



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 445 OF 2013

(FORMERLY RUNYENJES SUCCESSION CAUSE NO. 142 OF 2013)

IN THE MATTER OF THE ESTATE OF SEBASTIAN NGUTU WAGANAGWA alias NGURU WAGANAGWA (DECEASED)

AND

ANISIA GATARA RUVIO.....APPLICANT

VERSUS

CATHERINE GICUKU NJERU.....ADMINISTRATOR/RESPONDENT

R U L I N G

1. This cause relates to the estate of the late **SABASTIAN NGUTU WAGANAGWA** (deceased herein) who died sometime in the year 1967 domiciled at Gichera Sub-Location within Embu County. As per the petition lodged via **Runyenjes Principal Magistrate's Court Succession Cause No.142 of 2013**, the deceased died intestate and left behind the following dependants namely;

- (i) Niceta Thaara Nguru
- (ii) Isabela Wanjuki Njeru
- (iii) Catherine Gicuku

2. Catherine Gicuku Njeru was appointed the administratrix of the only estate of the deceased comprising **KAGAARI/WERU/1073** on 17th October, 2013 by this court and on 24th July 2014 the said grant was confirmed where the estate was distributed by this honourable court as follows:-

- (i) Catherine Gicuku Njeru - 0.53 ha
- (ii) Niceta Thaara Nguru - 0.53 ha
- (iii) Isabela Wanjiku Njeru - 0.53 ha &
- (iv) Marie Njoki Nderi - 0.40 ha

3. Anisia Gatara Ruvio took out summons for revocation of grant dated 5th November 2014 seeking for revocation of aforesaid grant on the grounds inter alia that the cited beneficiaries save for Niceta Thaara Nguruto are all strangers and not the legitimate heirs or children of the deceased herein. This is the application now before court and the subject of this ruling.

4. The applicant claims that she is a sister to the deceased herein and has been in occupation of the estate since 1967. In her Supporting Affidavit sworn on 4th November 2014, the applicant has deposed that the appointed administratrix/Respondent is not a beneficiary though she concedes that she is a daughter of the late Rosemary Ndiiri who was once married to the deceased herein. According to her the only biological child to the deceased is Niceta Thaara Nguruto who was left under the care of the applicant when her mother left and that she is the one who brought her up and was staying with her until she got married. She has faulted the Respondent for secretly filing the petition of letter of administration without involving her knowing that she was in occupation of the estate.

5. At the oral hearing of this application the applicant added that the late Rosemary Nderi, the Respondent's mother was to her late brother, and that when she got married she already had two children who came with her and lived with the deceased. The two children according to

her are the Respondent and Isabela Wanjuki Njeru. She further testified that upon the demise of her brother the deceased herein, her late father, the late Waganagwa Ruvio gave her the land comprising the estate herein. She further claimed that she was unmarried and that is her late father gave her the estate because according to her the widow to the deceased herein had left the homestead. In her view the estate herein belongs to her as she lives there with her children. She has therefore moved this court to nullify the grant so that she can get back what she believes is her land.

6. The Administratrix/Respondent on the other hand has opposed this application through a Replying Affidavit sworn on 24th December, 2014. According to the Respondent the applicant is her aunt being a sister of her late father the deceased herein. She has deposed that the applicant claim herein is untenable because in her view, her claim rests on her father's estate which was a subject in **Embu Succession Cause No.436 of 2013**. She has listed the properties in that estate of, Rubiu Gatugo alias Ruvio Gatugo (deceased) as KAGAARI/KIGAA/840, KAGAARI/WERU/1074 and KAGAARI/NTHAGAIYA/T.161. She has argued that the applicant should be staking her inheritary rights over those listed assets with her brother Genesio Kathuri Waganagwa and not the estate herein.

7. The Respondent has further deposed that their late mother left her matrimonial home after the demise of the deceased to look for work in order to take care of them and that she died before petitioning for letters of administration of her late husband, the deceased herein.

8. At the hearing of this application, the Respondent told this court that she is the first born in the family having been born in 1963 while Niceta Thara is the second born with Isabella being the last born. According to her, her mother was chased away when their late father, the deceased herein passed on and that deceased's brother Genesio Kathuri is the one who chased her late mother out of the matrimonial home. She further added that her uncle Genesio later accepted them back after they agreed to slaughter a he-goat and that they were given 1/2 acre to plough which was however later taken away.

9. The Respondent has stated that she went to the Area Chief who issued her with an introductory letter filed herewith the petition for Letters of Administration. She justified the inclusion of Marie Njoki Nderi in the distribution of the estate stating that she helped in financing the Succession Cause.

10. The Respondent further disputed the applicant's claim that she will be left landless if the grant herein is not revoked. She tendered the proceedings in Succession Cause No.130/2013 as D Exhibit 1 which is a cause relating to the estate of Applicant's father the late **RUBIA GATUGO** alias **RUVIO GATUGO**.

11. This court has considered this application and the written submissions done through Muthoni Ndeke and Co. Advocate. This is an application brought under **Section 76** of the **Law of Succession Act** which provides for elaborately grounds upon which a grant may be revoked or annulled. The applicant has submitted that her application has demonstrated that the grant was obtained fraudulently by making of a false statement or concealment from court of something material. The applicant considers that the fact that she is in occupation of estate and has developed it since 1967 is material.

12. The issues for determination in this application in my view are basically as follows:-

- a) Whether the applicant was a dependant and therefore a beneficiary of the estate herein.
- b) Who are the dependants to the estate of the late Sebastian Ngutu Waganagwa, the deceased herein?

13. To begin with the 1st issue, is that there is no dispute that the applicant is a sister to the deceased herein. Both the applicant and the Respondent are in agreement on this fact but what is contested is the question of dependency.

The applicant for good measure has been candid that her claim on the only property comprising the estate is based on the fact that she has been in actual occupation of the same since 1967 when her late father **RUIO GATUGO** (deceased) reportedly gave her the parcel. The question of occupation is not denied but the Respondent states that they (deceased's children) were forced out of the estate. The question of occupation however is neither here nor there because the law of succession provides the meaning of what constitutes dependency and hence the right to inherit or benefit from an estate of a deceased person. **Section 29** of **Law of Succession Act** provides as follows:-

..... a dependant means,

a) The wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death.

b) Such of the deceased's parents step parents, grand-parents, grandchildren, step children, children whom the deceased had taken into his family as his own, brothers and sisters and half brothers and half-sisters as were being maintained by the deceased prior to his death..... " (Emphasis added).

14. For one, the applicant has deposed and testified that she is a sister to the deceased herein. This clearly places her claim in section 'b' of the cited section which provides that for a claim to be sustained it has to be qualified by the fact that the deceased maintained the claimant immediately prior to his/her death. There is no such claim in the applicant's application because as observed above, her claim is not hinged on "**dependency**" *per se* pursuant to **Section 29(b)** of the **Law of Succession Act**, but the fact that she is in actual occupation of the estate and the fact that she treats it as a gift by her late father. This claim in my view is not tenable in law for the simple reason that "**occupation**" *per se* does not make one a dependant unless one is able to prove that the deceased gave her/him a share in the estate as gift *inter vivos* or as gift during deceased's lifetime which is not the case here. The applicant's father did not have capacity to distribute or give out an estate belonging to his late son to anyone because **Section 3** of **Law of Succession Act** clearly shows that the estate herein was "**free property**" property and exclusively belonged to the deceased herein. So apart from the fact that there is no evidence showing that the late **RUVIO GATUGO** intermeddled with the estate herein, I find that he had no right or capacity to dispose it or give it out as a gift to any of his

children.

15. Secondly the applicant has insisted that Niceta Thaara is the only child to the deceased and that the Respondent and Isabela Wanjuki are not biological children as they came with their late mother. But even if this was a proven fact, which is not the case here, the two could still stake their claim under **Section 29(b)** as cited above because the deceased took them as his children and provided for them. I have considered the evidence tendered by the Respondent and perused through the chief's letter dated 19th July, 2013 filed together with the petition for Letters of Administration and I am satisfied based on the same that the Respondent has proved to the required standard in law (balance of probabilities) that the deceased died leaving a widow the late **ROSEMARY NDIIRI** and her three children Catherine Gicuku, Niceta Thaara Nguruto and Isabela Wanjiru Njeru surviving him as the only dependants within the meaning of **Section 29 of Law of Succession Act**. That finding settles the second issue for determination in this application. Rosemary Ndiiri is now said to be deceased which leaves the three children namely; Catherine Gicuku Njeru, Niceta Ngurto and Isabela Wanjiku Njeru as the only children and dependants in the estate of the deceased herein.

16. The applicants claim as correctly deposed by the Respondent rests on her father's estate through **Succession Cause No.436 of 2013**. I have looked at the copy of the summons for confirmation of grant tendered as D.Exh 1 and clearly and correctly the applicant herein is named as one of the dependants of the estate of **RUBIA GATUGO** alias **RUVIO GATUGO**. She has every right in that cause but certainly not in this cause because the estate herein exclusively relates to the estate of her late brother Sebastian Ngutu Waganagwa alias Ngutu Waganagwa and she was not a dependant or beneficiary of that estate. Her summons for revocation of grant dated 5th November, 2014 is for that reason disallowed.

17. However having made the above findings, I have noted that the Respondent included one Marie Njoki Nderi as a beneficiary on account that she had advanced her some money to file the succession cause. The advancement of the money did not contravene the law but doing so with the view of purchase or as a consideration of part of estate clearly offends **Section 82 of Law of Succession Act**. There was an inadvertent mistake to include her as a beneficiary and it is only in that regard that this court on its own motion hereby revokes the grant issued on 17th October, 2013 and confirmed on 24th July, 2014. This court in view of the aforesaid reasons and in the exercise of this court's discretion under **Section 66 of Law of Succession Act** hereby issues a fresh grant to Catherine Gicuku Njeru to administer the estate of the late Sebastian Ngutu Waganagwa alias Ngutu Waganagwa (deceased) as provided for by the law. In view of the age of this cause I grant her the liberty/leave to apply for confirmation of the grant before the expiry of the statutory period of six months. I shall not make any order to costs as this is a family matter.

Dated, delivered and signed at Embu this 27th day of September, 2018,

R.K. LIMO

JUDGE