



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 125 OF 2009

IN THE MATTER OF THE ESTATE OF MBURU MWANIKI (DECEASED)

MARGARET WAIRIMU MURIGI GITAU.....1st APPLICANT

MURIGI GITAU.....2ND APPLICANT

VERSUS

ETHAN MBAU GITAU.....RESPONDENT/PETITIONER

RULING

The respondent petitioned for and was granted letters of administration intestate for administration of the estate of Mburu Mwaniki (deceased) who died on 10th May, 1974. The petition was filed on 2nd October, 1991 in the magistrates' court at Murang'a as **Succession Cause No. 283 of 1991**.

According to the affidavit in support of the petition for grant of letters of administration, the petitioner named himself and the following persons as having survived the deceased:

1. Gitau Mburu (A)
2. Njeri Mburu
3. Njogu Mburu
4. Gitau Mburu (B).

The respondent described himself in the petition as the grandson of the deceased.

The only asset listed as comprising the deceased's estate was land known as **Title No. Loc. 6/Munguini/39** measuring approximately 4 acres. The deceased had no liabilities.

On 27th July, 1998 the respondent sought to have the grant confirmed and this time round, he omitted one of the two persons named as Gitau Mburu from the list of survivors eligible for a share of the deceased's estate. In the affidavit in support of the summons, he proposed to have the estate distributed to the following persons as follows:

1. Wanjiku Njogu - 1.0 acre

2. Elias Njogu - 0.5 acres

3. Simon Ngugi - 0.5 acres

4. Ethan Mbau Gitau - 2.0 acres

The grant was confirmed on 2nd day of October 1998 and a certificate of confirmation of the grant issued on the same date. The schedule thereto shows that the court distributed the estate as proposed by the petitioner.

By a summons for revocation of grant dated 5th February, 2009 and filed in this court on 6th February of the same year, the applicants sought to have the grant revoked or annulled on the ground that the proceedings to obtain it were defective in substance; that the grant of letters to the respondent was obtained fraudulently by concealment from the court information material to the case; and that the grant to the respondent was obtained by means of untrue allegation of fact in point of law to justify its issue.

In the affidavit in support of the grant, the 1st applicant deposed that despite the fact that the respondent was, just like them, the deceased's grandchild, he had transferred his entire estate to himself and thereby effectively disinherited them. According to the applicant, the respondent did not disclose that the deceased was survived by other children who included their deceased father, Gitau Mburu and who were also entitled to his estate.

The respondent admitted in his replying affidavit that the applicants were his first cousins since their respective fathers were brothers whose father was the deceased. Accordingly, they were all the deceased's grandchildren.

The respondent also admitted that he had been registered as the sole beneficiary of the land but he deposed that he was so registered pending the transmission of the estate to the beneficiaries thereof. In any event, so he swore, he was the administrator of the deceased's estate who also funded the succession cause.

During the hearing of the summons for revocation of grant, the parties reiterated their depositions in their respective affidavits though the applicant added that the respondent had chased them from the land and that he was occupying and utilizing the land to their exclusion. On his part, the respondent did not deny that he was using the land exclusively but insisted that he had bought the applicant's share from their late father. He did not, however, produce any evidence of such purchase.

What I gathered from the evidence on record is not a case for revocation annulment of grant under **section 76** of the Law of Succession Act but rather a case for non-compliance with the confirmation order and distribution of the estate as directed by the court.

It is rather inconceivable and perplexing that although the respondent's own proposal of the distribution of the estate was adopted by the court and duly encapsulated in the certificate of confirmation of grant, he somehow went behind it and managed to transfer the entire estate to himself to the exclusion of other beneficiaries whom he himself had acknowledged were not only the deceased's survivors but were also entitled to a share of his estate.

The allegation that he had purchased the applicants' father's share was not supported by any proof and indeed it was a self-defeatist claim because the deceased's estate could not possibly have been disposed of before the confirmation of the grant of letters of administration. In any case, in the unlikely event that he had purchased the applicant's share from their deceased father, he had no reason to allocate them any share of the deceased's estate in his summons for confirmation of grant.

This allegation is also inconsistent with his own deposition in the replying affidavit that he only temporarily registered himself as the sole proprietor of the estate pending the transmission of the shares to their respective beneficiaries who, in this case, must have included the applicants.

As I have noted before, the applicants may not have made out a case under **section 76** of the Law of Succession Act, but it is quite clear that the administrator who was entrusted with the administration and the distribution of the estate abused his powers and transferred the deceased's entire estate to himself; he thereby effectively disinherited the rest of the deceased's heirs including the applicants. In the face of such manifest injustice, the court cannot watch helplessly, fold its hands and sit back simply because the procedure the applicants adopted to approach the court is not the appropriate one. If the court was to take that course, it would effectively be abdicating its sacrosanct duty to administer substantive justice under the cover of procedural technicalities. The Constitution itself abhors such conduct so much so that it expressly provides under **article 159(2)(d)** that courts must administer justice without undue regard to procedural technicalities.

In the law of succession itself, **rule 73** of the **Probate and Administration Rules** saves this court's inherent powers to make such orders as are necessary to meet the ends of justice; it states as follows:

73. Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

It is in the spirit of this rule and **article 159 (2) (d)** of the Constitution that I am inclined to make the following orders: -

1. The applicants summons dated 5th February, 2009 is dismissed but with no orders as to costs.
2. The Land Registrar, Murang'a is directed to cancel the registration of Ethan Mbau Gitau as the absolute proprietor of **Title No. Loc. 6/Munguini/39**.
3. The Land Registrar, Murang'a is directed to comply with the confirmation order made on 2nd October, 1998 and transfer the subdivisions out of **Title No. Loc. 6/Munguini/39** to the respective names as set out in the schedule to the certificate of confirmation of grant dated 2nd October, 1998 upon presentation of the requisite mutations and transmission documents.
4. Pending transfer and registration of the various subdivisions as stated in 3 above, the registration of **Title No. Loc. 6/Munguini/39** be reverted back to name of the deceased, Mburu Mwaniki.

It is so ordered.

Signed, dated and delivered this 13th day of October, 2017

Ngaah Jairus

JUDGE