



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 109 OF 2000**

**IN THE MATTER OF THE ESTATE OF JANET NYAKIO MUGURE (DECEASED)**

**STEPHEN MUCHIRI WAIHARO.....1<sup>ST</sup> APPLICANT**

**GORETTI WAIRIMU WILLY.....2<sup>ND</sup> APPLICANT**

**-VERSUS-**

**GEORGE GAITHO WAIHARO.....RESPONDENT**

**RULING**

Janet Nyakio Mugure died on 19<sup>th</sup> December 1995 as evidenced by the death certificate attached to the petition.

**PLEADINGS**

Through Chamber Summons application filed on the 25<sup>th</sup> January 2000 the Applicants/Objectors sought from Court the following orders;

**(i) That the grant of letters of administration confirmed in favor of George Gaitho Waiharo in Kiambu Law Courts Succession Cause 91 of 1996 shall be revoked.**

The Respondent, George Gaitho Waiharo petitioned for a grant of representation intestate in the Principal Magistrate Court in Kiambu on the 5<sup>th</sup> March 1996 for the estate of his late grandmother one Janet Nyakio Mugure who died on the 19<sup>th</sup> December 1995. Stephen Muchiri Waiharo and Goretti Wairimu Willy objected to a Grant of Representation to the estate of Janet Nyakio Mugure protesting that the Respondent filed a petition of Grant of Letters of Administration without informing and obtaining consents from the Objectors/Applicants.

**HEARING**

**RESPONDENT'S CASE**

On 14<sup>th</sup> June 2016, George Gaitho Waiharo testified that he was served with the Application for revocation dated 25<sup>th</sup> January 2000. The suit properties Land Parcel Ndumberi/Ndumberi/113 & Ndumberi/Ndumberi/T. 608 belonged to his grandmother. His late grandmother called him to her home

and left him to build a home to live in on her land. He lived with her and took care of her the rest of her life before she died. The Respondent told the court that his grandmother called him, her brother, the Respondent's grandfather and family elders and told them not to send him away from the land after her demise. On 6<sup>th</sup> February 1994, he called elders and he conducted the ceremony of providing a goat to be slaughtered and the matter was settled. Later, she had called him to her deathbed and bequeathed him with all her property. After her death; the Respondent's grandfather agreed that they would give the Respondent the property and the matter was settled.

In 1996 the Respondent lodged petition for grant of letters of administration, the Applicants objected to this Application and claimed the property did not belong to the Respondent and failed to attend court.

During cross-examination the Respondent disputed claims that the property he is to Inherit belonged to his parents and reiterated that the land was bequeathed to him by his grandmother who had only one child, their mother, Franscisca Wanjiku who predeceased his grandmother. After her death he went to Kiambu to apply for letters of Administration as the sole administrator. In Kiambu Law Courts **Succession Cause 91 of 1996**, the Applicants, the Respondent's brother and sister objected to the application and it was resolved by having them all together the Applicants and the Respondent listed as joint administrators. Later, he applied for confirmation of grant and the Applicants declined to attend Court and he had the grant confirmed on 13<sup>th</sup> January 2000. The 2 land parcels mentioned above were registered in Respondent's name.

### **OBJECTORS' CASE**

The Objectors/Applicants testified that they are also grandchildren to the deceased. Their mother, the late Francisca Wanjiku was the only child of the deceased Janet Nyakio Mugure. Their mother was married to their father, the late Willy Waiharo and they had 5 children namely;

1. Stephen Muchiri Waiharo (1<sup>st</sup> Objector)
2. Goretta Wairimu Waiharo (2<sup>nd</sup> Objector)
3. George Gaitho Waiharo (Respondent)
4. Gladys Nungari Waiharo ( deceased and left 4 children)
5. Anastacia Wairio Waiharo

The 1<sup>st</sup> Applicant Stephen Muchiri Waiharo told the court that on the 7<sup>th</sup> April 1999 both Applicants and the Respondent were appointed jointly as administrators of the deceased estate. When he went to court he found that the Respondent, his brother had confirmed the grant as sole beneficiary. The next day they went and objected to the confirmed grant since he did not know how the property was distributed. He was told that the case had been transferred to Nairobi. The Applicant disagrees with the Respondent's claim that all family members agreed that he was to inherit from their maternal grandmother all her property. According to the 1<sup>st</sup> Applicant they had agreed that the land in Ndumberi was for him and Gaitho and the other parcel of land was for their two sisters.

The 2<sup>nd</sup> Applicant also testified that the two witnesses were her brothers. She testified that they were all appointed joint administrators of the deceased's estate in **Succession Cause 91 of 1996 in Kiambu law Courts** after they objected to the grant to be issued to the Respondent only. Later, she learnt that the Respondent had confirmed the grant as sole beneficiary. They were not informed, consulted or their consents obtained before the grant was confirmed. The Respondent had been given a plot in a place called Kawaida. The 2 brothers are to share **NDUMBERI/NDUMBERI/113** and **NDUMBERI/NDUMBERI/T.608** for all 3 sisters.

During cross examination the witness testified that she lives with the children of her late sister and that

the property in question is not that of their father but only that of their grandmother. She did not know of any ceremony conducted to bequeath the land to the Respondent by their grandmother.

## **ISSUES**

1. Was the grant confirmed on 13<sup>th</sup> January 2000 in **Kiambu Law Courts Succession Cause 91 of 1996** valid, legal and regular to distribute the deceased's estate?
2. Should the grant be revoked, annulled or reaffirmed?

## **DETERMINATION**

The process of confirmation of grant is regulated by **Section 71 of Law of Succession Act Cap 160** which relevant part provides;

***“Provided that in cases of intestacy, the grant of letters of administration Shall not be confirmed until the Court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed, the grant shall specify all such persons and their respective shares.”***

The Court proceedings in **Succession Cause 91 of 1996** confirm the Applicants/ Objectors and Respondent were appointed joint administrators of the deceased's estate. However, the summons for confirmation of grant did not include the Objectors consents and the distribution of the estate was to the Respondent as sole administrator and beneficiary.

Ideally, the administrators should jointly lodge the summons for confirmation of grant. Where they have disagreed and have divergent views either on the beneficiaries, assets that comprise of the deceased's estate and/ or proposals on the proposed mode of distribution; the other administrators ought to file an affidavit of protest as envisaged in **Probate and Administration Rules 40 (6) (7) & (8)** and serve the Applicant administrator. The court would hear and determine the protest and summons for confirmation of grant and determine the dispute as provided by the above cited **Section 71 of Law of Succession Act Cap 160**.

In the instant case, the Objectors/Applicants did not appear in Court to give consents or sign anywhere their consents to the confirmation of grant. They did not appear in Court or file affidavit of protest. Therefore the Trial court did not satisfy itself of the respective identities and shares of all persons beneficially entitled.

Secondly, in the case of **GRACE KANYI NGANGA versus NICHOLAS NJONJO NGANGA IN THE MATTER OF THE ESTATE OF JOSEPH NGANGA GAKUMO (DECEASED) SUCCESSION CAUSE 1045 of 1990** GBM Kariuki J (as he then was) observed;

***“In the absence of written consents by each of the beneficiaries to the estate, one widow would not alone legitimately be entitled to have the grant confirmed and the estate distributed in the manner that it was.”***

Similarly, in the instant case in the absence of evidence that the Objectors /Applicants participated in the confirmation of grant process and consented to the mode of distribution of the deceased's estate, the present grant of confirmation is flawed. **Section 76 of the Law of Succession Act Cap 160** provides;

***“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the Court decides either on application by interested party of its own motion;***

***a) If the proceedings to obtain the grant were defective in substance;***

***b) The grant was obtained fraudulently, by making of a false statement or by concealment***

*from the Court of something material to the case;*

*c) The grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;*

*d) .....*

*e) ....."*

The grant confirmed on 13<sup>th</sup> January 2000 was irregular, invalid and illegal as it was processed without knowledge, consent and participation of the Objectors to the grant who are also grandchildren of the deceased. It failed to conform to the laid down procedures and material evidence was concealed from the Trial court that the Respondent was not sole administrator and beneficiary of the Deceased's estate as presented.

From the evidence on record, it emerged that there is contention on the distribution of the deceased's property especially the suit properties. On the one hand, the Respondent avers that he was bequeathed all land belonging to his grandmother in the presence of her brother, his grandfather and elders through a ceremony. Apart from his assertion, this alleged fact is not backed by any other evidence oral or written. The only fact that seems true is that he of all his siblings lived with and took care of his grandmother until her demise. He was allowed and he did during the deceased's lifetime build his house on her land and lives there todate.

On the other hand, the Respondent's siblings averred that they live on their late father's property albeit too small. They are children of the only daughter of the deceased and therefore in equal standing with the Respondent, their brother to have a share of their grandmother's estate. They claim that the Respondent was allocated land in a place called Kawaida. This allegation was not proved by any other evidence that the said plot exists, it belongs to the Respondent and he was bequeathed the said plot by the deceased. Secondly, the Objectors categorically refused that there was a ceremony where the Respondent was allocated their grandmother's land. They stated that the 2 suit properties **NDUMBERI/NDUMBERI/113** and **NDUMBERI/NDUMBERI/T.608** are to be distributed among all 5 siblings I property for the men and the other for the Ladies. What is not clear is if this is the Objectors' proposal on distribution of the deceased's estate or it had been agreed upon what is not clear is where and by who or that is a suggestion for this Court to adopt. Due to the parallel and contrary versions of distribution of the deceased's this court is not inclined to determine the distribution of the deceased's estate at this stage but allow the relevant parties to agree and file fresh summons for confirmation of grant.

## **COURT ORDERS**

**Having carefully considered the evidence on record and documents furnished to this Court, the court orders the following;**

- 1. The grant confirmed on 13<sup>th</sup> January 2000 in Succession Cause 91 of 1996 is revoked and annulled under Section 76 of Law of Succession Act Cap 160.**
- 2. The 3 administrators shall file summons for confirmation of grant within 90 days from today.**
- 3. In default of agreement or consensus the administrator to file summons and/or affidavit of protest (s) with alternative mode of distribution for the Court to determine distribution of the estate.**
- 4. In the meantime, until the grant is confirmed, the Respondent shall remain situated at his home on the said land devoid of any harassment, interference, intimidation from Objectors, servants, agents and/ or other 3<sup>rd</sup> parties. The said properties shall not be subdivided,**

**transferred, sold or adversely dealt with in any other way by any of the parties until further orders of the Court.**

**5. Each party will bear its own Costs**

**DELIVERED SIGNED DATED IN OPEN COURT ON THIS 16<sup>TH</sup> DAY OF AUGUST, 2016**

**MARGARET W. MUIGAI**

**JUDGE**

**In the presence of;**

**Mr. Njuguna for the Applicant and Applicants present**

**Respondent/ Administrator absent**