



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**MISC. SUCCESSION CAUSE NO. 22 OF 2013**

**IN THE MATTER OF THE ESTATE OF KIBUTU MUCHIRI (DECEASED)**

**AND**

**MARY WAMBUI KINYUA..... APPLICANT**

**VERSUS**

**FRANCIS MUKINGO KIBUTU.....1<sup>ST</sup> RESPONDENT**

**JAMES MWAI MUCHIRI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. **MARY WAMBUI KINYUA**, the applicant herein has taken out Summons dated 29<sup>th</sup> March, 2012 for Revocation of Grant issued vide Kerugoya Senior Principal Magistrate's Court Succession Cause No. 47 of 1989 to **James Mwai Muchiri** and **Francis Mukingo Kibutu** in respect to the estate of the late **KIBUTU MUCHIRI** (deceased) who died on 7<sup>th</sup> January, 1973 domiciled in Thaita Village, Kirinyaga.

2. The Summons for Revocation/annulment of the said grant is premised are stated on the face of the application and are as follows:

- a. ***That the proceedings to obtain the grant were defective in substance.***
- b. ***That the grant was obtained fraudulently and by concealment of something material to the cause.***
- c. ***That the grant was obtained by means of an untrue allegation of a fact essential on a point of law to justify the grant.***
- d. ***That some beneficiaries were not notified of the succession cause when it was filed.***
- e. ***That the petitioners conspired with the chief to lock out other children of the deceased.***

3. In the supporting affidavit sworn on 29<sup>th</sup> March, 2012, the applicant has deposed that the deceased left behind other dependants whom she named as:

1. Susan Muthoni
2. Ajerina Wambui
3. Juliana Waruguru

The above named dependants according to the applicant never benefited from the estate and faulted the

administrator for including himself as a beneficiary when he was not a child to the deceased.

4. The applicant at the hearing of the Summons for Revocation of Grant which proceeded by way of oral evidence told the court that the deceased herein had five children and gave the names as follows:

1. Juliana Waruguru
2. Susana Muthoni
3. Angelina Wambui
4. Mary Wambui and
5. Francis Mukingo Kibutu

5. It was her evidence that their mother died in 1997 and the only property left behind by their father was **INOI/THAITA/174** which measured above 5 acres according to her. She asked this Court to revoke the grant issued so that all the children of the deceased could benefit from the distribution of the estate.

6. **Francis Mukingo Kibutu**, the 2<sup>nd</sup> Respondent opposed the application for revocation of grant through a replying affidavit sworn on 9<sup>th</sup> July, 2015. He has deposed that he is a son to the deceased and that James Mwai Muchiri the co-petitioner in the cause was a brother to the deceased. He has further deposed that the applicant was fully involved in the succession proceedings in the subordinate court and annexed a copy of the proceedings from the lower court (FMK 13) to demonstrate that the applicant fully participated therein. He has further deposed that the applicant has taken him through numerous unnecessary litigations and cited Kerugoya Senior Principal Magistrate's Court Case No. 241 of 2002, L.D.T. No. 52 of 2004 at Kerugoya, and L.D.T No. 8 of 2011.

7. The 2<sup>nd</sup> Respondent has further faulted the applicant for sleeping on her rights for over 16 years when she ought to have moved the court to annul the grant which he says she knew way back in 1999. He has further added that the 1<sup>st</sup> Respondent James Mwai Muchiri is now deceased and the share he got (INOI/THAITA/1437) from the estate is now occupied by his son, Laban Wachira.

8. In his evidence before court, Francis Mukingo Kibutu acknowledged that the applicant was his sister. He told this Court that the person who brought him to file for succession was his late uncle James Mwai Muchiri and that they jointly applied for letters of administration in respect to the estate of the late KIBUTU MUCHIRI despite the fact that his mother was still alive by then. He further added that all the beneficiaries were involved and were in court when the grant was confirmed. He however, conceded that the applicant deserves to get a share in the estate.

9. I have perused through the record of the subordinate court and the annexures exhibited by the 2<sup>nd</sup> respondent's replying affidavit. It is clear from the record of the subordinate court (Kerugoya Principal Magistrate's Court Succession Cause No. 47 of 1987) that on 17<sup>th</sup> September, 1991 when the cause came up in court the 1<sup>st</sup> Respondent James Mwai Muchiri, told the hon. Court that the deceased herein had 5 children and a wife. He gave the name of the wife as LYDIA MUTHONI and indicated that she was present in court including 2<sup>nd</sup> Respondent herein as the son of the deceased. The other children (daughters to the deceased) were not indicated to be present.

10. This Court has further noted from the proceedings that on 22<sup>nd</sup> October, 1991, Lydia Muthoni, the then surviving widow objected to the grant of letters of administration to the petitioner insisting that the deceased was her husband. Later the subordinate court issued the grant to both petitioner and the objector (Lydia Muthoni). During the confirmation of the grant on 27<sup>th</sup> August, 1999, the subordinate court noted that the widow (objector) was unable to communicate as she appeared deaf. The Court adjourned the matter to 28<sup>th</sup> September, 1999. On the said date the record shows the daughters were absent but the petitioner told the court that all the daughters were married. The court then confirmed the grant indicating that there was no objection. It is unclear if the objector was present and/or if she had recovered from the hearing impairment that was noted a month earlier on 27<sup>th</sup> August, 1999. The record further shows that the 1<sup>st</sup> respondent James Mwai Muchiri went to court later asking the court to execute

transmission documents as Francis Mukingo, the 2<sup>nd</sup> respondent herein had refused to execute the documents.

11. This Court has noted that the applicant was not involved in the succession and even if she was involved, she was definitely absent when the grant was confirmed. There is no explanation given as to why the applicant was left out in the distribution of the estate despite the fact that it was made clear to the trial court prior to the confirmation that there were other beneficiaries who were absent and among those beneficiaries was the applicant who was unmarried and resided on the estate.

12. The subordinate court also appointed the widow who was the objector as the co-administratrix on 11<sup>th</sup> December, 1998 and it is not clear how she was left out in the administration of the estate when she was the administratrix. I find that there was inadvertent mistake on the part of the subordinate court to confirm the grant without finding out from all the beneficiaries if the proposed mode of distribution was acceptable or not. It was also a mistake to issue a grant and fail to include the name of Lydia Muthoni who was the objector and court appointed administratrix. To that extent even without looking at the other issues raised in the Summons for Revocation of Grant herein, the procedure and the proceedings to obtain the grant were clearly defective. I also find that material facts may have been concealed from the court owing to the hearing impairment of the widow which was noted in the proceedings. The said widow – Lydia Muthoni later on died prior to the filing of the present application. It is therefore difficult to know if she agreed with the proposed mode of distribution adopted by court. It is also unclear how the administratrix was replaced by the respondent herein but what is apparent is that the replacement was equally unprocedural.

13. I find that the applicant is a daughter of the deceased as conceded by the 2<sup>nd</sup> respondent. The 2<sup>nd</sup> Respondent has further conceded that she deserves to get a share. This Court finds that she is a surviving child of the deceased within the meaning of **Section 35** of the **Law of Succession Act** and by law it was wrong and unfair to lock her out of distribution. This Court finds that she has laid a firm basis for this Court to invoke the provisions of **Section 76** of the Act which I hereby do to revoke that grant in respect to the estate of the late Kibutu Muchiri that was confirmed on 28<sup>th</sup> September, 1999. The operation of the said provisions is not time bound. The upshot of this is that I find merit in the Summons for Revocation of Grant dated 29<sup>th</sup> March, 2012. The same is allowed with no order as to costs. I further direct that any entries in the register at the lands office made as a result of the said grant be hereby reversed and the name of the deceased be reinstated pending distribution of the estate.

14. In order to bring this matter to an end I shall exercise my discretion under **Section 66** of the **Law of Succession Act** and appoint both the applicant, Mary Wambui Kinyua, and the 2<sup>nd</sup> Respondent Francis Mukingo Kibutu to be joint administratrix and administrator respectively in the estate of the late Kibutu Muchiri. The two are given liberty to engage the other family members and if they are in agreement on the issue of distribution they can file for confirmation of grant before the expiry of six months. It is so ordered.

***Dated and delivered at Kerugoya this 29<sup>th</sup> day of February, 2016.***

**R. K. LIMO**

**JUDGE**

29.2.2016

Before Hon. Justice R. Limo J.,

Court Assistant Wailly Mwangi

Interpretation English-Kikuyu

Mwangi holding brief for Ngangah for Respondent

Applicant Mary Wambui present in person

**COURT:** Ruling signed, dated and delivered in open in presence of Mwangi holding brief for Ngangah for respondents and Mary Wambui Kinyua (applicant) in person.

**R. K. LIMO**

**JUDGE**