



REPUBLIC OF KENYA
HIGH COURT AT NAIROBI
FAMILY DIVISION- MILIMANI LAW COURTS
SUCCESSION CAUSE NO. 1291 OF 2015
IN THE MATTER OF THE ESTATE OF PETER KAGIA WAKAHENYA (DECEASED)

BETWEEN

BERNARD KIMANI KAGIA.....APPLICANT

AND

MARTHA NJOKI KAGIA.....1ST RESPONDENT

PAUL KAMAU KAGIA.....2ND RESPONDENT

RULING

INTRODUCTION

The deceased, Peter Kagia Wakahenya, alias Peter Kagiah Wakahenya died on 14th February 2002 as stated in evidence in Chief by the Applicant.

The Applicant Bernard Kimani Kagia, one of the sons of the deceased, filed Summons for Revocation and Annulment application dated 27th May 2015 against 1st Respondent, Martha Njoki Kagia, widow of the deceased and the 2nd Respondent, Paul Kamau Kagia, eldest son of the deceased. The Respondents filed for Grant of Letters of Administration vide Kiambu Chief Magistrate's Court vide **Succession Cause No. 82 of 2002** and the same was issued on 27th September 2006. Bernard Kimani Kagia (hereafter 'the Applicant') has filed the present Application seeking the following orders:

1. ...

2. ...

3. *That the grant of Letters of Administration and the Confirmed Grant issued on 27th September 2006, to Martha Njoki Kagia and Paul Kamau Kagia, the Respondents herein in the Senior Principal Magistrate's Court at Kiambu in Succession Cause No. 82 of 2002 herein be revoked and annulled.*

4. *That a temporary injunction be issued restraining the Respondents, their servants or agents from selling, transferring by way of transmission and in any way causing subdivision of land*

parcels Ting'ang'a/Cianda Block1/294, Kiambaa/Kanunga/T.575. Kiambaa/Kanunga/1078, and shares with Kanunga Farmers Co-operative Society Ltd (No. 205), and the deceased's Estate, until the hearing and determination of this Application.

5. That preservatory orders be granted on land parcel Nos. Ting'ang'a/Cianda Block1/294, Kiambaa/Kanunga/T.575. Kiambaa/Kanunga/1078, and shares with Kanunga Farmers Co-operative Society Ltd (No. 205), and the deceased's Estate, until the hearing and determination of this Application. (sic)

6. That all consequential transactions undertaken by the Letters of Administration and the Confirmed Grant both issued on 27th September 2006 to Martha NjokiKagia and Paul KamauKagia, the Respondents herein, in the Senior Principle Magistrate's Court at Kiambu in Succession Cause No. 82 of 2002 be cancelled.

7. That the costs of this Application be borne by the Respondents.

THE APPLICANT'S CASE

PLEADINGS

In his Affidavit sworn on 27th May 2015 in support of the Application, the Applicant stated that he is the deceased's son and the 1st and 2nd Respondents are his mother and brother respectively.

The Applicant deposed that the Grant of Letters of Administration was issued un-procedurally as the Grant and Confirmed Grant were issued on the same day as shown by the annexed copies which depict that both grant and confirmed grant were issued on 27th September 2006. This is in contravention of **Section 73 (1)** of the **Law of Succession Act** which stipulates;

The court shall, within 1 year from the date of any grant of representation, give notice to the holder of grant to apply for confirmation thereof

Further, that the proceedings leading to the grant of the same at the Senior Principal Magistrate's Court at Kiambu are defective in substance as the Respondents fraudulently made false statements by untrue allegations and concealment of a fact essential in point of law.

The Applicant further argued that the Respondents filed the petition without involving him in any way and obtaining his consent and that they forged his signature in applying for the Grant. Although he was included in the Petition documents he was never informed about the filing of the Succession Cause and neither did he consent to the same.

The net value of the deceased's Estate exceeds Kshs 100, 000/= and it is worth more than Kshs 10, 000, 000/= and as such, the Senior Principal Magistrate's Court lacked the jurisdiction to entertain and issue the Grant.

It was the Applicant's other contention that the Respondents sold some of the deceased's Estate including land parcel Nos. Ting'ang'a Cianda Block1/294 and Kiambaa/Kanunga/T.575 to several innocent buyers. In that regard, it was his argument that according to the purported Certificate of Confirmation of Grant, the 1st Respondent holds the deceased's Estate only for a life interest and she therefore has no right to sell any of the deceased's properties and as such, the said sales are a nullity.

The Applicant deposed further that he was at the moment refunding one Antony NgigiWanjari, the purchase price in regard to the parcel known as Ting'ang'a/ Cianda Block1/294 as evidenced by the annexed agreement and copies of receipts to the application marked **BKK-2**. The 1st Respondent also sold Kiambaa/Kanunga/T.575 to one Mary Nyambura Irungu, and his brother, Michael Thuku Kagia is now refunding the purchase price to the said Mary according to the copy of agreement annexed to the

application as **BKK-3**.

The Applicant argued further that he has suffered heavy loss and damage and that he has further learnt that the Respondent intends to re-sell the same properties notwithstanding the fact that the previous sales were illegal. It is apparent that the administrators are not fit to faithfully administer the deceased's estate according to the law

In the Applicant's view therefore, unless the Grant of Letters of Administration are revoked and annulled he will be disinherited and furthermore, that he has built a house on the land parcel Ting'ang'a/Cianda Block1/294, and he lives therein with his family. Accordingly, that he stands to suffer irreparable loss and damage and therefore, the Court ought to intervene and grant the orders sought herein.

HEARING

On 8th March 2016, the Applicant testified in Court on the unfolding events culminating to the instant application. In 1997 he was residing in Eldoret. He came home and found that his 2 brothers Lucas and Stanslus occupied his house awaiting to undergo a certain ceremony. His late father gave him money to rent a house. He lived in Kiambu town for 3 years.

In 2000 upon the birth of a daughter who was named after his mother, she came to visit him and his family and urged him to come and reside at home. He promised to go home whereupon according to his father's instruction, his mother divided the land comprised of Ting'ang'a/Cianda Block1/294 into 2 parcels. He was allowed to build his house on the said land.

He was to provide certain gifts to the elders which included, a he goat, debe of honey, blanket and coat which he did and promised that there were photographs to prove this ceremony. It took him 2 years to subdivide the land and to begin building. Unfortunately his father died in 2002.

The Applicant later learnt from his wife that the 1st Respondent approached her and got from her a copy of the Applicant's Identity card and in exchange she received Kshs. 10,000/- from the widow of the deceased to enhance her business. Later, the Applicant discovered the ID card was used to irregularly obtaining grant of letters of administration without his knowledge or consent.

While the Applicant was building on his side of the land, he saw a strange person who cultivated on the land, he removed the fence to his side of the land and he encroached on his portion of the land. The person, Anthony Ngige Njeri informed the Applicant that he bought the land from his mother. He consulted his Uncle and he went and filed a caution on the title of the land at Kiambu Lands Registry.

The Applicant resolved to refund the said party the purchase price through instalments. While the petition filed in Kiambu Law Courts in Succession Cause 82 of 2002 subsisted, the parties had protracted discussions several times at the Chief's and District Officer's offices. They finally agreed to refund monies paid to their mother as purchase price for the suit properties to the buyers. Their mother resided in the ½ Plot while the applicant stays on the other ½ plot.

The administrators sold his portion of land again to one Gitau Gwandaru who withdrew when the Applicant showed him the caution. The Applicant continues to demand his ½ portion of the land in question.

The proceedings were stopped as the matter was very acrimonious between the Applicant and his eldest brother over their mother. This Court gave parties opportunity on cooling down to pursue amicable discussions to settle this matter out of Court.

On 8th June 2016, Counsel for Respondents informed Court, that the Applicant did not appear or come for meeting. The matter was set down for Ruling.

THE RESPONDENTS' CASE

In response to the Application, the Respondents filed an Affidavit in reply sworn by the 1st Respondent on 2nd February 2016.

It was their position that the Application is misconceived and an abuse of the Court process. Accordingly, that the **Succession Cause 82 of 2002** before the Senior Principal Magistrate Court was neither filed illegally nor secretly, and the Applicant had full knowledge of the same as the matter was discussed at a full family meeting.

It was their contention that at no time have they attempted to disinherit any of the deceased's children or disposed any of the properties, as the 1st Respondent is registered as a Trustee therein holding the same in trust during her life interest on their behalf. Further, that no transfer can be effected during her lifetime and she can also not transfer any of the property without the children's consent.

The 1st Respondent deposed that all the beneficiaries to the Estate have been fully provided for, including her grandchildren and her two deceased children. The Respondents attached proposed subdivision annexed to their affidavit and marked as **MJK-1** of the suit property Ting'ang'a Cianda Block1/294 into 8 plots for each child and grandchildren from the deceased children of the deceased. Additionally, that the contentions in regard to purchase and refund of cash to Mary Nyambura Irungu and Antony Ngigi Wanjeri are personal matters that are not in any way connected to the deceased's Estate.

For the foregoing reasons, it was their contention that the Application is scandalous, vexatious and an abuse of the Court's process and time and ought to be struck out with costs. The Applicant is mischievous and untruthful in alleging that the deceased's properties are being wasted and sold to third parties. Finally, that the Applicant has not come to Court with clean hands and hence he is not entitled to the equitable and discretionary reliefs sought.

THE APPLICANT'S REJOINDER

In his Further Affidavit sworn on 7th March 2016 reiterated his earlier assertions and maintained that the Application herein is properly and legally before the Court. Further, that the 1st Respondent sold the properties and converted the proceeds to her personal gain and that the forgeries were committed in 2002 and this Court is therefore bound to investigate the same.

According to the Applicant, the Respondents have wasted, intermeddled and sold properties to third parties. Furthermore, he maintained that he has not in any way misled the Court and the orders sought herein ought to be granted.

DETERMINATION

The Applicant raised the following issues;

The grant of letters of administration intestate were obtained procedurally and irregularly because;

He was not aware of the Petition filed in **Succession Cause 82 of 2002** filed in Kiambu Chief Magistrate's Court until;

1. He learnt from his wife that his mother secretly approached her to give her a copy of his ID card and in exchange gave her Kshs. 10,000/-
2. In April 2002, he was informed by a certain lady that their family members were at the District Officer's Office for Land Board Consent meeting held to facilitate sale of land.
3. He deposed that he was not aware, involved nor was his consent sought on obtaining the grant for letters of administration

4. From the copies of orders attached to the Applicant's application, there are 2 orders, the grant of letters of administration and confirmation of Grant both issued on the same date; 27th September 2006.

5. The Chief Magistrate's Court at the time lacked jurisdiction to hear and determine the petition whose estate was valued at over Ksh 100,000/-

Based on the Parties' respective pleadings as I have reproduced above, the key question for determination is whether the Applicant has made out a case to warrant the revocation of the Letters of Grant and Certificate of Confirmation of Grant issued on 27th September 2006, and whether the orders sought in the present Application should be granted.

In that regard, **Section 76** of the **Law of Succession Act** provides for the alteration and revocation of Grants. It states that:

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-

i. To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or

ii. To proceed diligently with the administration of the estate; or

iii. 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

iv. That the grant has become useless and inoperative through subsequent circumstances.

It therefore follows that in an Application for revocation or annulment, an Applicant ought to satisfy the Court that the Application meets at least one of the grounds stipulated in the above provision.

From the evidence adduced by the Applicant and subjected to cross-examination by the Petitioner's advocate, the Applicant did not consent as is required by provisions of **Rule 26 (1) and (2) of Probate and Administration Rules** to the issuance of grant of letters of administration. Although the Court file where **Succession Cause 82 of 2002** is housed was not availed for perusal by this Court, the circumstances outlined by the Applicant on how he discovered the grant was issued and parcels of land were up for sale clearly depicts a process shrouded in secrecy. If the Applicant was informed and aware, he would not be objecting several years down the line.

Secondly, even if he may have agreed to the grant of letters of administration, the issuance of both grant and confirmed grant simultaneously is illegal and irregular. By dint of **Section 73** of the **Law of Succession Act**, there ought to be sufficient period for administrators to exercise their statutory mandate under **Section 83** of the **Act**. Thereafter, in line with **Section 83 (e) and (f)** of the **Act**, within 6 months,

the administrators

‘to produce in Court a full and accurate inventory of assets and liabilities of the deceased and a full and accurate account of all dealings therewith upto date of account.....subject to Section 55, to distribute or to retain on trust all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and income therefrom, according to the respective beneficial interests therein under the Will or on intestacy as the case maybe.....

From the above provisions and the evidence on record, the proceedings leading up to issuing grant and confirmed grant on the same date are defective in substance as explained in the above -cited legal provisions. To grant confirmation of grant, the Court ought to ensure as required by **Section 71(1)** of the **Law of Succession Act** that;

After the expiration of a period of 6 months [after issuance of grant] or such shorter period as the Court may direct under subsection (3) from the date of grant of representation, the holder thereof shall apply to the Court for confirmation of grant in order to empower the distribution of any capital assets

The Court is further mandated under the same legal provision as follows;

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 ought to have been presented with summons for confirmation which:

- a. outlined beneficiaries (surviving spouse(s) children of the deceased and dependants) of the deceased’s estate***
- b. List of assets that comprise of the deceased’s net estate available for distribution***
- c. Proposed mode of distribution of the net estate of the deceased’s estate***
- d. Written consents of all beneficiaries to the proposed distribution.***

From the evidence on record, the Applicant was not aware and had no clue of these developments. If he did instead he would have filed protest to the summons for confirmation of grant. There is no evidence that there was any meeting to discuss and agree on the mode of distribution of the deceased’s estate. The fact of the defective process in obtaining grant and confirmed grant, the grant shall and is hereby revoked by dint of **Section 76 (a)** of the **Law of Succession Act**.

The Applicant has founded his Application for revocation and annulment on the grounds that the Senior Principal Magistrate’s Court did not have jurisdiction to determine and grant the Letters of Administration. This Court perused the evidence adduced by the Applicant and notes that according to the Certificate of Confirmation of Grant, the Estate of the deceased comprised of various properties namely, Tang’anga/Cianda Block1/294; Kiambaa/Kanunga/T.575, Kiambaa/Kanunga/1078 and shares with Kanunga Farmers Co-operative Society Ltd. The Applicant claimed that the Estate is worth more than Kshs 100, 000/= and the Resident Magistrate’s Court exceeded its jurisdiction. Although no valuation report was availed to ascertain the value of the estate, the 3 parcels of land in such an area where the land is utilized for agricultural activities would most definitely fetch much more than kshs 100,000/-.

By virtue of **Section 48** and **49** of the **Law of Succession Act**, the Magistrates’ courts at the time 2002-2006 lacked requisite jurisdiction to hear and determine the instant matter. However, today, the law has been changed to enhance Magistrates’ Court pecuniary jurisdiction.

The Applicant stated and that the Respondents are intermeddling and wasting the deceased’s Estate and

selling some properties to third parties.

The Applicant adduced detailed account of 3 separate instances that the parcels of land that constitute the deceased's estate were sold by the 1st Respondent widow of the deceased. The applicant alluded to Ting'ang'a/Cianda Block1/294 and the Kiambaa/Kanunga/T.575, which he alleged were sold to Antony Ngigi Wanjeri, Mary Nyambura Irungu and Gitau Gwandaru respectively. He produced Agreements to show he agreed to refund the purchase price by instalments to Anthony Ngigi Wanjeri Ksh 100,000/- and his older brother Michael Thuku Kagia to repay Mary Nyambura Irungi Ksh 110,000/- purchase price paid to the 1st Respondent widow of the deceased for sale of land.

The Respondents denied this allegation and claimed the agreements for payment of debt had nothing to do with this matter

The **Evidence Act, Chapter 80 of the Laws of Kenya**, demands that he who alleges must prove. Specifically **Sections 107 and 109** thereof which provide that:

Section 107 states thus:

- 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
- 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

Section 109 is to the effect that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

The Applicant adduced viva voce evidence and was cross-examined by the Petitioner's advocate. The Respondents did not testify or adduce evidence to controvert the Applicant's version in line with the Evidence Act.

The Applicant's agreement to pay back the purchase price reads as follows;

I Anthony Ngigi Njeri ... do hereby acknowledge receipt of Ksh. 20,000/= from Bernard Kimani Kagia ... the same being refund for a consideration paid for sale of land parcel Ting'ang'a/Cianda BLK/294 paid to Martha Njoki Kagia (1st Respondent)

Clearly, although there was no Agreement for sale produced, this Acknowledgement of Refund confirms that the suit property **Ting'ang'a/ Cianda BLK/294** that forms part of the deceased's estate was sold by 1st Respondent without approval and consent from beneficiaries of the deceased's estate.

Section 37 of the **Law of Succession Act** prescribes;

A surviving spouse entitled to life interest under provisions of Section 35 or 36, with consent of all co-trustees and all children of full age, or with the consent of the court, may during the period of life interest, sell any of the property subject to that interest if it is necessary for his own maintenance:

Provided that, in the case of immovable property the exercise of that power shall always be subject to the consent of the Court.

The Applicant's claim that the administrators have intermeddled with the estate is grounded on facts as

established by agreements to refund funds and retain the land parcels. These parcels were sold in contravention of the laid down procedure as provided by law. The fact is augmented by the Applicant's testimony that in April 2002, he was alerted that family members converged at the District Officer's Office for Land Board Meeting for consent to sell land. All family members were present except for him and his eldest brother who were in the dark as to irregular disposal instead of distribution of the deceased's estate.

The Respondents on their part deposed that there was no sale transfer or disposal of any land, the widow enjoys life interest over the estate of the deceased and is registered as trustee holding the properties in trust during the life interest. The 1st Administrator deposed that she has not transferred any land and is still their mother holding all the properties in trust and on behalf of all her children and will only transfer with consents of all her children.

Despite the administrators alluding to their statutory mandate, the facts in these proceedings depict their actions have been contrary to the law. They deliberately excluded from discussions and transactions and seemingly tried to constructively evict the Applicant by putting up his portion of land for sale without his knowledge.

Having a life interest over the estate is not a blank cheque but one is placed in a fiduciary relationship to act with regard to the properties in the best interests of all beneficiaries.

The Court in ***TAU KATUNGI VS MARGRETHE THORNING KATUNGI AND ANOTHER, SUCCESSION CAUSE NO. 1040 OF 1991*** observed that:

***“[19] Life interest confers a limited right to the surviving spouse over the intestate estate. He or she does not enjoy absolute ownership over the property. They cannot deal with as if it was their own. By virtue of Section 37 of the Act, a surviving spouse cannot during life interest dispose of any property subject to that life interest without the consent of all the adult children, co-trustees and the court. This is meant to safeguard the interest of the children who are the ultimate beneficiaries of the property the subject of life interest. It is in this respect that the life interest operates as a trust over the property the subject thereof, a trust held by the surviving spouse for the benefit of the surviving children.*”**

[20] At life interest there is a convergence of the interests of the surviving spouse and those of the children. The device seeks to secure the interests of both. Where the deceased therefore is survived by both a spouse and children, the net intestate estate will not pass absolutely to either of the two categories of survivors during the life time of either. The holder of the life interest in this case is still alive, and has not remarried, she is therefore still entitled to the property at this time and the same cannot be conveyed to the children. Conversely, all the children of the deceased are still alive, consequently the widow cannot have the property absolutely to herself, but she is entitled to whatever income that derives from it.” (Emphasis added)

DISPOSITION

- 1. In conclusion, based on the above analysis, it is the holding of this Court that the grant of Letters of Administration and confirmation of grant on the same date is of 27th September 2006 was defective, irregular and un-procedural under Section 76 (a) of the Law of Succession Act cap 160 and are revoked and annulled forthwith.**
- 2. The Illegal sale of the suit properties without due regard to Section 37 of the Law of Succession Act Cap 160 amounts to intermeddling with the deceased's estate. Any future sale, transfer, disposal, subdivision of land that constitutes estate of the deceased shall not be valid without consents of all beneficiaries and order of Court before distribution of the estate.**
- 3. A new fresh grant is issued in the names of Martha Njoki Kagia Paul Kamau Kagia and Bernard Kimani Kagia as joint administrators of the deceased's estate.**

4. The joint administrators shall file summons for confirmation of grant and if all beneficiaries are not in agreement as to the mode of distribution, each shall file a protest and the Court shall determine the matter.

5. The Applicant's house on the disputed land that is part of the estate shall not be interfered with and the Applicant shall remain in situ until distribution of the estate equally or equitably between the beneficiaries of the estate.

6. Each party shall bear own costs.

7. Any aggrieved party is at liberty to apply.

DELIVERED SIGNED & DATED IN OPEN COURT ON 16TH SEPTEMBER 2016

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

.....