



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**SUCCESSION CAUSE NO. 561 OF 2013**

*IN THE MATTER OF THE ESTATE OF HERMAN GICHANGA (DECEASED)*

**MARGARET WAGATHAIRU GICHANGA.....APPLICANT**

**VERSUS**

**JIMNAH MWANGI GICHANGA.....RESPONDENT**

**JUDGMENT**

The applicant filed in court a summons dated 16<sup>th</sup> April, 2010 seeking revocation of a grant of letters of administration intestate made to the respondent in respect of the estate of the late Herman Gichanga who died on 4<sup>th</sup> March, 1996 at Kora in Murang'a District (now Murang'a County). The grounds upon which the summons was made are that:-

1. The proceedings to obtain the grant were defective in substance and that the court had no jurisdiction to entertain the petition;
2. The grant was obtained fraudulently by making of a false statement;
3. The respondent concealed from the court evidence material to the case; and,
4. The grant was obtained by means of an untrue allegation of fact essential to justify the grant.

The summons was supported by the affidavit of the applicant on 16<sup>th</sup> April, 2010; in that affidavit, the applicant has sworn, *inter alia*, that she was excluded from the proceedings that culminated in the grant of letters of administration and the subsequent confirmation of the grant and that she only became aware of what the petition was all about when she was told by the court that she no longer had land because the land on which she was dwelling, which is land parcel **Loc/Kagumoini/741**, was now registered in the name of the respondent as the sole proprietor.

In response to the summons, the respondent swore that he was the son of the deceased and prior to his death, the deceased had made an oral will in the presence of all his family members including the deceased in respect of his land known as **Loc/Kagumoini/741**. Although he stated that he had annexed a copy of the will to his affidavit, there is no evidence of such will or what it entailed. In any case, if the will was oral it would certainly not be possible to exhibit it on an affidavit; considering that the respondent himself petitioned for letters of administration *intestate*, it is apparent that there was no will of whatever nature, written or oral.

The summons was disposed of by way of oral evidence and as will become clear later in this judgment,

the real questions for determination are largely questions of law since the pertinent facts are not in dispute. I have considered the record, the parties' pleadings, their evidence and the submissions they filed in support of the positions they adopted.

The record from the magistrates' court where the grant of letters of administration intestate was made shows that the petition was lodged in court by the respondent on 28<sup>th</sup> November, 2007. The persons listed in form **P&A 5** as the only survivors of the deceased are the respondent himself and the applicant who was described as the widow of the deceased. Land reference **Loc 14/Kagumoini/741** was listed as the only asset in the estate.

On the same date of 28<sup>th</sup> November, 2007, a citation addressed to the applicant was extracted requiring her to appear within fifteen days, apparently of the date of service, and take the letters of administration of the deceased's estate in default of which the grant would be made to the respondent. The requisite notice addressed to the principal registrar notifying him of an application for grant of letters of administration intestate pursuant to **rule 4(1)** of the **Probate and Administration Rules** was also sent to him on the same date.

Although the Principal Registrar responded to the notice on 30<sup>th</sup> November, 2007, certifying that there was neither a grant of representation nor an application for such a grant in respect of the deceased's estate, the District Registrar had by 28<sup>th</sup> November, 2007 issued a notice notifying members of the public that the respondent had lodged the petition for the grant of letters and that the grant was going to be made within thirty days of the date of its publication.

What followed was a summons dated 25<sup>th</sup> March, 2008 filed in court on the even date by the respondent seeking for the grant of letters of administration; in the affidavit he filed in support of the summons, the petitioner stated that the cause had been advertised in Kenya gazette on the 7<sup>th</sup> December, 2007 and that no objection had been made. The application was set for hearing on 23<sup>rd</sup> April, 2008.

The court coram on the hearing date is recorded as S.N.Mbungu (SRM), Gatungu (Court Clerk), Petitioner, "other", and Mr Kagwi for the petitioner/applicant. It is not known who was being referred to as "other". Mr. Kagwi is recorded to have addressed the court and said that the matter before court was his client's chamber summons dated 23<sup>rd</sup> April, 2008 and the party cited had not filed any objection. The court record then reads as follows:-

***"Cited party-I have not filed any paper***

***Court-Grant of letters of administration be issued to the petitioner. The same be confirmed after six months, the cited party at liberty to file protest."***

By a summons dated 29<sup>th</sup> August, 2008, the respondent sought to have the grant of letters made to him confirmed. In the affidavit in support of the Summons for Confirmation of grant, he listed the applicant as the deceased's widow and himself as his son. He sought the grant to be confirmed before the elapse of six months "to avoid bloodshed". As far as the distribution of the estate is concerned, he sought to be registered as the sole proprietor of the parcel of land known as **Loc 14/Kagumoini/741** which as noted, is the only asset comprising the deceased's estate.

The application came up for hearing on 17<sup>th</sup> September, 2008; on this day the coram is recorded as D.Orimba (SRM), Gatungu(Court Clerk), Petitioner(present) "other"(present) and Kagwi for the petitioner (present).

While prosecuting the application, Mr Kagwi informed the court that the deceased's widow was in court and that she had her own parcel of land; he therefore asked the court to confirm the grant in terms proposed in the supporting affidavit. The court proceeded to confirm the grant as prayed.

Once the respondent became the sole proprietor of the land in question the next step he took was to seek to evict the applicant from the estate; he therefore filed a chamber summons within the cause seeking an order of eviction to be issued against the applicant; in his affidavit in support of the application he branded the applicant a “trespasser”.

Having nowhere to go and faced with the imminent danger of eviction, it dawned on the applicant that if the deceased’s estate had devolved upon the respondent as the sole proprietor, she had in essence been disinherited. From the record, I understand this to have been the main reason why she moved to this Court by way of the summons herein seeking to revoke the grant made to the respondent.

I have carefully read through each and every page of the record in the **Kangema Senior Resident Magistrates Court Succession Cause No. 47 of 2007** in which the grant in issue was made and subsequently confirmed. Although it appears a citation was taken out against the applicant, there is no evidence on record that the citation was served upon her. If the applicant was not served as appears to have been the case, then there was no basis for the respondent’s petition for letters of administration intestate for the estate of Herman Gichanga; the respondent could not have proceeded as if the applicant had renounced her right to take out the letters of administration yet she had not been served with the citation.

**Rule 22(1)** as read with sub **rule (5) (a)** of the **Probate and Administration Rules** deals with this question **and it** provides as follows:-

***22.(1) A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto.***

***(2)...***

***(3)...***

***(4)...***

***(5) If the time limited for appearance has expired and the person cited has not entered an appearance in either the principal registry or the Mombasa registry, the citor may-***

***(a) in the case of a citation made under sub rule (1), petition the court (if he has not already done so) for a grant to himself;***

It is clear that while the respondent was entitled to take out, as he did, a citation against the applicant under **rule 22 (1)** he could only petition the court for a grant to himself under sub **rule 5(a)** if the time limited for appearance had expired and the applicant had not entered appearance in the principal registry or in the district registry where the citation had been taken out.

The applicant could not possibly be said to have failed to enter appearance and thereby given the respondent the opportunity to petition the grant to himself if she had not been served with the citation and was therefore ignorant of its existence.

In the face of this blatant breach of **rule 22(1)** as read with sub **rule (5) (a)** of the **Probate and Administration Rules**, the process through which the grant was made was flawed or, to adopt the language of the statute, “the *proceedings to obtain the grant were defective in substance*” as expressly stated in section **76 (a)** of the **Law of Succession Act**.

Any of the grounds stated in **section 76** of the **Law of Succession Act** would be sufficient to have the grant revoked or annulled and therefore there would be no reason to consider any other issue once it has been established that the process through which the grant was obtained was tainted with illegality. But even assuming that the process was valid, what happened subsequent to the grant would raise doubts on whether the respondent’s quest to administer the deceased’s estate was consistent with the objectives of

## the Law of Succession Act.

The grant was made in April 2008 and was confirmed in September 2008 before the elapse of six months. The reason given in the application for confirmation of grant before the elapse of six months was, as the respondent swore “to avoid bloodshed”; it is not clear what “avoiding bloodshed” meant but perhaps it may be inferred from the subsequent events.

What happened after the grant was confirmed was the respondent’s relentless effort to kick out the deceased’s widow out of the only inheritance that he left her. Armed with the certificate of confirmation in which he was indicated as the sole proprietor of the land on which the applicant was dwelling, the respondent filed an application in court to evict her; the respondent was in effect engaging the court process to sanitise what can only be described as his selfish or immoral intentions. He confirmed this when he testified that all he wanted was for the applicant to go back to her parents.

The grant was hurriedly confirmed before the expiry of six months for reasons that are quite inconsistent in my view, with the relevant law.

**Section 71 (3) (a) (b)** is clear on when an application for confirmation of grant can be made, it says:-

***71.(3) The court may, on the application of the holder of a grant of representation, direct that the grant be confirmed before the expiration of six months from the date of the grant if it is satisfied-***

***(a) that there is no dependant, as defined by section 29, of the deceased or that the only dependants are of full age and consent to the application;***

***(b) that it would be expedient in all the circumstances of the case so to direct.***

When the grant was confirmed before the elapse of six months, none of the conditions specified in **section 71. (3) (a) and (b)** was complied with. There is no doubt that the deceased’s widow fits the definition of a dependant under **section 29** of the Act and she was of full age at the material time. Though she was the deceased’s dependant and was of full age there is no evidence that she consented to the application. Again it cannot be possibly be argued that the rush to evict her from her inheritance, which is exactly what the respondent sought was what one would regard as ‘expedient’ as to direct that the grant be confirmed before the expiry of six months.

In confirming the grant, the subordinate court seems also to have overlooked **section 71 (1) (2)** of the Act which provides:-

***71. (1) After the expiration of a period of six months, or such shorter period as the court may direct under subsection (3), from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of the grant in order to empower the distribution of any capital assets.***

***(2) Subject to subsection (2A), the court to which application is made, or to which any dispute in respect thereof is referred, may-***

***(a)...***

***(b)...***

***(c)...***

***(d)...***

***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 record is not clear whether the applicant was present in court when the summons for confirmation of grant came up for hearing; she is neither included in the coram nor is she recorded to have addressed the court on whether she consented to the confirmation of the summons as proposed by respondent. All the court heard was from the counsel for the respondent who told the court that the applicant had her own share of land and therefore the respondent ought to be registered as the sole proprietor of the deceased's estate; however, the parcel of land which the applicant was alleged to possess was not described anywhere in the petition or in the affidavit in support of the summons for confirmation of grant. In these circumstances, it is obvious that the court cannot be said to have been satisfied as to the respective identities and shares of the persons beneficially entitled to the estate of the deceased before it confirmed the grant.

**Rule 40(8) of the Probate and Administration Rules** is clear that the only time the court may dispense with the attendance of the beneficiaries or persons beneficially entitled to a deceased's estate at the confirmation hearing is when those persons have consented in a prescribed form to the confirmation; under this rule if a person beneficially entitled has not filed a consent in writing then rather than confirming the grant, the court has to set down the matter for directions its disposal. The rule says:-

***40.(8) Where no affidavit of protest has been filed the summons and affidavit shall without delay be placed by the registrar before the court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the applicant, the protester and to such other persons as the court thinks fit.***

There is no evidence that the applicant consented, in whatever manner, to the confirmation of grant and there is no way she would have consented to the confirmation which in effect disinherited her; the learned magistrate disregarded this provision of the law.

More importantly, no reference at all was made to **section 35(1)(b)** of the Act which provides for inheritance of widows or widowers surviving their spouses; it states as follows:-

***35. (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to –***

- a. the personal and household effects of the deceased absolutely; and***
- b. a life interest in the whole residue of the net intestate estate:***

***Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.***

Legally speaking, therefore, it is only the applicant who, under **section 35(1) (b)** is entitled to the deceased's estate except that her interest in the estate is subject to either her lifetime or her remarriage to any person whichever comes earlier. Where does this leave the respondent? The answer to this question can be found in the rest of the provisions of under **section 35** of the Act; in order to appreciate the answer given it is necessary to reproduce these provisions here. They state as follows:-

***(2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1), have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but that power shall not be exercised by will nor in such manner as to take effect at any future date.***

***(3) Where any child considers that the power of appointment under subsection (2) has been unreasonably exercised or withheld, he or, if a minor, his representative may apply to the court for the appointment of his share, with or without variation of any appointment already made.***

*(4) Where an application is made under subsection (3), the court may award the applicant a share of the capital of the net intestate estate with or without variation of any appointment already made, and in determining whether an order shall be made, and if so what order, shall have regard to –*

- (a) the nature and amount of the deceased's property;*
- (b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;*
- (c) the existing and future means and needs of the applicant and the surviving spouse;*
- (d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;*
- (e) the conduct of the applicant in relation to the deceased and to the surviving spouse;*
- (f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will, if any; and*
- (g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.*

*(5) Subject to the provisions of sections 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or, in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.*

From the foregoing provisions, it is apparent that the respondent's entitlement to the deceased's estate is not only secondary to that of the applicant but also, to some extent, it depends on her goodwill; the net intestate estate can only devolve upon her and it is only after such devolution that she will have the discretion to exercise her power of appointment of all or any part of the net intestate estate and transfer it to the respondent as a gift. If, in the respondent's view, the power of appointment is unreasonably withheld or exercised, then under subsection (3) he will have the option of applying to court for his share of the estate; it is then that the court will determine what is rightly due to the respondent taking into account all those factors stated in subsection **4(a) to (g)**.

The only other time that the respondent will be entitled to the deceased's estate or the residue thereof is when the applicant either dies or remarries.

I have already found that the process through which the grant was made was flawed to the extent that the grant can be said to have been obtained through proceedings that were defective in substance under **section 76 (a) of the Law of Succession Act**; the purported confirmation of grant was therefore of no legal effect. Consequently the applicant's summons for revocation of grant dated 16<sup>th</sup> April, 2010 is hereby allowed and the grant made to Jimnah Mwangi Gichanga on 23<sup>rd</sup> April, 2008 in respect of the estate of Herman Gichanga is hereby revoked; costs will be in the cause considering that the dispute was between a mother and her step-son. Following the revocation of the grant and for completeness of record the Court makes the following orders:-

- a. The applicant, Margaret Wagathairu Gichanga is hereby appointed the administrator of the estate of Herman Gichanga (deceased);
- b. Any transaction or any other dealing on land reference **Loc 14/Kagumoini/741** as a result of the certificate of confirmation dated 3<sup>rd</sup> November 2008, including the transfer of that parcel of land to the respondent or any other person is hereby cancelled;

- c. **Land reference Loc 14/Kagumoini/741** shall devolve upon and shall be registered in the name of Margaret Wagathairu Gichanga to hold for life interest; and
- d. The respondent is at liberty to apply for his share of the estate in the event the applicant exercises her power of appointment or withholds it unreasonably.

**It is so ordered.**

**Dated and signed at Nyeri this 29<sup>th</sup> day of December 2014**

Ngaah Jairus

JUDGE

**Read and delivered in open court this 13<sup>th</sup> day of February, 2015**

H.P. Waweru

JUDGE