



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 853 OF 2013

IN THE MATTER OF THE ESTATE OF MIIRI NDERI KARIRI alias KIURA NDERI
(DECEASED)

SUSAN WAMBURA MIIRI1ST APPLICANT

AGNES WANJIKU MIIRI2ND APPLICANT

ESTHER WANJIRU MIIRI3RD APPLICANT

FRANCISCA KUTHI MIIRI4TH APPLICANT

AND

FRANCIS MURIITHI MIIRI.....1ST RESPONDENT

SHEM N. MIIRI.....2ND RESPONDENT

WILLIAM KINYUA MUCHIRA.....3RD RESPONDENT

RULING

1. **Susan Wambura Miiri**, Agnes Wanjiku Miiri, Esther Wanjiru Miiri and Francisca Kuthi Miiri are the applicants herein who took out summons dated 18th March, 2013 for annulment or revocation of grant issued to Shem. N. Miiri, the 2nd respondent herein and confirmed on 7th March, 2002.
2. The grounds upon which the application was premised were as follows:
 - a. *That the grant was obtained fraudulently by making false statements.*
 - b. *That the proceedings to obtain the grant were defective in substance in that the respondents deliberately misled the court.*
 - c. *That the respondents deliberately concealed from the court something material to the case.*
 - d. *That the grant was obtained by means of untrue allegation of a fact essential on a point of law to justify the grant notwithstanding that the allegation was made in conspiracy and by lying to court inadvertently.*
3. **Background**

The applicants are sisters to the respondents and all of them are children to the deceased herein, the late MIIRI NDERI KARIRI ALIAS KIURA NDERI who died intestate on 27th May, 1999 domiciled at the now Kirinyaga County. According to the petition filed the deceased left the following surviving him;

1. Peris Kathugu Miiri (widow now deceased)
2. Mary Wawira Miiri (daughter)
3. Francis Muriithi Miiri (son)
4. Francisca Kuthii Miiri (daughter)
5. Shem Ndwiga Miiri (son)
6. Esther Wanjiru Miiri (daughter)
7. Agnes Wanjiku Miiri (daughter)
8. Susan Wambura Miiri (daughter)

4. The assets that comprised the estate of deceased herein were as follows:

- a. Money at Barclays Bank of Kenya Account Number 3715100.
- b. Shares at Housing Finance Company of Kenya.
- c. Land parcel No. NGARIAMA/MERICHI/530
- d. NGARIAMA/KABARE/197.
- e. A share No. 2299 at Langata Development Company.

5. The petitioner, Shem N. Miiri was appointed the administrator of the estate of the deceased herein on 21st March, 2001 and duly applied for confirmation of the grant vide summons dated 8th October, 2001. The record shows that the petitioner and the beneficiaries not described appeared before Hon. Judge in Embu on 7th March, 2002 wherein the grant was confirmed by the High Court sitting in Embu.

6. The applicants have now come to this Court vide aforementioned summons deponing through Susan Wambura Miiri, one of the applicants that the mode of distribution was never disclosed to them and that the respondents who are sons to the deceased benefitted from the estate more than them and that the proceedings leading up to confirmation of the grant was done secretly without consulting them and hence the reason why they are seeking for annulment of the said grant.

7. When the matter came up for directions before the court in Embu, the court directed that the Summons for Revocation of Grant be disposed of by way of oral evidence and directed the matter be transferred here for hearing and determination.

8. **The Applicants' case**

Susan Wambura Miiri testified that she was the last born in the family of seven children. She told this Court that the respondents who are her brothers lied to them that what was being distributed or shared was the money at the bank. She added that the respondents promised them some two rooms for business at Githurai property and equal shares in Ngariama/Kabare/197 and Ngarima/Merichi/530 but later realized that they had gotten a raw deal as the respondents had gotten the lion's share in the estate. She denied that there was a family meeting on 5th September, 1999 where an agreement on the mode of distribution was reportedly reached saying that she did not sign any agreement. She further faulted the respondents for taking the share given to their mother when she passed on.

9. On being put to task to explain why she took so long to take action, the applicant told this Court that she could not trace the court file and the proceedings and that is why they took more than ten years to bring this present application. She told this Court that the respondent refused to disclose to them the details of the succession cause filed to enable them take action.

10. Esther Wanjiru Miiri the 3rd applicant on her part testified and supported the sentiments of her sister Susan Wambura. She added that she was present in court on 7th March, 2002 when the grant was confirmed but added that no questions were asked and that they were not given a chance to say anything concerning the distribution of the estate.

11. She however, admitted that some sort of arrangements were agreed upon which was that the brothers (respondents herein) were to sell some shares and develop the property in Githurai which was to be utilized by all the beneficiaries and this she said was not done. The 3rd applicant further told this Court that she was the one staying with her late mother and that the above arrangements were agreed at their home but that the other sisters were not present when the issue of shares being sold to develop Githurai property was discussed.

The 3rd applicant further added that Irene, a granddaughter

brought up by the deceased was left out altogether in the distribution of the estate of the deceased herein though she was a dependant. She accused the respondents for being hostile to her by destroying her house and crops she had planted in a portion she was occupying in the estate.

12. The 3rd applicant under cross-examination by respondents' counsel conceded that she decided to come to court after the promulgation of the new Constitution in 2010 when they realized that their rights were infringed. She told this Court that she was present in court on 7th March, 2002 in Embu High Court but that it was their late mother who spoke. She further conceded that she was present in a meeting called at their home and that all her siblings attended the meeting where the issue of distribution of the estate was discussed.

13. Francisca Kuthii Miiri the fourth applicant on her part told this Court that she was present in a family meeting when the issues touching the estate were discussed. She also told this Court that she was present in court and had agreed on the mode of distribution but only changed her mind when she was informed that the new constitution gave them more rights than what they anticipated prior to the confirmation of grant on 7th March, 2002.

14. She further added that Irene was a beneficiary to the estate but was left out by mistake as she was brought up by the deceased as his child.

15. Agnes Wanjiku one of the daughters of the deceased testified and confirmed that she was in court during confirmation and that she was also present during a family meeting where they agreed on how to share the properties forming the estate herein. She further testified that Irene a grandchild to the deceased and daughter to her late sister Mary Wawira was left out together with two other children including William Kinyua. She also conceded that they changed their minds although they had initially agreed on the mode of distribution of the estate as confirmed by court on 7th March, 2002.

16. In their written submissions the applicants urged this court to revoke the grant in order to ensure that the remaining assets in the estate are distributed equally among all the beneficiaries.

17. Respondents case

The respondents opposed the Summons for Revocation of Grant through an affidavit sworn by Francis Muriithi Miiri sworn on 23rd July, 2013 where he deposed that they agreed as a family in a family meeting held on 5th June, 1999 on how the estate of the deceased herein was to be distributed. He maintained that all the family members were present and signed the minutes of the meeting to prove their presence. He further deposed that they petitioned for letters of administration of the estate of the deceased herein with the participation of all the children and that during confirmation of the grant everyone was present and annexed a copy of the proceedings of 7th March, 2002 to demonstrate his assertions.

18. In his evidence before this Court, the 1st respondent told the Court they had agreed that their late mother's share of 1 ½ acres was to go to the daughters or the applicants and wondered why the applicants were not satisfied when they appeared satisfied initially when they attended court for confirmation of grant and the mode of distribution that was adopted by the court in Embu. He reasoned that Irene and her siblings being children of her late sister should benefit from the share that was reserved for his late mother – which was 1 ½ acres. He faulted the applicants for chasing him out of the one of the properties (Ngariama/Merichi/530) that after they have turned hostile to him.

19. Under cross-examination by the applicant, the 1st respondent told this court that he sold the property in Githurai and put up rooms some of which he was ready to surrender to the applicants based on their earlier agreement. He added that Irene did not get anything but that William Kinyua took the share meant for her. He further added that he sold the shares that were given to him during confirmation. He also conceded that he got 15% of the money that belonged to the deceased deposited at the bank as per their initial agreement.
20. In their written submissions drawn and filed on their behalf by their counsel, the respondents submitted that no grant was issued on 7th March, 2002 as the grant in this cause was issued on 27th February, 2001. They submitted that the applicants were not honest and truthful in their application to warrant being assisted by this Court.
21. In their view, the applicants took out summons for annulment of grant as an afterthought when in essence they were involved from the start to the end pointing out that the minutes of the family meeting demonstrates that they were involved in every step in the succession cause.
22. It was further submitted that the involvement of the applicant could be demonstrated by the fact that they were all present in court when the grant was confirmed on 7th March, 2002. They pointed out that while the 1st and 3rd applicants stated in their evidence that they were not involved in the succession, the other two Agnes Wanjiku Miiri and Francisca Kuthii Miiri differed saying they were fully involved and that they only changed their minds after the passage of the new constitution. The Respondents submitted that such reasons should not be used to interfere with the grant herein.
23. On the question of one Irene being left out in distribution of the estate, the Respondents submitted she had benefitted from one shop in Ngariama/Kabare/197 and that she was to benefit like the other applicants from 1 ½ acres of land meant for their late mother comprised in NGARIAMA/KABARE/197.
24. The Respondents urged this Court to find no merit in the application and relied on the authority in Muranga High Court Succession Cause No. 433 of 2013 between MBURU NJOROGE –VS- FREDRICK MBURU NJOROGE where the court held that having fully participated in the proceedings leading to the confirmation of grant, the applicants could not turn back and ask for revocation of grant on the basis that they were dissatisfied with the manner in which the estate was distributed.

25. **Determination**

The only issue for determination in the application before me is whether the grant confirmed by this court then sitting in Embu on 7th March, 2002 should be annulled or revoked pursuant to **Section 76** of the Law of Succession Act and whether the applicant in invoking the grounds listed thereon have established any or all the grounds.

26. I have carefully considered the application, the grounds upon which it was made and the evidence tendered by the applicants during the viva voce hearing. I have also considered the opposition by the respondents, the evidence tendered and their submissions including the authority cited.
27. It is clear from the evidence tendered before me that the applicants despite the contrary assertions by 1st and 3rd applicants (Susan Wambura Miiri and Esther Wanjiru Miiri) were made aware of the succession proceedings and went along with the sort of arrangements that saw the confirmation of grant on 7th March, 2002. All except the 3rd applicant benefitted from a share of the money that was in Barclays Bank but that fact is far from her major complain in this application. Her major borne of contention like the other applicants is that they got a raw deal in the distribution of the estate which they asserted favoured the 1st and 2nd respondents who were the sons to the deceased. They asserted that after the new constitution was passed they realized that what they had been given was less than what they deserved. The fundamental question however, is whether this can be a valid ground to annul a grant.
28. Under **Section 76** of the **Law of Succession Act** a grant may at any time be revoked or annulled whether confirmed or not on any of the following grounds:

- a. That the proceedings to obtain the grant were defective in substance.
- b. If the grant was obtained fraudulently through false statements or concealment of material facts.

- c. If the grant was obtained by means of untrue allegation of fact essential on a point of law to justify the grant notwithstanding that the allegation was made by mistake or inadvertently.
 - d. If the person issued with a grant fails within one year or a longer period to apply for confirmation or proceed diligently with administration of the estate or fails to give an inventory or account of the estate when required to do so or if the grant has become useless or inoperative through subsequent circumstances.
29. The applicants indicated in their application that they were seeking revocation of grant on the first four (4) of the grounds above but looking at the affidavit in support of the application the grounds grow thin and apart from deposition under paragraph 7 that some beneficiaries were left out, which was an inadvertent mistake, there are no facts supporting any of the grounds alluded in the face of the summons for revocation of grant.
30. This Court finds that a change of mind on the mode of distribution of an estate by person who has fully participated in the proceedings leading up to the confirmation of grant, is not a ground envisaged under **Section 76** of the **Law of Succession Act**. In this respect I fully agree with the decision made by Hon. Justice Ngaah Jairus in the case quoted by the respondents the case of **Mburu Njoroge –Vs- Frederick Mburu Njoroge [2014] eKLR**. However, looking at the proceedings of 7th March, 2002 at the High Court in Embu during confirmation of the grant herein, it is not very clear which beneficiaries were present in court that day.
31. I of course agree with the respondent that the conduct of the applicants seems to suggest that they were present and raised no objection which could be true but I am persuaded of at least one fact on a balance of probability. And this is the fact that Irene, one of the beneficiaries, was absent and this could explain the reason why she was left out in the distribution of the estate despite the uncontested fact which came out clearly during the hearing that she was brought up by the deceased like any other child of the deceased. This therefore puts her within the description given under **Section 29 (c)** of the **Law of Succession Act**. She was a dependant to deceased and I am not persuaded by the argument advanced by the respondents that William Kinyua Muchira her sibling was given a portion of the property to hold in trust for Irene and any other sibling being children to late Mary Wawira Miiri – a daughter to the deceased.
32. I have checked at the proceedings keenly and noted that when the petition was presented, the petitioner SHEM MIIRI stated that the late Mary Wawira Miiri was survived by only one child – William Kinyua Muchira. There was no mention of Irene. At the hearing, the 1st respondent Francis Muriithi Miiri admitted that Irene was brought up by their late mother and the deceased in this cause. In this respect, I do find that the grant herein was obtained by means of untrue allegation of fact even though the allegation could have been made by genuine mistake or in ignorance. The respondents might have thought William Kinyua Muchira would hold the property on behalf of his siblings but they were mistaken.
33. Secondly I find that the share assigned to the late Peris Katugu Miiri (deceased) is now inoperative due to her demise before the administration of the estate and transmission of her share was completed. I therefore find that part of the grant confirmed has become inoperative through the said subsequent circumstances.
34. This Court having been made aware of the above facts though the applicants may not have invoked them directly, is mandated under the law to proceed on its own motion if satisfied that any of the grounds under **Section 76** obtains.

In sum though this Court is not satisfied with some of the reasons given as indicated above, I am persuaded by the two grounds I have highlighted above. I do find that it is in the interest of justice to proceed *suo moto* and allow this application. I am not persuaded by the respondents that the summons for revocation of grant is defective for seeking to revoke a grant issued on 7th March, 2002. The summons sought to revoke the grant that was confirmed on 7th March, 2002. The wording may not be perfect but excusable given that they acted in person and drew the application themselves. Substantively the application has met the threshold. Consequently the grant issued on 21st March, 2001 and confirmed on 7th March, 2002 is hereby revoked/or annulled.

The petitioner is directed to sit down with all the beneficiaries and list down all the assets

remaining in the estate and agree on the mode of distribution. In default of agreement any of the parties can move the court. In this regard a fresh grant is hereby issued to him and one of the applicants herein to be picked by the sisters. In view of the relationship of the parties in this cause and in order to promote reconciliation, I shall make no order as to costs. Each party to pay own costs. It is so ordered.

Dated and delivered at Kerugoya this 28th day of October, 2015.

R. K. LIMO

JUDGE

28.10.2015

Before Hon Justice R. Limo J.,

Court Assistant Willy Mwangi

Susan Wambura

Agnes Wanjiku

Esther Wanjiru Applicants present

Francisca Kuthii

Kimotho holding brief for Maina for Respondent

COURT: Ruling signed, dated and delivered in the open court in presence of applicants in person and Kimotho advocate holding brief for Maina for respondent.

R. K. LIMO

JUDGE

28.10.2015