>st</sup> wife while she (objector) was the 2<sup>nd</sup> wife and had children. The objector filed application for annulment/Revocation of grant dated 4/4/2016. It was based on the following grounds:

1. THAT the grant and/or Certificate of Administration Intestate was obtained fraudulently by making false statement or by concealment to court of information material to the case.

2. THAT the grant and/or certificate of Administration Intestate was obtained by means of untrue allegations of facts essential in point of law to justify the grant.
3. THAT the administratrix/respondent mischievously omitted the second house of the deceased in this suit.
4. THAT the administratrix/respondent in her Summons for Confirmation of Grant failed to reveal that her co-administrator, NATHAN NDIGA NJOGU (Deceased) passed away on 8<sup>th</sup> December, 2013.
5. THAT the respondent/administrator has failed to proceed diligently with the administration of the estate of the deceased.
6. THAT as a result thereof, the grant has thereby become useless and inoperative.

6. The petitioner Winfred Njeri Njogu opposed the application and filed a Replying affidavit. Her contention is that the succession was done in accordance with the law. She depones that the issue of the deceased having a second house is controverted as the objector is still married to one Jamlick Magera. Her prayer is that the objector's application be struck out.

7. When the matter came up for hearing on 5/12/17, the parties agreed on all the issues save for whether Wanguru Plot B 158 should be included in the certificate of confirmation of grant.

8. The issue for determination is whether the plot No. Reg WRG/PT/B 158 (to be referred to as the plot) forms the estate of the deceased.

9. It is not in dispute that the administratrix is the legal daughter of the deceased with his 1<sup>st</sup> wife who is deceased. It is also not in dispute that the deceased left behind the assets listed above.

10. It is not in dispute that the objector is a wife to the deceased.

11. The contention by objector is that the plot is the objectors matrimonial home where she resided with the deceased until he met his death. The objector testified that she contributed funds towards the purchase of the plot and they developed it by constructing a 3 bedroomed house where they lived. She depones that Wang'uru Plot B 158 was bequeathed to her by the deceased prior to his death. That upon the death of the deceased, the family of the first house and second met at the Assistant Chief's Office, Kiarukungu Sub-location sometimes in the year 2012 where it was confirmed that the plot being her matrimonial home should go to the objector.

12. The Petitioner contends that the claim by the objector that the plot constitutes her matrimonial home are untrue as the plot was in the name of the deceased and the objector has not tendered any evidence to prove that she participated in anyway in acquiring the plot.

13. Section 60 of the Land Registration Act provides:

***“If any of the joint tenants of any land, lease or charge dies, the Registrar shall, upon proof of death delete the name of the deceased tenant from the register by registering the death certificate.”***

This means that where property is in the names of joint owners, upon the death of one of them, the surviving owner automatically becomes the owner upon presenting the evidence of death of the joint tenant i.e death certificate to the registrar. The property automatically passes to the surviving joint tenant. This principle of survivorship over jointly owned property operates to exclude the property from the **Law of Succession Act** upon the death of one of the joint tenants. I am in agreement with the holding by Achode J. – Mwangi Gakuri –v- Bernard Kigotho Maina & Another, H. C NBI. Succ. Cause No. 2335/2011 where she stated:

***“Property is capable of passing upon death other than by will. It may pass by survivorship..... This applies in cases of joint tenancies that is, where property is jointly owned. Where a co-owner of property is a beneficial joint tenant of the property, their interest will automatically/pass to the surviving tenant upon their death by virtue of the principle of survivorship..... The principle of survivorship operates to remove jointly owned property from the operation of the law of Succession upon the death of one of the joint tenants.”***

14. The objector has proved that her name has been entered in the record of ownership by county Council of Kirinyaga Annexure “**LWM 7Q**” and LWM7b show that on 5/4/2012 the County Council of Kirinyaga heard and determined that plot No. B158 Wang'uru belong to Lucy Wangithi(second wife) and the name of Johnson Njogu vide minute No. 196/97 be replaced by that of Lucy Wangithi.

The extract of the minute reads as follows:

***“PT B 158 WANGURU Lucy Wangithi against Mary Wathitha family filed the dispute. Both parties were present. Lucy said that Johnson Njogu Gichobi had two wives and she was the wife. They purchased PT B in 1997 and was approved vide min. No. WTPM &H 196/97. They both developed and settled. Wathitha family said that they are following their fathers property including the disputed plot because its registered under their father.”***

The record shows that the petition was filed on 17/10/2013. In view of the above minutes of Kirinyaga County Council, the plot had already been transferred to Lucy Wangithi. As such it did not form part of the estate of the deceased.

15. The applicant Lucy Wangithi has deposed that she contributed to the purchase of the plot and construction of a house which is her

matrimonial home. She has proved that she has been paying electricity bills and the land rent as well as the rates, annexure LWM7 b is the electricity bill and LWM8 is a receipt for payment of rates in her name.

16. When the administratrix testified she admitted that she was aware that her deceased father had another wife she was living in town. She testified that she was not aware that the plot in dispute had changed hands and is in objector's name. She admitted that she did not know when the plot was bought. She cannot therefore dispute the objector's testimony that she contributed to the purchase of the plot. The administratrix admitted that the objector was living on the plot with the deceased and her children. She admitted that herself and her family have never lived on this plot. She also admitted that she appeared before Kerugoya Dispute Resolution Tribunal where it was held that the objector owns the plot.

17. In view of the foregoing, it is clear that the testimony by the objector that she contributed to the purchase of the plot and that the plot was her matrimonial home is credible.

Section -7- of the Matrimonial Property Act provides:-

***“Subject to Section 6(3) ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards the acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”***

In this case the objector is the surviving spouse and has averred that she contributed towards the purchase of the plot. Her evidence is not rebutted. Though it is submitted that the objector has to adduce proof, I find that her testimony on oath is sufficient and there is no dispute that she is the only surviving spouse who lived in the matrimonial home during the lifetime of the deceased. As the spouse she has the right to remain in the matrimonial home. She was left on the plot by the deceased and the administratrix has never lived on the plot and had no idea how it was acquired.

18. My view is that as the objector and the deceased were joint owners, the objector as the surviving joint owner was entitled to acquire ownership without being subjected to the process of intestacy. In the case of **Isabel Chelangat –v- Samuel Tiro(2012) eKLR**, the principle of survivorship also known as ‘jus accrescendi’ was expounded where it was stated:

***“A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right of survivorship and “four unities.” The right of survivorship (jus accrescendi) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant. A joint tenancy cannot pass under will or intestacy of a joint tenant as long as there is a surviving joint tenant as the right of survivorship takes precedence.”***

By the principle of survivorship land owned jointly passes automatically to the surviving owner when one dies without the need to file a Succession Cause. W. M. Musyoka in his book Laws of Succession at page 3 states as follows:-

***“Property is capable of passing upon death other than by will. It may pass by survivorship..... This applies in cases of joint tenancies that is, where property is jointly owned. Where a co-owner of property is a beneficial joint tenant of the property, their interest will automatically/pass to the surviving tenant upon their death by virtue of the principle of survivorship..... The principle of survivorship operates to remove jointly owned property from the operation of the law of Succession upon the death of one of the joint tenants.”***

19. Being the surviving spouse she is entitled to the matrimonial home. Plot No. 2560 Unit H6 which is in the name of the objector does not form part of the estate of the deceased. I am of the view that plot No. B 158 belongs to the objector who was registered as such before the filing of the petition of letters of Administration. The administratrix was aware of this as she had participated in the dispute resolution tribunal which confirmed that the plot should go to Lucy the objector. Section 76 of the Law of Succession Act Provides for the situations upon which the court may order the revocation of grant. 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 at 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.”***

To buttress this 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.”***

20. The administratrix failed to include the objector and her children when she filed the succession cause. The court was not made aware of the existence of the 2<sup>nd</sup> house. The administratrix failed to disclose that her co-administrator had passed away, included plot No. B 155 which was the objectors matrimonial home and was where she lived with the deceased and that the deceased had made his wishes in respect of his properties. The foregoing shows that the proceedings to obtain the grant were defective as the administratrix had made false statement and concealed material facts from the court. This entitles the court to order the revocation of such grant.

21. It is submitted that under section 76 the court has discretionary powers when faced with application for revocation of grant and can make orders as it considers fit in the circumstance. Reliance was had in the case Kipkurgat Arap Chipsiror & Others –v- Kisugut Arap Chepsiror where the Court declined to revoke the grant but entered the names of applicants as beneficiaries. The court has discretion and furthermore Rule 73 of Probate and Administration Rules gives court powers to make such orders as would serve the interest of Justice. It provides:

***“Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as maybe necessary for the ends of justice or to prevent abuse of court process.”***

#### **IN CONCLUSION:**

It has been proved that the grant was obtained thro’ concealment and none disclosure of material facts. The Plot No. 158 B does not form part of the estate of the deceased.

I order that:

1. The objector shall be joined in the cause as a beneficiary to ensure that she is always informed on the proceedings in the matter.
2. Plot No. B 158 vested on the objector after the demise of the deceased and should not form part of the estate of the deceased.
3. Costs awarded to the objector.

**Dated at Kerugoya this 31<sup>st</sup> day of July 2018.**

**L. W. GITARI**

**JUDGE**