



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
SUCCESSION CAUSE NO.227 OF 2004

In the Matter of the Estate of the Late M' Mwithimbu M' Mwiira Alias Mwithimbu Tubu (Deceased)

BASILIO M' MUNGANIA M' MWITHIMBU

STEPHEN GITONGA M' RIMBERIA.....APPLICANTS

-VS-

THOMAS MBURUGU M' MBWI.....RESPONDENT/PETITIONER

RULING

No consent was obtained

[1] Before me is a Summons for Revocation of Grant expressed to be brought under Section 76 (a) (b) (c) of the Law of Succession Act and Rules 44 (1) and 73 of the Probate and Administration Rules, and Section 128 of the Registered Land Act, (now repealed). The significant orders being sought in the application are:

- 1. That the Confirmed Letters of Administration issued to Thomas Mburugu M' Mbwi the Respondent herein on 4th December 2006 be revoked or annulled.***
- 2. That the costs of this Application be provided for.***

The other prayers are now spent.

[2] The major reasons for applying are inter alia: (1) that this Succession Cause was filed secretly and without the knowledge of the Applicants and other beneficiaries of the estate of the late M' Mwithimbu M' Mbwiria; and (2) that the Applicants never signed or gave consent to the Petitioner to file this Succession Cause and apply for the confirmation of grant.

Viva voce evidence

[3]When the matter came up for directions on 9th June 2006, it was agreed that the Application be canvassed by way of *viva voce* evidence. This matter was fully canvassed before Makau J and the gist of the evidence adduced thereto is as hereunder:-

[4]According to the Objectors' witness OW1, one Basilio M' Mungania, the deceased was his father and the Petitioner was a grandson to the deceased. He stated that the following were his brothers:

1. M' Rimberia M' Muthumbu (deceased)
2. Margaret Kaigongi (deceased)
3. M' Ithamikwa M' Mwithimbu (deceased)
4. Basilio M' Mungane
5. Francis M' Mbwi (deceased)
6. Geoffrey M' Mboroki

[5] It was his case that that when the Petitioner filed the Petition, he called himself son of Mwithibu which was not true. He stated further that the Petitioner did not obtain his consent to Petition for the Grant. He was also not invited during the hearing of this case. He told the court that at the time of the demise of, the deceased had not shared out his property. Finally he testified that he wished that the estate property should be shared equally among the deceased children. For those reasons, he urged the court to annul/revoke the Grant herein.

[6] OW2 Stephen Gitonga testified that he was a grandson of the deceased and fully adopted OW1's evidence. He further testified that the Petitioner neither informed them when he petitioned for the grant nor sought his consent thereto, and urged the court to annul the grant.

[7] The Petitioner also testified as PW1. He told the court that the deceased was his grandfather and confirmed the evidence by OW1 that the deceased had 4. It was his evidence that in filing this matter, he did not involve the Applicant as they had their own land parcel No. 512 which was left to his father. He also testified that there were other lands of the deceased occupied by his uncles. He said that his interest was to see his mother and siblings get their hare. He did not agree with OW1 as the land in question was his father's share from the deceased and that the Applicants have their own lands.

[8] PW2 Geoffrey M' Mboroki testified that he was son of the deceased and that he knew the Applicants and Petitioner who were his brothers and nephew respectively. It was his testimony that the 1st Applicant was his step brother and that the Petitioner did not discuss with them prior to filling this succession cause.

Submissions by Applicants

[9] In support of their case, the Applicants also submitted and urged the court to take into account the fact that the Petitioner was grandson of the deceased who did not seek the consent of the sons and daughters of the deceased prior to the filling of this Succession Cause. Accordingly, under Rule 26 (2) of the Probate and Administration Rules, where no consent is given and there is no renunciation, the party seeking to apply should set out facts on which the court should rely in making a grant of letters.

[10] It was further submitted that the late M' Mwithimbu M' Mwiira's children were not included in the list of persons surviving the deceased and that the Petitioner's failure to include the said persons was an act of concealment of material facts so as to keep the real beneficiaries unaware of the filing of this cause. He further contended that, contrary to the Petitioner's evidence that all the deceased children had been provided for, the Petitioner provided no proof thereof. The Petitioner intentionally described himself, his mother, stepmother and his siblings as the only persons entitled to a share of the estate. Therefore, distribution of the estate was done without full disclosure of all the beneficiaries and it was, thus, unfair and unjust. Consequently, they urged the court to revoke the Grant as prayed.

Submissions by the Petitioner

[11] On the other hand it was submitted for the Petitioner that he followed the right procedure in filing this Succession Cause and obtained the relevant consents. He urged that during the deceased's lifetime, he had done his best and had all his sons provided with land each getting 15 acres. According to the

Petitioner, the main issue for consideration was how the estate of the deceased would be distributed.

DETERMINATION

[12] I have carefully considered this application, the evidence on record and the rival submissions by the parties. The application before me is essentially one for revocation and or annulment of grant under Section 76 of the Law of Succession Act CAP 160 of the Laws of Kenya. Here I will not re-invent the wheel as under Section 76 of the Law of Succession Act CAP 160 of the laws of Kenya I need only ask whether the application satisfies the threshold provided in law. And, given the arguments being presented, the most apt grounds to consider are, whether:

(a)The proceedings to obtain the grant were defective in substance;

(b)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; and

(c)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.

[13] Upon consideration of all the facts of the case, the affidavit, oral and documentary evidence as well as legal arguments before me, I see the following three major issues emerging, as issues in controversy;

(a)Whether the Petitioner omitted some dependants in the petition;

(b)Whether the Petitioner sought the consent of persons in priority or equality to him in a applying for the grant of representation herein;

(c)Whether the distribution was unfair and unjust; and

(d)Ultimately, whether I should annul or revoke the grant issued to the Petitioner herein.

I will place the facts and arguments herein to the threshold in section 76 of the Law of Succession Act.

Omitting beneficiaries

[14] Let me begin with this matter which is fairly straight forward. The Applicant contended that the Petitioner had omitted the sons and daughters of the deceased in the list for dependants. As per OW1's evidence in chief, the children of the deceased were as follows:

1. M' Rimberia M' Mthumbu (deceased)
2. Margaret Kaigogi (deceased)
3. M' Ithamikwa M' Mwithimbu (deceased)
4. Basilio M' Mungane M' Mwithimbu
5. Francis M' Mbwi Mwithimbu (deceased)
6. Geoffrey M' Mboroki

The Petitioner acknowledged four of the above to be the children of the deceased. But, despite that admission, none of the children of the deceased was listed in the application for confirmation as a beneficiary of the estate. The Petitioner only listed his mother and siblings as the only dependants and or beneficiaries of the deceased person. Ultimately, none of the sons and daughters of the deceased were provided for in these proceedings. He said that his reason for omitting and not providing for them was

because they had been given land by the deceased and that the land in question was his late father's share in the estate. Whether that allegation is true or not, it is a major concealment of a material fact in law, thus, a fatal omission in law; and on that ground alone the application should succeed. But, I will consider the other grounds.

Consent to apply

[15] Doubtless, the Petitioner is grandson of the deceased whereas the Applicants are the children of the deceased. He ought to have sought and obtained the consent of the applicants and other children of the deceased. It was his evidence that he did not involve the Applicants in the filing of this Succession Cause. The Petitioner's own witness Geoffrey M' Mboroki corroborated that fact. Again, these pieces of evidence confirm that he obtained the Grant herein by concealment from the court of something material to the cause.

[16] OW1 and PW2 both being sons of the deceased are beneficiaries of the estate and even rank higher in priority to the Petitioner who is grandson to the deceased and the admission by the Petitioner that he did not involve them in this succession cause was clearly in violation of Rule 26 (2) of the Probate and Administration Rules which provides that:-

An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

Notice to or written consent or renunciation of right by all such persons entitled in priority to the Petitioner is a fundamental requirement of the law and must be adhered to except in those cases which fall under rule 27 of the Probate and Administration Rules. I suppose a citor who is permitted by court to file a cause after the persons in equality with or priority to him have refused to accept letters of administration is exempt from the requirement of rule 26 of the Probate and Administration Rules. But, this case is not one such exempted from the said requirement. This requirement is crucial in succession causes given the nature of the proceedings and the fact that rights to inherit property are involved therein; that is why even in confirmation proceedings, the court is required under Rule **40 (8)** of the Probate and Administration Rules to deal with lack of consent in a more significant manner and should hear parties who did not give consent before confirmation of the grant is given. As was rightly submitted for the Applicants they neither gave their consent nor renounced their rights to apply. See Koome J (as she then was) in **THE MATTER OF THE ESTATE OF NGARI GATUMBI ALIAS JAMES NGARI GATUMBI (DECEASED NAIROBI HIGH COURT SUCCESSION CAUSE NO.783 of 1993** persuasive decision that:

"A grant will be revoked where a person who is entitled to apply is notified by the petitioner of their intention to apply and that persons consent to the petitioner's application is not sought."

[17] The above analysis leads to one inescapable inference; that **the grant herein was obtained on the strength of false claims, without obtaining the consent of persons who had prior right to the grant and on the basis of facts concealed from the court. And thus, this grant is a perfect candidate for revocation as was held in the case of SAMUEL WAFULA WASIKE -vs- HUDSON SIMIYU WAFULA CA NO.161 OF 1993** (Kwach, Omolo and Tunoi JJA) that:-

"A grant obtained on the strength of false claims, without obtaining the consent of persons who had prior right to the grant and on the basis of facts concealed from the court, is liable to revocation."

Conclusion and orders

[18] Upon my analysis above, and placing the facts of this case on the legal scale, I conclude that;

(a)The proceedings to obtain the grant were defective in substance;

(b)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; and

(c)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.

Consequently, and having come to the above conclusion, the Confirmed Letters of Administration issued to the Petitioner on 4th December 2006 is hereby revoked. The orders issued by Makau J on 16th November 2011 with regard to prayer 2 of the Application are hereby vacated. The parties are further directed to agree on the person or persons to be appointed as the administrator of the estate of the deceased within 14 days which failing the court will exercise its final discretion under section 66 of the Law of Succession Act. After such appointment of administrators, they shall apply for confirmation of the grant where parties will once more have an opportunity to canvass their respective modes of distribution for determination by the court. This being a succession matter, each party shall bear own costs of the application. It is so ordered.

Dated, signed and delivered in open court at Meru this 22nd day of November, 2016

F. GIKONYO

JUDGE

In the presence of:

Mrs. Ntarangwi advocate for applicant – present

Mr. Rimita advocate for petitioner - absent

F. GIKONYO

JUDGE