



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

SUCCESSION CAUSE NO. 1879 OF 2011

IN THE MATTER OF THE ESTATE OF FRANCIS WANJAH THIANI- DECEASED

MILKA NYAGUTHI.....1ST APPLICANT

FRACIA WANJIKU.....2ND APPLICANT

VERSUS

PETER THIANI WANJAH THIANI.....1ST RESPONDENT

STEPHEN NGETHE WANJAH THIANI.....2ND RESPONDENT

MIRIAM MUTHONI WANJAH THIANI.....3RD RESPONDENT

GEORGE NJOROGE WANJAH THIANI.....4TH RESPONDENT

RULING

1. The deceased Francis Wanjahi Thiani died on 5th November 1991. On 17th February 1993 a joint grant of letters of administration intestate was issued to the respondents Miriam Muthoni Wanjahi, Peter Thiani Wanjahi, Stephen Ngethe Wanjahi and George Njoroge Wanjahi. The grant was issued by the Chief Magistrate's Court at Kiambu in Succession Cause No. 194 of 1992. The deceased was polygamous. He had married two wives. The first wife was the late Wanjiru Wanjahi who was the mother of Miriam. The second wife was the late Mugure Wanjahi who was the mother of Peter, Stephen and George. In all, the first house had six children (all daughters) and the second house had nine children (three sons and six daughters).

2. On 23rd March 1993 Miriam applied for the confirmation of the grant. The application was opposed, following which there was oral hearing. A judgment was delivered in which it was decided that the deceased had only one parcel of land, parcel No. Dagoretti/Thogoto/940 measuring about 5.1 acres. It was ordered that Miriam gets 0.25 acres and the balance be shared equally among Peter, Stephen and George. A certificate of confirmation of the grant was issued on 6th June 2000.

3. On 25th August 2011 the applicants Milka Nyaguthi and Fracia Wanjiku filed this summons for the revocation of the grant on the grounds that the proceedings leading to the grant were defecting in substance; the grant was obtained fraudulently by the making of false allegations of fact essential in point of law; and that there was concealment of material facts. Milka swore a supporting affidavit which

essentially claimed that the distribution of the estate was done without the consent of all the beneficiaries. They are daughters of the deceased.

4. Peter swore a replying affidavit to oppose the application. He denied that there was fraud or misrepresentation in the issuance of the grant. He stated that the applicants had been represented by their sister Miriam, uncle Daniel Wathigo Mburu and brother-in-law James Kariuki Kagume all of whom had testified during the proceedings in the subordinate court. Of relevance to the present ruling was the plea in the replying affidavit that:-

“4.THAT this matter has been heard by a court of competent jurisdiction and judgment issued hereof, hence this application is incurably defective and should be dismissed.

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9.THAT there surely must be an end to litigation and since the judgment of the lower court in 1999 no action has been taken by the applicants and they cannot come to court 13 years to attempt to disturb the *status quo* without alluding to earlier judgment.”

Basically, the respondents’ case was that the summons was *res judicata* in view of the judgment of the lower court that was delivered on 25th June 1999. The applicants’ position was that they were perfectly entitled to be heard on the application for the revocation of the grant. Each side had counsel who filed written submissions on the objection.

5. A grant of representation, whether or not confirmed, may at any time be revoked or annulled on any of the grounds under **section 76** of the **Law of Succession Act (Cap.160)**. Under **rule 44** of the **Probate and Administration Rules**:-

“44(1) Where any person interested in the estate of the deceased seeks pursuant to the provisions of section 76 of the Act to have the grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that resident magistrate’s registry.”

6. It has been indicated that this cause was filed and heard at the subordinate court at Kiambu. The summons for revocation was filed in this court, in complete compliance with the provision of the **Rule**. This court was, until last year, the nearest High Court to the subordinate court at Kiambu. The applicants are complaining that, although they were interested in the estate they were excluded from the distribution, and that their consent was not sought in the distribution. The merits of the complaint aside, they came to the proper forum. Regarding the issue that the applicants were complaining thirteen (13) years after the judgment, **section 76** of the **Act** provides that such application may be brought –

“at any time.”

7. Lastly, regarding the claim that the summons is *res-judicata*, it is evident that this is the first time that the court is being asked to revoke the grant. This is the first time that the applicants have come to court to claim that they were interested in the estate and yet the same had been distributed without reference to them; that their consent was neither sought nor obtained before the estate of their father was distributed. No court has heard and determined this claim, and therefore under **section 7** of the **Civil Procedure Act**

(Cap. 21) the summons filed by the applicants is not *res judicata*.

8. Consequently, the preliminary objection raised by the respondents is without merit and is dismissed with costs.

DATED and SIGNED at NAIROBI this 22nd day of MARCH 2017.

A.O. MUCHELULE

JUDGE

DATED and DELIVERED at NAIROBI this 29TH day of MARCH 2017.

R.E. OUGO

JUDGE