



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 364 OF 2006

In the Matter of the Estate of Solomon Arachi Kirimania (Deceased)

ZIPPORAH GACEKE M'ARACHI.....PETITIONER

Versus

JENNIFFER WANZA KATIVANGA.....APPLICANT

RULING

Revocation of grant

[1] By Summons dated 11th May 2009 brought under Sections 76 and 47 of CAP 160 and Rules 44 and 73 of the Probate and Administration Rules, the applicant seeks the following orders:

- 1. THAT the confirmed grant issued to the petitioner ZIPPORAH GACEKE M'ARACHI on 23rd October 2008 be revoked or annulled.**
- 2. THAT in the alternative, the mode of distribution ordered on 17th October, 2008 be set aside and the applicant be granted an opportunity to be heard on distribution.**
- 3. THAT an order of inhibition do issue against LR. NO. KIIRUA/NAARI/65 pending the hearing and determination of this application.**
- 4. THAT costs be in the cause.**

[2] The grounds upon which the summons is grounded are set out in the application, the supporting and supplementary affidavit of Jennifer Wanza Kativanga sworn on 11th and 28th May 2009 respectively. She stated that she was the wife of the deceased's late son David Kirimania M'Arachi. She and her five children have always resided on the deceased's estate. Out of the five three are her children with the deceased, who are Nancy Mbinya Kiramania, Brian Bundi Kirimania and Mark Makau Kirimania. The petitioner applied for the grant secretly and concealed from the court that the applicant is one of the beneficiaries and left her out in the mode of distribution. She deposed further that her co-wife Salome Igoki Nkarichia who predeceased their husband left two behind two sons, James Kithinji and Eric Mwenda who she takes care of. She affirmed that she and James Kithinji Kirimania who is married to one Judy Nkirote are in actual and constructive possession and cultivation of about 2 ½ acres of the estate.

[3] In the replying affidavit of Zipporah Gaceke M'Arachi sworn on 21st May 2009, the deponent denied this cause was filed secretly as the applicant was duly informed of the filing of the cause but she refused to have anything to do with it. She ascertained that her late son David Kirimania M'Arachi was married to Salome Igoki and they had two sons, Kithinji and Mwenda who reside on the estate. The applicant's claim over her son's paternity of her children has always been contested. Thus, she believes that the applicant is not a dependant of the estate and has no claim whatsoever. She is certain that if any land is sought by the applicant is given to her she will sell to the detriment of her grandchildren. That the applicant never involved her in the proceedings relating to the estate of her son as she squandered all the monies held in his account.

Submissions

[4] In the written submissions, the applicant reiterated the contents of her affidavits. She asserted that her application met the threshold set by Section 76 of CAP 160 to have the grant revoked and relied on the cases of **Dan Ouya Kodwar v Samwel Otieno Odwar [2015] eKLR** and **Patrick Murithi Munene v Francis Mwiti & 4 others [2017] eKLR**. The petitioner submitted and retold what she had stated earlier. She specifically averred that under Section 66 of CAP 160 she ranks in priority over the other beneficiaries and that there is no need of revoking the grant. Under section 35 of CAP 160 the petitioner is entitled to a life interest in the whole residue of the estate but allocated herself 12

acres. The applicant ought to have moved the court under the provisions of the said section for the appointment of shares of the dependants that she claims were left out. The 2 ½ acres of land the applicant stated to be in possession of is what she should seek to have apportioned in her favour which can be accommodated without having the grant revoked.

ANALYSIS AND DETERMINATION

[5] I have been called upon to decide **whether or not to revoke and or annul the confirmed grant issued to Zipporah Gacheke M'Arachi.**

[6] Section 76 of the Law of Succession Act stipulates the threshold revocation or annulment of a grant as follows:

“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, 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.”

[7] The applicant claimed that the grant was obtained by concealing from the court that she is a beneficiary of the estate and the grant was obtained without her consent. I have perused the record and I see the petitioner mentioned the applicant as one of the persons surviving the deceased. What's more she gave her consent for making of the grant as she signed Form 38. This is a clear indication that she knew about the cause. Thus, the proceedings were neither filed secretly nor upon concealment of facts material to the case.

[8] The deceased was survived by:

- a. Zipporah Gacheke M'arachi - Wife
- b. Dorothy Kendi Nturibi - Daughter
- c. Jennifer Wanza Kativanga - Daughter in Law
- d. Francis Mutembei M'Arachi - Son
- e. Rael Kagwiria M'Arachi - Daughter Married (deceased)
- f. Jenniffer Kanana M'Arachi - Daughter
- g. Nelly Kaguri M'Arachi - Daughter

However, in her mode of distribution the petitioner divided the estate, LR No. KIRUA/NAARI/65, among all the beneficiaries except the applicant and Rael Kagwiria M'Arachi. Nevertheless, she deposed that her grandchildren occupy about six acres which she will take into consideration when distributing the estate.

[9] The deceased who died intestate left behind a widow and children. She allocated herself 12 acres. There is nothing wrong with the surviving spouse getting a distinct share of the estate immovable property. See the case of **Stephen Gitonga M'murithi v Faith Ngira Murithi [2015] eKLR** the Court of Appeal held:

“As for the issue of the widow having been given an outright tangible shareholding in the net intestate estate of the deceased as opposed to a life interest, we find nothing in section 40 of the Laws of Succession Act that can prevent a court of law from looking at the peculiar circumstances of each case and then determine whether to apply strictly the rule on life interest or

temper with it in the interests of justice to all the affected parties. In the circumstances of this case having found that the principle in section 38 was the appropriate applicable principle, ordering a life interest would have occasioned injustice to all the dependants as opting for such an option would have only bestowed upon the widow Naomi a hovering interest over the individual interests of all the other beneficiaries thereby making it impossible for all the beneficiaries to enjoy freely the resulting benefits from the deceased's estate. We find it was prudent for the learned trial Judge to accord a direct unencumbered benefit to the widow Naomi as opposed to a life interest."

[10] The only problem is that she left out the applicant in the distribution. The applicant and the children of the deceased son of the deceased is entitled to take his share under the principle of representation. I should however agree with the petitioner that provision for such dependant could be made without necessarily revoking the grant. The applicant in paragraph 10 of her supplementary affidavit sworn on 28th May 2009 averred that she and her son live and work on 2 ½ acres of land of the estate property. She also stated that she takes care of the children of Salome, the first wife of her late husband. As a matter of right and in the interest of justice I direct that;

a. The applicant shall take 2 ½ acres of the estate land which she will hold on her own behalf and in trust of all the children of the late David Kirimania M'Arachi, These children are; (1) James Kithinji; (2) Eric Mwenda; (3) Nancy Mbinya Kirimania; (4) Brian Bundi Kirimania and (5) Mark Makau Kirimania.

b. The share of the petitioner will now reduce to 8 ½ acres.

c. The certificate of confirmation of grant shall be amended accordingly.

d. This being a succession cause, I make no order as to costs. It is so ordered.

Dated, signed and delivered in open court at Meru this 30th day of October, 2018

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F. GIKONYO

JUDGE

In presence of

Kithinji for Kariuki for protestor

Ngugi for Thingaru for petitioner

Court - Ruling delivered in open court. Matter finalized.

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F. GIKONYO

JUDGE