



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PROBATE AND ADMINISTRATION DIVISION

SUCCESSION CAUSE NO. 1332 OF 2011

**IN THE MATTER OF THE ESTATE OF KIMANI KIGOTHO Alias KIMARI KIGOTHO
(DECEASED)**

FRANCIS KAMAU KINYANJUI.....APPLICANT

Versus

GEORGE MBUGUA KIMARI.....RESPONDENT

R U L I N G

1. The deceased to whose estate these proceedings relate is Kimani Kigotho Alias Kimari Kigotho who died on 18th August, 1995. A grant of Letters of Administration was made to George Mbugua Kimari (hereinafter the Respondent) on 18th May, 2006 and confirmed on 17th September, 2008.
2. On 2nd July, 2011 the Applicant filed an application by way of Summons for Revocation and/or annulment under **sections 76 Laws of Succession Act, Rules 44(1) and 49 of the Probate and Administration Rules**. In the application he seeks orders that the Grant of Letters of Administration made on 18th May, 2006 and confirmed on 17th September, 2008 to George Mbugua Kimari be annulled and revoked.
3. The application is premised on grounds that the grant was obtained fraudulently by making of a false statement and concealment from the court of something material to the case to wit that the Applicant and his siblings are beneficiaries of the estate of the deceased. That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify revocation of the grant. That the deceased held land parcel No. Kiganjo/Kiamwangi/335, an ancestral land, in trust for the members of the family of Wamai Kigotho (deceased). That the proceedings in Succession Cause No. 93 of 2006 to obtain the grant before the Chief Magistrate in Thika court were defective in substance since the magistrate did not have jurisdiction.
4. The application is supported by the Applicant's affidavit sworn on 2nd July, 2011 in which he reiterates the grounds of the application. He goes on to depose that he learnt about Succession Cause No. 93 of 2006 when he was served in CMCC 1082 of 2009 in which case the Respondents had sued him and sought injunction orders to restrain him from interring the remains of his mother, Pauline Muthoni Kimari in land parcel No. Kiganjo/Kiamwangi/335.
5. He avers that the said parcel of land was registered in the name of Wamai Kigotho and upon his

demise it was registered in the names of his step brother Kimari Kigotho to hold in trust for the Wamai Kigotho's (Applicant's) family. That the family members of Wamai Kigotho have been in possession of the said land parcel since time immemorial. That the Respondent failed to disclose that the deceased was survived by other beneficiaries who are as follows:

- a). George Mbugua Kimari - cousin
 - b). Pauline Muthoni Kimari – step-grand daughter (deceased)
 - c). Teresia Wanjiku Njathi – step-grand daughter
 - d). Peter Ndung'u Kimari – cousin (deceased)
 - e). Francis Kamau Kinyanjui – step great grand son
 - f). Beth Nyamweru Muthoni – step great grand daughter
 - g). Ndung'u Muthoni – step great grandson
 - h). Catherine Wairimu Kinyanjui – step great grandson
 - i). Florence Wangari P. Ndungu – cousin
6. The Applicant made further averments that the Respondents failed to obtain consent from his mother, other beneficiaries and himself before filing the petition for letters of administration of the deceased's estate: that after the conclusion of civil suit No. 1082 of 2009, the Applicant was allowed to bury his mother in the said land parcel: that the lower court did not have jurisdiction to issue the grant in view of the value of the asset of the estate which is over Kshs.3,000,000/=.
7. Mr. Muthomi learned counsel, for the Applicant filed written submissions in which he stated that the Applicant has made out a case that warrants the revocation of the Certificate of Confirmation of Grant issued by the lower court on 18th May, 2006. The submissions are predicated on grounds that the lower court which issued the grant lacked pecuniary jurisdiction to do so, the deceased's estate being worth three million shillings (Kshs.3,000,000) and not Kshs.300,000/= as set out in the petition forms by the Respondent. That the issuance of the grant contravened **section 47 and 48** of the **Law of Succession Act** as the petition for grant of letters of administration should rightly have been lodged in the High Court.
8. Mr. Muthomi argued that the grant was issued without full disclosure of all material facts by the Respondent, which facts would have significantly weighed on the court's determination of the matter. Counsel pointed out that the Respondent filed a petition and affidavit, on the 27th February 2006, wherein he named the only survivors of the deceased as George Mbugua Kimari and Peter Ndung'u Kimari. Mr. Muthomi referred the court to the decision of Majanja J, in **Succession Cause No. 32 of 2014** in the matter of the Estate of Doto Wino (deceased).
9. Counsel further asserted that the Respondent failed to disclose in the petition that land parcel No. Kiganjo/Kiamwangi/335 was ancestral land which belonged to one Wamai Kigotho, who was grandfather to the Applicant's mother. That upon the demise of Wamai the land was registered in the name of the deceased, who was Wamai's step-brother, to hold in trust for the Kigotho's lineage.
10. Mr. Muthomi argued that in her judgment in Civil Suit No. 1082 of 2009, the Senior Resident Magistrate, Thika Court, noted with great concern that the grant made to the Respondent was secured by means of misrepresentation. Learned counsel urged the court to consider that the Respondent has demonstrated that he has no good faith towards the Applicant and other beneficiaries and, if the grant as issued stands, the beneficiaries in the deceased's Estate will suffer

irreparably.

11. I note from that record that the Respondent has not entered appearance despite being served, neither has he filed any reply to the Applicant's allegations. I none the less have considered the merits of the grounds set forward in the application.
12. On whether the Grant in succession cause No. 93 of 2006 ought to be revoked. The circumstances that can lead to the revocation of grant have been set out in **Section 76 Law of Succession**. For a grant to be revoked either on the application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.
13. A grant may also be revoked if the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the Estate. See - **Matheka and anor v Matheka [2005] 1 KLR pg 456**. It may also be revoked if it can be shown to the Court that the person to whom the grant has been issued has failed to produce to the Court such inventory or account of administration as may be required.
14. I have considered the depositions in support and in opposition of the application for revocation and note first, that the Respondent did not give notice or obtain consents of parties with priority for applying for the grant. The identities of the beneficiaries and their interests in the estate are material facts and once it is established that their interests were concealed, the grant of representation issued is flawed.
15. **Section 51(1)(g)** of the Succession Act as read together with **Rule 26(1)** of the **Probate and Administration Rules**, provide that:

“Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.”

In the circumstances these would have been the Applicant and other surviving members of the family of Wamai Kigotho. – see the decision of Majanja, J. in **Succession Cause No. 32 of 2014**. Accordingly, I find and hold that the grant was obtained contrary to the provisions of the foregoing laws.

16. Secondly, the Respondent concealed from the court the fact that the suit land may have been ancestral land which may therefore have been the subject of a Trust. The court was entitled to consider this issue at the time of issuing and confirming the grant.
17. Lastly, the suit property is stated to be worth about Kshs.3 million. Had this fact been disclosed to the court which issued the grant of letters of Administration the court would have found that it lacked the pecuniary jurisdiction to make the said grant of letters of Administration. The petition should have rightfully been filed in the High Court.
18. In view of the foregoing I find that the grounds of the summons for revocation dated 18th May, 2006 have merit. The application is allowed with the following orders:

i) The grant made to George Mbugua Kimani on 18th May, 2006 and confirmed to him on 17th September, 2008 in Succession Cause No. 93 of 2006 in Thika Chief Magistrate's Court be and is hereby revoked.

ii) Any titles acquired pursuant to the sub-division of L.R. Kiganjo/Kiamwangi/335 following confirmation of the grant herein be and are hereby nullified and cancelled.

iii) The Respondent to serve all persons entitled in the same degree or in priority to the

petitioner to apply for the grant of letters of Administration.

iv) In view of the enhancement of the magistrates' pecuniary jurisdiction in the magistrates' Courts Act 2015, this cause is referred back to Thika Magistrate's court for the hearing of the petition and for the confirmation of grant in the estate of Kimani Kigotho alias Kimari Kigotho.

Costs in the cause.

SIGNED DATED and **DELIVERED** in open court this **14th day** of **June, 2016**.

L. A. ACHODE

JUDGE

In the presence ofadvocate for the Applicant

In the presence ofadvocate for the Respondent