



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 687 OF 1984**

**IN THE MATTER OF THE ESTATE OF CHARLES NGOTHO GACHUNGA (DECEASED)**

**RULING**

1. The matter for determination is the Summons for Revocation of Grant dated 30<sup>th</sup> January 2012. The applicants complain that the respondent obtained representation to the estate in a process that excluded them and subsequently caused the estate to devolve solely to himself at the confirmation of grant on 30<sup>th</sup> November 1988.
2. The respondent's reply to the application is comprised in the affidavit he swore on 21<sup>st</sup> February 2012. The respondent did not respond to the allegation that the deceased was the father of the applicants, and they sisters to the respondent. He basically pleads that the applicants have taken twenty-four (24) years to move the court for the revocation of the grant.
3. Directions were taken on 6<sup>th</sup> March 2013. The parties were given thirty (30) days to file written submissions on whether there was adequate provision for the dependants.
4. Both sides filed their respective written submissions. The applicant's submissions were filed on 5<sup>th</sup> June 2013, while the respondent's were filed on 19<sup>th</sup> June 2014.
5. The applicants submit that there has been concealment of material facts from the court; the fact that the deceased was survived by other children, besides the respondent. They state that this is fertile ground for revocation of the grant under Section 76 of the Law of Succession Act.
6. The respondent presents a two-pronged argument in his submissions. He submits that the application is brought after lapse of a considerable period of time and therefore the same is time-barred due to effluxion of time. Secondly, he argues that the applicants are married daughters who are not entitled to inherit under Kikuyu customary law. He takes the position that the Constitution of Kenya 2010 has recognized customary law. He concludes by stating that no fraud has been established in terms of Section 76 of the Law of Succession Act.
7. I have noted that although the directions given on 6<sup>th</sup> March 2013 envisaged written submissions limited to adequate provision for the dependants, none of the parties submitted on the matter. They chose to confine themselves to the question of whether there was adequate material upon which the court can find for the revocation of the grant herein.
8. The directions are still in place. They have not been complied with. What should I do in the circumstances? Directions are not in the same footing with orders made in a ruling or judgment. They

can be varied at any time by the court. I will in this case treat them as varied and I shall determine the application dated 30<sup>th</sup> January 2012 without reference to them.

9. The application is not brought under Section 26 of the Law of Succession Act, and therefore the issue of adequate or reasonable provision for dependants does not arise. The court has not yet made a determination as to whether the applicants are dependants in terms of Section 29 of the Act or not. In any event, provision for dependants cannot arise, by virtue of Section 30 of the Act, where the grant on record has been confirmed. In this case the grant on record was confirmed on 30<sup>th</sup> November 1984.

10. The original file, opened in 1984, was misplaced. I am operating on the basis of a re-constructed file following orders made in HC Misc. Application No. 61 of 2012 on 6<sup>th</sup> June 2012. The reconstructed file is not complete, but copies of the documents availed by the parties paint an adequate picture of the events in the matter prior to 6<sup>th</sup> June 2012.

11. The available record reveals that the deceased died on 7<sup>th</sup> September 1984. Representation to his estate was sought by the respondent in a petition filed in court on 24<sup>th</sup> October 1984. It was stated that the deceased was survived by two individuals; his widow, Alice Njeri Ngotho, and his son, Patrick Gachunga Ngotho, the respondent herein. He died possessed of three plots or parcels of land situate at Kawangware, Nairobi. The grant of letters of administration intestate was made to the respondent, Patrick Gachunga Ngotho, on 4<sup>th</sup> December 1984.

12. The respondent, as administrator of the estate of the deceased, moved the court by an application filed sometime in July 1988 for confirmation of the grant. In the affidavit sworn in support of the application, he listed himself as the sole survivor of the deceased, his mother having then died. The grant was confirmed on 21<sup>st</sup> October 1988 and a certificate of confirmation of grant was issued on 30<sup>th</sup> November 1988. The three (3) Kawangware plots; being numbers 7, 963 and 964, devolved wholly upon the respondent.

13. The deceased died in 1984, three (3) years after the Law of Succession Act had come into force. By virtue of Section 2(1) of the Law of Succession Act, his estate was subject to the Act. He died intestate, and therefore distribution of his estate was to be governed by Part V of the Law of Succession Act.

14. The relevant provisions governing applications for grant of representation under the Act is Section 51. The information that must be disclosed in such application in cases of intestacy is Section 51(2)(g). The provision states that –

***“An application shall include information as to – in cases of total or partial intestacy, the names and addresses of all surviving spouses children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased,....”***

15. Section 51(2)(g) of the Act is supplemented by Rule 7(1)(e)(i) of the Probate and Administration Rules. Rule 7(1)(e)(i) states –

***“... the application shall be by petition... supported by affidavit... containing so far as they may be within the knowledge of the applicant, the following particulars – in cases of total or partial intestacy the names, addresses mental state and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving child, like particulars of such person or persons who would succeed in accordance with Section 39(2) of the Act.”***

16. These two provisions require the person applying for a grant of letters of administration intestate to disclose all the surviving children of the deceased.

17. The affidavit sworn by the respondent in support of the petition for grant of letters that he filed in

October 1984 disclosed himself as the child surviving the deceased. The applicants asserts that they also are children of the deceased. The respondent has not denied this, but argues instead that as married daughters they were not entitled to a share in the deceased. I hereby make a specific finding that the applicants are surviving children of the deceased. The respondent was obliged to disclose them in his petition, yet he chose not to. He was clearly in violation of Section 51(2)(g) of the Act and Rule 7(1)(e) (i) of the Rules.

18. It would appear that the respondent read “children” in Section 51(2)(g) of the Act and Rule 7 (1)(e) (i) of the Rules as referring to exclusively either to sons of the deceased or sons and unmarried daughters. The Law of Succession Act, and the Rules made under it, does not at all define “child” or “children” in a discriminatory manner. In the absence of such discrimination, reference to “child” or “children” must be taken as making reference to children of either gender whether married or unmarried. If it was intended that “child” and “children” be qualified to mean sons only or sons and unmarried daughter then nothing would have been easier than for the drafters of the Act to provide so.

19. The respondent argues that the applicants were married daughters and at customary law they were not entitled to a share in their late parents’ estate. As stated earlier, the deceased died after Law of Succession Act came into force, and by virtue of *Section 2(1)* of the Act his estate fell for distribution and administration under the Act. The effect of *Section 2(1)* of the Act is to oust the application of customary law to estates of persons dying after the Act came into force. The respondent is basing his assertions on the Constitution. I have scrutinized the provisions of the Constitution cited by the respondent, and I have not seen any that overrides the very clear provisions of *Section 2(1)* of the Law of Succession Act. None of them elevates customary law above the provisions of the Law of Succession Act.

20. It is argued that the application has come in too late. In other words the same was filed after an inordinate delay which has had the effect of rendering it time-barred due to effluxion of time. The answer to this submission is that the office of administrator is for life. He can be called to account at any time so long as he is still alive. Needless to say that section 76 of the Act does not impose any time limitations within which an application for revocation of grant ought to be filed.

21. The application dated 30<sup>th</sup> January 2012 is premised on Section 76 of the Law of Succession Act. This provision empowers the court to revoke a grant in circumstances where the same was obtained in defective proceedings and where there are problems with the administration of the estate.

22. In the instant case the application targets the grant-making process. The applicants argue that the process was defective and was fraught with misrepresentation and concealment of important matter from the court. Their case is that the respondent was statutorily bound to disclose all the surviving children of the deceased at the time he sought the grant. He did not comply with the statutory dictates. He concealed or withheld information from the court. That constituted a misrepresentation, which was continued up to the time of confirmation.

23. I have already made a finding in paragraph 12 hereof that there was a violation of or non-compliance with Section 51(2)(g) of the Law of Succession Act and Rule 7(1)(e)(i) of the Probate and Administration Rules. Such violation amounted to a significant defect in the proceedings leading up to the making of the grant. The non-disclosure of the applicants, whether innocently or otherwise, amounted to a concealment of important matter from the court and it had the effect of a misrepresentation of the true state of affairs.

24. I am satisfied that a case has been made out for revocation of the grant made on 4<sup>th</sup> December 1984 and I do therefore make the following orders:-

(a) that the grant made on 4<sup>th</sup> December 1984 is hereby revoked;

(b) that I hereby appoint Patrick Gachunga Ngotho, Anne Mbura Ngotho and Mary Ruguru Muturi administrators of the estate of the deceased and a grant of letters of administration intestate shall issue accordingly to them:

(c) that Patrick Gachunga Ngotho is hereby directed to render a full and accurate account of his administration of the estate within 45 days of the date of this ruling;

(d) that the three (3) survivors of the deceased shall consult on how Patrick Gachunga Ngotho shall provide adequately for Anne Mbura Ngotho and Mary Ruguru Muturi out of the estate of the deceased and report to court within 45 days;

(e) that in the event the parties fail to agree on distribution within the 45 days in terms of paragraph (d) above, the orders made on 21<sup>st</sup> October 1988 shall stand vacated, and the certificate of confirmation of grant dated 30<sup>th</sup> November 1988 cancelled;

(f) that in the event of (e) above, the estate of the deceased shall be shared equally between Patrick Gachunga Ngotho, Anne Mbura Ngotho and Mary Ruguru Ngotho in accordance with Section 38 of the Law of Succession Act; and

(g) that each party shall bear their own costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 30<sup>th</sup> DAY OF January 2015.**

**W. MUSYOKA**

**JUDGE**