



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**SUCCESSION CAUSE NO. 1601 OF 1997**

**IN THE ESTATE OF THE MATTER OF THE NGUGI GITHETE – (DECEASED)**

**RULING**

1. I am called upon to decide two applications, one dated 17<sup>th</sup> November 2011 and the other 2<sup>nd</sup> February 2012, for review and revocation of grant on one hand and for rectification of grant on the other.
2. The application dated 17<sup>th</sup> November 2011 seeks two principal orders:-
  - a. Review of orders that were made by Kubo J. on 18<sup>th</sup> April 2006 revoking a grant that had been issued to Grace Nyambura Ngugi on 9<sup>th</sup> March 1989.
  - b. Revocation of grant made on 12<sup>th</sup> May 2010 to Muthingani Githete.
3. The applicant had been appointed administrator of the estate of the deceased vide a grant made on 9<sup>th</sup> March 1989 in **Thika Resident Magistrate Court Succession Cause No. 41 of 1989**, which was then confirmed on 1<sup>st</sup> February 1990. The said grant was revoked on 18<sup>th</sup> April 2006 by an order of Kubo J. The applicant complains that the order was made *ex parte*, she was never served with the application the subject of the said order. She states that she should not be punished for the mistakes of her lawyer.
3. The ruling of 18<sup>th</sup> April 2006 was predicated on an application dated 18<sup>th</sup> June 2001 which sought revocation of the grant made on 9<sup>th</sup> March 1989 on the grounds that the same was obtained fraudulently and had left out some dependants of the deceased. The said application was filed at the instance of a brother of the deceased on the grounds that the names of the siblings of the deceased had been omitted yet they were entitled to a share in the estate.
4. There is an affidavit of service sworn on 22<sup>nd</sup> July 2002 and filed in court on 23<sup>rd</sup> July 2002 which shows that the revocation application dated 18<sup>th</sup> June 2001 had been served on the 1<sup>st</sup> administrator and that she did not sign the papers in acknowledgement of receipt. There is also another affidavit of service sworn on 20<sup>th</sup> November 2002 and filed in court on 28<sup>th</sup> November 2002 showing service of the said application upon the advocates for the administrators.
5. The respondent filed a replying affidavit on 8<sup>th</sup> March 2004, where she showed that the matter related to the matter of her dead husband who was survived by her and his widow and their children. The land in question was registered in his name, and thereafter there could be no claim by any other person.

6. The application dated 18<sup>th</sup> June 2001 was argued on 8<sup>th</sup> February 2006. This date for hearing was fixed at the registry *ex parte* on 8<sup>th</sup> November 2005 by a clerk from the chambers of counsel for the applicant in the absence of the representative of the respondent.
7. Upon the fixing of the matter for hearing on 8<sup>th</sup> February 2006, the same was served on 7<sup>th</sup> December 2005 on counsel for the respondent. There is an affidavit of service dated sworn on 16<sup>th</sup> December 2005 and filed in court on 8<sup>th</sup> February 2006. There is attached to the affidavit a hearing notice dated 30<sup>th</sup> November 2005 with a stamp of Messrs. Macharia & Co. Advocates embossed on the reverse dated 7<sup>th</sup> December 2005 and bearing the signature of the recipient. The matter was mentioned on 26<sup>th</sup> January 2006 when the hearing date was confirmed. The applicant was represented, but the respondent was not. I suppose that the matter has been listed on the cause list for that day.
8. From the material before me, it is clear to me that the applicant was served with the revocation application dated 9<sup>th</sup> March 1989 and she even replied to the said application. Her lawyer was served with notice of the date fixed for the hearing of the said application. Her lawyer did not attend court. I am not persuaded that good reasons exist for reversing the order made by Kubo J. on the said application.
9. Following the revocation of the grant on 18<sup>th</sup> April 2006, the court made another grant on 12<sup>th</sup> May 2012 to Muthingani Githete. The said Muthingani Githete is a brother of the deceased person. The deceased had two properties registered in his name and therefore the two properties formed part of his estate, that is to say Loc.5/Kagumoini/1365 and Loc.5/Gitura/277. Both the applicant and the respondent claim to be interested in the said assets.
10. Under *Section 35* of the Law of Succession Act, the priority to devolution of property in intestacy is given to the surviving spouse and children of the deceased. The next in line are the parents of the deceased who are entitled only in circumstances where there is no surviving spouse or child. This is the effect of *Section 39* of the Act. Siblings of the deceased will only take a share in cases where there is no surviving parent.
11. The deceased in this case was survived by a spouse and children. Ideally, the estate ought to devolve upon the said spouse and the children. This is the effect of *Section 35* of the Act. The siblings have no claim therefore to the estate of the deceased. Their remedy, if they claim that the deceased held the same in trust for them, lies in their filing a suit at the Environment and Land Court for a declaration of trust in their favour. The probate court does not have jurisdiction to declare such trust.
12. I am also cognisant of *Section 66* of the Law of Succession Act which states that priority in the making of the grant in intestacy should be given to the surviving spouse, followed by the children, the parents and the siblings of the deceased in that order. In this case the applicant was way up the hierarchy while the respondent was right at the bottom. Preference ought to have been granted to the widow. There is merit in the argument that the grant made to Muthingani Githete ought to be revoked.
13. I make the following orders on the application dated 17<sup>th</sup> November 2011:-
  - a. Prayer 2 is hereby dismissed.
  - b. Prayer 3 is allowed.
  - c. The respondent shall be appointed administrator of the estate of the deceased.
  - d. Each party shall bear their own costs.
14. I note that this matter originated from the Thika Chief Magistrate's Court. It only came here for the determination of the revocation application dated 18<sup>th</sup> June 2001. That application has been determined. There is nothing more for this court to do. I therefore direct that the original file in Thika Resident Magistrate's Cause Succession Cause No. 41 of 1988 be returned to the Thika Resident Magistrate's Court for further handling.

15. The Thika Court shall issue a fresh grant of letters of administration intestate to Grace Nyambura Ngugi, who shall thereafter apply for confirmation of the grant.

16. As the respondents claimed to have an interest in the matter, the Thika court shall, after the issuance of the grant to the applicant, and before its confirmation, stay the cause for three months from the date of this ruling to facilitate the filing of a suit by the respondent at the Environment and Land Court or further action.

**DATED, SIGNED and DELIVERED at NAIROBI this 31<sup>st</sup> DAY OF January, 2014.**

**W. MUSYOKA**

**JUDGE**