



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO.286 OF 2007

In The Matter Of:

The Estate of the Late Solomon M' Tumbiri M' Munyua (Deceased)

GEOFFERY MURITHI M'ITUMBIRI.....PETITIONER

VERSUS

CATHERINE KIENDE.....INTERESTED PARTY

RULING

[1] Before me is a Summons for Revocation of Grant expressed to be brought under Section 76 of the Law of Succession Act CAP 160 of the Laws of Kenya and Rule 44 (1) of the Probate and Administration Rules. The significant orders sought in the Summons are:

1. ***An order revoking or annulling Grant of Letters of Administration intestate issued to Geoffrey Murithi on 26th June 2008.***
2. ***An of inhibition restricting any kind of dealings over L.R NO. Ntima/Igoki/2531 and Kiirua/Ruiiri 4977 and 4978 and Plot No. 3B Makutano pending the hearing and determination of this matter or until further orders of this honourable court.***
3. ***An order to include Plot No. 3B Makutano as part of the estate of the deceased and the said property to be distributed to beneficiaries.***
4. ***Any such further orders or sequential orders as the court will deem fit and proper.***
5. ***An order that costs of this application to be borne by the Petitioner.***

[2] The major grounds for applying are:

1. THAT the Grant herein was obtained fraudulently as the Petitioner/Respondent herein gave misleading information on the estate of Solomon M' Itumbiri (deceased)
2. THAT the grant herein was also obtained by concealment from this Honourable court of a material fact in relation to the estate of Solomon M' Itumbiri that ought to have been disclosed.
3. THAT the Petitioner deliberately and in an attempt to conceal all property of the deceased left out Plot NO. 3B Makutano which formed part of the estate of the deceased.
4. THAT the grant therein was obtained secretly and without the knowledge and express consent of the applicant, who by virtue of being daughter of the deceased, has a lawful interest in her late father's estate.
5. THAT it is fair, just and equitable that this application be allowed.

[3] In support of her application, the Applicant stated that the deceased was survived by the following dependants:

1. Veronicah Karega-wife (deceased),
2. Geoffrey Murithi-son,
3. Catherine Kiende-daughter
4. Jane Karwitha- daughter

She also contended that at the time of his death the deceased left the following assets:

1. L.R NO. Ntima/Igoki/2531,
2. L.R No. Kiirua/Ruiri/3198; and
3. Plot No.3B Makutano.

She made further averments that this Cause was filed without her knowledge and that she never signed any consent to the making of Grant of Letters Administration intestate to a person of equal or lesser priority. In addition thereto, she claimed that the Petitioner failed to disclose all the deceased's property by deliberately leaving out Plot No.3B Makutano.

[4] The Applicant amplified the above grounds in the supporting affidavit. She, however, emphasized that, after the Confirmation of Grant, the Petitioner transferred all of the deceased's property to himself. She also urged that being a sister to the Petitioner, she was equally entitled in the same degree as the Petitioner to apply for Letters of Administration as per the order of consanguinity set out in Section 66 of the Law of Succession Act. According to her, the Petitioner sought the consent of one Boniface Kimathi Murithi and Rael Kaimi Murithi who were his son and wife respectively. She submitted that, the said act was a serious misrepresentation and a complete violation of Rule 26 (2) of the Probate and Administration Rules and order of consanguinity set out in Section 66 of the Law of Succession Act. The Applicant cited the case of **ELIZABETH WANJIRU KAMAU V LUCY WANJIKU [2015] eKLR** to support her argument on the point.

[5] The Applicant submitted further. She termed as a lie the allegation by the Petitioner that the Applicant had requested for her share in the deceased's estate to be registered in the Petitioner's name. According to the Applicant, the Petitioner had sold the deceased property and forged an acknowledgement receipt dated 24th June 2010, wherein he fraudulently indicated that the Petitioner was selling the property in his capacity as the Applicant's trustee, and that she had received a deposit of Kshs 340,000. The Applicant denied having ever received any such money and submitted that she did not even know the purchaser in the transaction. And for those reasons, the Applicant was of the view that it was only just and equitable that the grant herein be revoked or annulled. She also sought for order of Inhibition to restrict any dealings in L.R NO. Ntima/Igoki/2531, L.R NO Kiirua/Ruiri/4977, 4978 and 3198 pending the hearing of this cause.

The Petitioner was of contrary view

[6] The Petitioner asserted that the deceased had fully shared out his assets prior to his death including the ones that remained in his name. He argued further that at the time that this Succession Cause commenced, the Applicant had duly given her consent to him to petition for Letters of Administration as well as consent to the Confirmation of Grant. The Petitioner submitted that there was adequate notice given to the Applicant and the other beneficiaries who gave their voluntary and uncoerced consent to the Confirmation of Grant in favour of the Petitioner and that the Applicant had authorized the Petitioner to sell a portion of her land which she acknowledged. On Plot No.3B Makutano he submitted that it was jointly owned and in accordance with the law on joint proprietorship applied. All he needed to do was to apply to the land registrar and prove the death of the other proprietor after which the registrar deletes the name of the deceased and the property goes to the surviving proprietor. Finally it was submitted for the Petitioner that the Applicant had failed to prove that the proceedings to obtain the grant were defective in substance or that the Grant was obtained fraudulently by making false statement, or by concealment of something material to the case . Consequently, the Petitioner urged the court to dismiss the Summons for

Revocation of Grant and lift the inhibitory orders against the suit property.

DETERMINATION

[7] I have carefully considered this Application and the rival submissions by the parties. Section 76 of the Law of Succession Act CAP 160 of the laws of Kenya is instrumental; it provides the circumstances under which a Grant may be revoked as follows:

“Revocation or annulment of grant

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—***
 1. ***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***
 2. ***to proceed diligently with the administration of the estate; or***
 3. ***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.***

[8] The Petitioner alleges that the Applicant was properly notified of the filing of this Succession Cause and that she voluntarily gave her consent to the Confirmation of the same. This allegation has been vehemently denied by the Applicant. The Applicant stated that instead of the Petitioner obtaining consents of all persons entitled to apply for letters of administration of the estate of the deceased in equality to or in priority to the Petitioner, he sought the consent of one Boniface Kimathi Murithi and Rael Karimi Murithi who were his son and wife respectively. The Petitioner did not rebut the allegations that he sought the consent of one Boniface Kimathi Murithi and Rael Karimi Murithi who are his son and wife respectively. The court has indeed perused Form 38 dated 28th June 2008 and it is confirmed that the consent to the making of a Grant of Administration intestate to person of equal priority was given by one Boniface Kimathi and Rael Murithi who were said to be the Petitioner's son and wife respectively. The submissions by the Petitioner that the Applicant had voluntarily given her consent are, therefore, not only false but clearly misleading. Although the fact that the Applicant is a daughter of the deceased has not been denied, but for sanctification I have also perused Form P & A 5, i.e. the Affidavit in Support of Petition for Letters of Administration Intestate and it is evident that the Applicant was listed as one of the daughters of the deceased. The other daughter is Jane Karwitha. The Petitioner is listed as son of the deceased. Those three were the only surviving children of the deceased. Accordingly, under section 66 of the Law of Succession Act and Rule 26 of the Probate and Administration Rules, the Applicant stood in the same degree as the Petitioner in relation to applying for grant of administration intestate of the estate of the deceased, and was therefore entitled to be notified of the intention to file for letters; of course this is for her to give consent or renounce her right thereto. There is nothing to show that the Applicant's consent was ever sought or given as by law required. Accordingly, I find that the Applicant did not give her consent to the making of a grant of administration intestate to the Petitioner who is also a person of equal degree with the Petitioner. The court finds the action of the Petitioner to substitute the Applicant and one Jane Karwitha with the Petitioner's wife and son in relation to the giving of consent to the making of a Grant of Administration intestate to be an affront of the law. Had he obtained these consents

or renunciation thereto from his sister, perhaps this application may have been avoided. Let it be known that the Petitioner's wife and son were persons of lesser priority as compared to his own sisters. The Petitioner violated Rule 26 (2) of the Probate and Administration Rules and the order of consanguinity as provided in Section 66 of the Law of Succession Act. Accordingly, the grant herein was obtained irregularly. But before I make my final orders, let me determine the other issues which are also important in this application.

Of ancestral land

[9] Following the foregoing finding, it is clear the direction the court is taking. In light thereof, arguments by the Petitioner; that the deceased had fully shared his assets prior to his death; that L.R NO Ntima/Igoki/ 2531 was the ancestral land and had been given to the Petitioner are matters which will be decided upon at a later stage upon evidence. For the sake of this decision, the only matter I should take note of is that there is evidence that L.R NO. 3198 Kiirua/Ruiri had been subdivided into three portions and the Applicant's sister one Jane Karwitha was given one portion namely Kiirua/Ruiri/3199.

Of joint-ownership

[10] The Petitioner argued that Plot NO.3B was owned jointly between him and the deceased. I must admit that joint ownership is a fundamental question of law and is attended to by the principle of survivorship, such that, by virtue of that principle, the beneficial interest of the deceased joint owner passes to the surviving joint-owner absolutely. See the decision of the court in the case of **BENSON MUTUMA MURIUNGI vs. C.E.O. KENYA POLICE SACCO and SARAH KAGWIRA [2016] eKLR** when it rendered itself as follows:

Property held by the Deceased as a Joint Tenant

Property held under a joint tenancy is subject to the rule of survivorship. Under the said rule the deceased ceases to be entitled to the property on his death where he or she is survived by one or more joint tenants; the surviving joint tenant takes the deceased's share by virtue of their surviving the deceased. Therefore, property in joint tenancy or ownership will only form part of the deceased's estate where the deceased is the only surviving joint tenant.

On this subject, see also eminent literary work by William Musyoka in his book "**Law of Succession**" published by Law Africa at page 36 where he discusses survivorship as follows:

"This applies in cases of joint tenancies that is where property is jointly owned. Where a co-owner of property is a beneficial joint tenant of the property, whether real or personal, their interest will automatically pass to the surviving joint tenant (s) upon their death by virtue of the principle of survivorship, otherwise known as the principle of jus accrescendi. Upon the demise of one of the tenants, that tenants' interest would merge with that of the surviving tenant....."

The principle of survivorship operates to remove jointly owned property from the operation of the law of succession, upon the death of a spouse who jointly owns property with the other spouse."

[11] The law is now cast. I will apply it on the facts of this case. Did the Petitioner conceal Plot No 3B Makutano from these proceedings? From the record, it would appear that the said Plot was owned by the deceased and one Makathimo M'Itwerandu. The plot was later transferred to Resilient Investment Limited as evidenced by minutes of the Town Planning, works and Housing Committee held on 30th October 2012 and annexed in the Petitioner's replying affidavit and marked as "GM5" where it was stated as follows in the last paragraph

MARKET CENTRES

i. Application 1036 by M'Itumbiri M' Munyua and Makathimo M' Itwerandu to transfer the ownership of plot No. Kinoru 3B to Resilient Investment Limited be approved"

But, there has been no record produced to show that the ownership of the said plot was joint-ownership. It could be ownership in common. I should also state that there is nothing to show that the entire plot passed to the said Makathimo M' Itwerandu upon the death of the deceased as by law required of joint ownership. In fact, the transfer of the plot that was done through the above minutes shows that the application was:-

'...by M'Itumbiri M' Munyua and Makathimo M' Itwerandu to transfer the ownership of plot No. Kinoru 3B to Resilient Investment Limited...'

M'Itumbiri M'Munyua is the deceased. From the record, he died on 18th February 2001 and the above transfer or proceedings to transfer the plot was done on 30th October 2012. That is problematic. All these issues create a very dark cloud upon the entire transaction and dealing in the said plot which would require extrinsic evidence to unravel. At this stage, therefore, it would be premature to categorize plot No 3B as a joint ownership. For now, that part which was owned by the deceased will be treated as part of the estate property until this cause is determined.

Authority to sell Applicant's land

[12] Finally the Petitioner submitted that the Applicant had authorized him to sell a portion of her land which she purportedly acknowledged vide annexure marked "GM3". The Applicant denied having ever instructed the Petitioner to sell the said portion of land. She also denied the acknowledgement receipt dated 24th June 2006 indicating the Petitioner was selling the land as the Applicant's trustee. She stated that these were forgeries. She further denied ever receiving the sum of Kshs. 340,000 as alleged and further stated that she did not even know the purchaser in the said transaction. From the material before me, there is absolutely no basis for the Petitioner to say that the parcel of land in question belonged to the Applicant. This is shrouded further by the allegation that the deceased had shared all his assets before his death. The only evidence available also was that the deceased had indeed subdivided L.R Kiirua/Ruiiri into three portions and the Applicant's sister Jane Kawitha was given one portion namely Kiirua/Ruiiri/3199. These facts are taking asymmetrical posture to each other. In these circumstances, I note that the allegations of forgery made by the Applicant to be weighty and serious; they cannot be dismissed as idle talk; they should be canvassed by way of viva voce evidence. Curiously, I note that the Petitioner in his replying affidavit filed in court on 7th May 2015 at paragraph 7 deposed that the deceased owned another piece of land namely Kiirua/Ruiiri 3198 which he had allegedly divided into three portions namely Kiirua/Ruiiri 3198, 3199 and 3200 respectively which he intended to transfer to the Applicant, Jane Karwitha and himself respectively whereas in the supporting affidavit in support for Confirmation of Grant he proposed to take the two parcels of land namely Ntima/Igoki 2531 and Kiirua/Ruiiri 3198 in whole.

Findings and orders

[13] In the end result I find that the Applicant was not notified of these proceedings and she did not give her consent to the Grant of representation; which was in total violation of section 66 and Rule 26 of the Law of Succession Act and the Probate and Administration Rules respectively. Again, I find that the portion owned by the deceased in plot No 3B Makutano shall be treated as part of the estate until this cause is determined. The upshot of the above analysis is therefore this: that the grant of administration made to the Petitioner on 26th June 2008 was obtained irregularly, through fraud and contrary to the law. It was based on defective or no consent of parties with equal degree to apply. On the basis of these findings the grant made to the Petitioner on 26th June 2008 is a candidate for revocation. Consequently confirmation of the said grant will also fall by the way side; it is blown off. And, corollary to the order of revocation, and in view of the circumstances of this case, it is deserved that inhibition shall be registered in all the estate property until this cause is determined. I note that there have been further subdivisions of

the original L.R NO NTIMA/IGOKI/2531; being L.R NO NTIMA/IGOKI/8422, 8523, 8424, 8425, 8426 and 8427. This will also apply to plot NO 3B. As a result the following orders are apt and I order:

1. *That the Grant of Letters of Administration intestate issued to the Petitioner herein on 26th June 2008 is hereby revoked. A fresh Grant shall be issued in the name of Geoffrey Murithi and Catherine Kiende as Joint Administrators.*
2. *That an Order of Inhibition is hereby issued restricting any kind of dealings over L.R NO.Ntima/Igoki/2531 and Kiirua/Ruiri/4977 and 4978 pending the final disposal of this matter or until further orders of this court. But since there has been subdivisions of the original L.R NO NTIMA/IGOKI/2531; I also order an inhibition to be registered in those subdivisions being L.R NO NTIMA/IGOKI/8422, 8523, 8424, 8425, 8426 and 8427. This will also apply to plot NO 3B. This order shall be served upon the Land Registrar and the survey office to avoid any future mischief.*
3. *In light of the findings above, I direct the Petitioner to file within 30 days, a full and accurate inventory as well as account in respect of all the properties of the deceased including plot No Kinoru 3B. After all he was the administrator of the estate and under the law he owes that duty to the court as well as the other beneficiaries of the estate.*
4. *That the Joint Administrators shall file summons for Confirmation of Grant together with a detailed affidavit or affidavits setting out equitable mode of distribution of the estate within 45 days of today. In the event they cannot agree, I direct the Applicant to file the Summons for Confirmation of Grant supported by an affidavit within 14 days after the expiry of the 45 days initially allowed hereinabove. If the latter order prevails, the Petitioner shall file an affidavit on distribution within 14 days of service of the summons.*
5. *Given the circumstances of the case, I am convinced it is a case where the Applicant should get a recompense of the expenses she incurred in applying. Looking at the entire litigation, she is the successful party and there is nothing in her conduct which would deny her costs. I, therefore, allow her application dated 23rd May 2013 with costs to be paid by the Petitioner. It is so ordered.*

Dated, signed and delivered in court at Meru this 18th day of April 2016

F. GIKONYO

JUDGE

In the presence of:

Mr. Kariuki advocate for petitioner.

M/s. Mbaikiata advocate for interested party.

F. GIKONYO

JUDGE