



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 542 OF 2009

IN THE MATTER OF THE ESTATE OF M'MUCHEKE GAKINDIA alias MUCHEKE GAKINDIA (DECEASED)

VIRGINIA KAJEU.....1ST APPLICANT

HENRY NCURI.....2ND APPLICANT

ARNEST NKUUBI.....3RD APPLICANT

-VS-

M'MUGAMBI M' MUCHEKE.....RESPONDENT/PETITIONER

JUDGMENT

1. This succession cause relate to the estate of **M'Mucheke Gakindia alias Muccheke Gaikindia (deceased)**. On 8th May, 2017, a Certificate of Confirmation of Grant was issued to the Petitioner **M'Mugambi M'Muccheke**.
2. By summons filed in court on 24th November, 2017, the Applicants sought for the revocation of the grant on the grounds on the face of the Summons and the supporting affidavit of **Vignia Kajeu Kangwana**. These were inter alia that, the applicants have been defrauded of their rightful shares in the estate of the deceased; that the applicants were never consulted when this Cause was filed and that the signatures in the consent were forgeries. Further, that the petitioner had sold another family property No. **Ntima/Ntakira/1273** where the 3rd applicant used to reside and a portion of the estate property where he had moved the 3rd applicant whereby the purchaser was now harassing the applicant to move out.
3. On 12th February, 2018, the court directed that the application be determined by way of *viva voce* evidence. The parties were directed to file and serve their affidavit evidence within a specific period. While the applicants complied with the said directions, the petitioner did not.
4. **OW1 Virginia Kajeu Kangwana** adopted her witness statement filed in court on 6th June, 2018 and testified that, the petitioner was her step brother while **Henry Nciiri** and **Arnest Nkuubi M'Muccheke** were his brother and son of the petitioner, respectively. It was her evidence that her deceased father had only left **land parcel No. Ntima/Ntakira/709** as his estate. That the following were left on the land; **Zakaria Murianki, Justin Mbaya, M'Mugambi M'Muccheke, Virginia Kajeu, Henry Nciiri and Susan Kairigo (widow)**. It was her further evidence that she was not included in the list of distribution as a daughter of the deceased and that the 3rd objector was brought into the estate land by his father (the petitioner) after being removed from another of the petitioner's property namely **Ntima/Ntakira/1273**.
5. **OW2 Arnest Nkuubi M'Mugambi** adopted his statement filed on 6th June, 2018 and testified that the deceased was his grandfather while the petitioner was his father. That he had been bequeathed **land parcel No. Ntima/Ntakira/1273** by his grandfather whom he was borne from his mother's side and since he was young, the petitioner got the land transferred to himself to hold the same in trust for him. However, in 2006, the petitioner secretly sold the said property and forced him to shift to his portion on **Nyaki/Ntakira/709**. That the petitioner was now selling that portion thereby rendering him landless. That the petitioner never consulted him during the filing of this Cause and the other beneficiaries had been left out. In cross examination, he reiterated that the deceased had one property namely **Ntima/Ntakira/709** and that the petitioner had removed him from **plot number 1273** and brought him to the estate land namely **Ntima/Ntakira/709**.
6. Although **M'Muthaura Gakindia** and **Gerald Marete Kirima** filed witness statements to support the applicants' case, they did not appear to be cross-examined on the same. I will therefore not consider their depositions.
7. On the other hand, **PW1 M'Mugambi M'Muccheke** testified that when the deceased died, he had left one property which he had divided to his children and that Virginia's house (the 1st applicant) had been given some portion. He further admitted that the 3rd objector was his son but that he should get land from him as opposed from the deceased. When cross examined by court, he admitted that he had sold his portion in the estate land to one Rahab Gakana Kirima.

8. Although the court directed that the parties do file written submissions within a specified period, as at the time of writing this judgment, only the applicants had filed their submissions.
9. It was submitted for the applicants that upon the deceased's death, the respondent filed the Succession Cause without their knowledge. He excluded their names from the list of beneficiaries thereby disinheriting them. It was further submitted that, it was in the knowledge of the petitioner that the 1st and 2nd applicants were his siblings thus entitled to a share of their late father's property regardless of their gender or marital status. As regards the 3rd applicant, the petitioner gave him his portion of inheritance after selling the land that belonged to him and in which occupied and that it would be unfair for the same to be taken away 12 years on.
10. I have carefully considered the evidence adduced by the parties and the submissions by the applicants. It is not in dispute that the 1st and 2nd applicants are children of the deceased whereas the 3rd applicant is the petitioner's son. It is also not in dispute that that the petitioner is the deceased's son. The parties therefore are beneficiaries of the estate of the deceased and are entitled to a share of the same as a matter of course, save for the 3rd applicant.
11. In their evidence in chief, OW1 and PW1 stated that the deceased had subdivided his land prior to his death. However, there was no evidence that was tendered to prove this fact. **PW1** in cross examination stated that the deceased did not give any land to the daughters allegedly because they were married. There was no evidence that the deceased had given any bequest during his lifetime. A child is a child whether daughter or son, whether married or unmarried and that fact requires no authority. All the children of the deceased, both daughters and sons, are entitled to a share in the estate.
12. **OW2's** case that he had been bequeathed **land parcel No. Ntima/Ntakira/1273** by his grandfather whom was borne from his mother's side and that in the year 2006, his father (the petitioner) had secretly sold the same and forced him to shift to his portion namely **Nyaki/Ntakira/709** was neither denied or challenged by the petitioner. In his evidence, stated that the 3rd applicant should get land from him as opposed from the deceased. When cross examined by court, the petitioner admitted having sold his portion to Rahab Gakana Kirima. One therefore wonders which land the petitioner will bequeath to the 3rd applicant if indeed he has admitted that he had already sold his portion. Similarly, the applicants' case that they were never consulted nor provided for in the distribution was neither controverted nor challenged.
13. I have perused the Certificate of Confirmation of grant dated 8th May, 2017. Save for the 2nd applicant, the 1st applicant has not been provided for. The applicants further contended that they were never consulted when this succession cause was filed and this fact remained unconverted.
14. In **SAMUEL WAFULA WASIKE -vs- HUDSON SIMIYU WAFULA CA NO.161 OF 1993** the Court of Appeal held:-
- “A grant obtained on the strength of false claims, without obtaining the consent of persons who had prior right to the grant and on the basis of facts concealed from the court, is liable to revocation.”***
15. It is doubtful if the sale by the petitioner to a 3rd party before confirmation of grant can hold. The claim by the 3rd applicant against the petitioner is a claim that should be lodged before the Land and Environment Court (the 12 year occupation claim) and not the family court.
16. From the circumstances of this case, I am satisfied that the Applicants have made a sufficient case for the revocation of the grant pursuant to Section 76 of the Law of Succession Act CAP 160 of the Laws of Kenya. Accordingly, the Certificate of Confirmation of Grant issued to the Petitioner on 6th May 2017, is hereby set aside. The grant made on 11th August, 2010 to the petitioner is hereby revoked. A fresh grant hereby issues to **M'Mugambi M'Mucheke** and **Virginia Kajeu Kangwana** jointly.
17. Leave is granted to them to apply for confirmation within 30 days. If they do not agree on distribution, any one of them may file the requisite application for confirmation proposing on how to distribute the estate and serve the other within that period. The opposing administrator may file and serve a protest within 7days of being served with the application for confirmation. Matter to be mentioned on a date to be agreed upon.

DATED and DELIVERED at Meru this 26th day of September, 2018.

A. MABEYA

JUDGE