



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

SUCCESSION CAUSE NO. 290 OF 2010

IN THE MATTER OF THE ESTATE OF THE LATE STEPHEN GITAU KIMEMIA

AURIEL MARIE JOY KIMEMIAH.....APPLICANT

VERSUS

SAMMY GITAU GEDION.....1ST RESPONDENT

DEDAN NJOROGE GITAU.....2ND RESPONDENT

JUDGMENT

A. THE APPLICATION AND OPPOSITION

1. By an application described as **Summons for Revocation of Grant**, dated 6th June 2011 but filed on 23rd June 2011 (*the Application*) one Auriel Marie Joy Kimemia (*the Applicant*) sought an order that the Grant of Letters of Administration (*the Grant*) made to Sammy Gitau Gedion and Dedan Njoroje Gitau (*the Respondents*) be revoked with costs to the Applicant on the grounds THAT -

- 1. The proceedings to obtain the grant were defective in substance as the deceased did not die intestate but died leaving a will and a Grant of Letters of Administration with the Will annexed of the deceased Stephen Gitau Kimemia dated the 5th May 2000 was issued to the Testamentary Executor one Cuthbert Mpame by the High Court of Zimbabwe on 31st May 2000. In the said Will, the deceased bequeathed his movable and immovable properties to his daughters Pearl Nduta Kimemiah, Alexandria Nyambura and Michelle Wangari.*
- 2. The grant was obtained by failing to disclose to this Honourable Court material facts which is the existence of Auriel Marie Joy Kimemiah and Pearl Nduta Kimemiah, Alexandria Nyambura and Michelle Wangari who are the wife and daughters of the deceased respectively.*
- 3. The proceedings to obtain the grant were defective in substance as citations were not sent to all dependants/beneficiaries of the estate of the deceased.*
- 4. The grant was obtained fraudulently by the making of a false statement and by the concealment from the court of material facts to the case to wit that the applicant's consent was not obtained at the time of petitioning.*

2. The Application was also supported by the Affidavit of the Applicant sworn on 6th June 2011.

3. The Application was however opposed by the Respondents in an Affidavit sworn jointly by them

on 1st August 2011 and filed on the same date.

B. THE APPLICANT'S CASE

4. The late Dr. Stephen Gitau Kimemiah (*the deceased*), was a Kenyan who lived and died in Zimbabwe on 19th May 2000 and was survived by his wife, the Applicant, and three daughters, Pearl Nduta Kimemiah, Alexandria Nyambura and Michelle Wangari. He died testate and a Grant of Letters of Administration with the Will annexed was issued to the Testamentary Executor one CUTHBERT MPAME by the High Court of Zimbabwe on 31st May 2000 (*the Executor*).

5. The Testamentary Executor in turn appointed the Applicant and her daughter Pearl Nduta Kimemiah under a Power of Attorney dated 17th December 2004 to administer the deceased's assets in Kenya (*the Attorneys*).

6. Under the said Power of Attorney, the Attorneys Petitioned the High Court of Kenya at Nairobi in Nairobi Succession Cause Number 2334 of 2006 for the Sealing of the Grant issued to the Executor by the High Court of Zimbabwe. The Grant was sealed on 16th January 2007 and a Notice of the Resealing of Grant was subsequently issued to the High Court of Zimbabwe, and the necessary Notice of Reseal of Grant was issued.

7. Among the assets of the deceased in Kenya was a parcel of land referred to in his Will as -

v. my half share of KIPKELION/KERICHO EAST DISTRICT/RIFT VALLEY PROVINCE/KENYA (the other half is owned by Mrs Joy Kimemiah).

8. The Applicant deponed in her Supporting Affidavit aforesaid that she and her co-administrator (*Pearl Wangari*), diligently and thoroughly searched for the title document to the parcel of land known as KERICHO/KIPKELION/BARSIELE/BLOCK 2 (KPLABA), PLOT 19 to no avail and came to the conclusion that the same was lost or misplaced. They made a Report to the Police, and were on 4th March, 2011 issued with an Abstract Form PExh.1 RECORD (OB 12/4/3/2011) – Loss of TITLE DEED KIPKELION/BARSIELE/BLOCK 2 (KAPLABA) Plot 19.

9. To their astonishment and utter surprise, upon conducting a search on the subject parcel of land, the Applicant's co-administrator, discovered that the title to the said land had been issued to the Respondents who are nephews to the deceased, pursuant to the Confirmation of Grant in this Succession Cause.

10. Their efforts to place a restriction on the subject land were thwarted by a letter dated 24th May 2011 from the Kericho District Land Registrar that she intended to remove the restriction within 30 days for the reason that the Respondent's herein were issued with Letters of Administration and Certificate of Confirmation on 29th November 2010.

11. The Applicant contends that the Respondents obtained title to the property with sole intention and purpose of disposing off the said property without her knowledge and ultimately benefit from the proceeds of an unlawful and illegal sale based upon a Grant which was obtained fraudulently by the making of a false statement and by the concealment from the court of material facts to the case, namely, that the applicant's consent was not obtained at the time of the Petition in this cause.

12. For all those reasons the Applicant seeks this court to revoke the Grant and set aside all transactions based upon the said Grant.

C. THE RESPONDENT'S CASE

13. The Respondent's case is set out in the joint Replying Affidavit of the Respondents sworn and filed on 1st August 2011 in which they contend inter alia that -

(a) they legally obtained the registration of the said land in accordance with the Certificate of

Confirmation of Grant made on 29th November 2010.

(b) the deceased having died, their proceedings for Grant of Letters of Administration and the subsequent confirmation of the Grant were not defective in any way since all the legal procedures were met including gazettment of the Petition and no objection was ever raised by the Applicant.

(c) that the deceased was a great friend of the Respondents' father who pre-deceased the Applicant's husband.

(d) that the deceased had hired the Respondent's father in 1978 as a farm manager to take care of the said land, and their father used to reside on the land.

(e) that their late father instructed them to treat the deceased with deep respect and as our own father hence the reason why upon Petitioning for Grant of Letters of Administration they stated that they were the deceased's sons.

(f) that the Deceased in 1991 in the presence of the Applicant and his daughters, gave to their father the entire said land and that the Deceased handed over to their father the main house keys and the title deed for the said land.

(g) that the Respondents and two of their late brothers moved into the land in the year 1997, and have since then resided on the land, and referred to the chief's letter dated 3/05/2005 as proof thereof.

(h) that they cultivate and lease part of the land, without any interference by the Applicant and/or any other person.

(i) that the Deceased never ever included the suit land as part of his estate, and they (Respondents) even doubt the genuineness of the Will.

(j) that the Deceased only visited the land twice and never asked either their father or they to vacate the land.

(k) that they could not have taken out citations because they did not know where to find the deceased's family members, and hence they opted to Petition directly themselves with a hope that once the Petition was gazetted, objections would have been raised.

(l) that since they knew the land had been given to their father and that since they had been in occupation of the land since 1992 they genuinely took out Letters of Administration to enable them to acquire the said land legally.

14. In addition to the said joint Replying Affidavit, the Respondents also, with leave of court, granted on 17th September 2011, filed on 17th January 2012 another joint Replying Affidavit sworn on 16th January 2012 reiterated their averments in the Affidavit of 1st August 2011 and further deponed *inter alia* that -

1. ***that the Summons for Revocation of the Grant (the Application) is fraudulent because they verily believe that it has been by a fictitious person purporting to be the Deceased's widow.***
2. ***That the Applicant do appear before court for identification purposes.***

15. For all those reasons the Respondents asked the court to dismiss with costs to them, the Application for revocation of the Grant made to them on 21st September 2010, and confirmed under a Certificate of Confirmation of a Grant made on 29th November 2010.

16. The Applicant promptly responded to the Replying Affidavit. In her Further Affidavit sworn on 23rd August 2011 and filed on 5th September 2011, the Applicant depones -

1. that she is the deceased's wife, and their three daughters, Pearl Nduta Kimemiah, Alexandria Nyambura and Michelle Wangari.

2. on advice of her Advocates on record, that the proceedings which led to the Respondent's obtaining registration to L.R. (Title Number/Kericho/Kipkellion/Barsiele Block 2 (Kaplaba) 19 were illegal as she (the Applicant) had obtained a Grant of Letters of Administration in Nairobi High Court Succession Cause No. 2334 of 2006, four years before the Petitioners applied to this court for a Grant of Letters of Administration, and was not expecting any other person to make a fresh application with regard to the Deceased's property. In any event her husband did not die intestate but died living a valid will (testate).

3. that the disputed land was part of the Deceased's estate.

4. that the Respondents were well aware of Nairobi Succession Cause No. 2334 of 2006 but chose not to participate in the proceedings to enable them lay claim to the land, but failed to do so.

5. that the Applicants have come to court with unclean hands and blatant and outright lies, and that their obtaining a Grant of Letters of Administration herein was done fraudulently and only for purposes of disposing of the deceased property, hence the application dated 27th November 2010, for Confirmation of the Grant.

6. that the Respondent's father was never given the parcel of land by her deceased husband, as alleged by the Respondents and neither and the Respondents concede that their father was only an employee of the applicant's deceased husband, and their father never occupied the land as an owner thereof.

17. In a quick rejoinder by way a Further Affidavit sworn on 6th October 2011 and filed on 7th October 2012, the Respondents point out that the Applicant had in paragraph 7 of her Further Affidavit of 23rd August 2011, acknowledged that her deceased husband had actually given the land to the Respondent's deceased father.

18. In addition to the various Affidavits, Counsel for the Applicant and the Respondents filed written submissions for and against the Application. The Applicant's Counsel's submissions dated 18th July 2012, were filed on 20th July 2012. The written submissions of counsel for the Respondents were dated 17th July 2014 were filed on the same day. An application by the Respondents counsel dated 5th June 2014, for determination of the Application by way of *viva voce* evidence was neither served nor argued, and is deemed to have been abandoned. If it had been argued, I would have dismissed it with costs on the sole ground that it was intended to frustrate the Applicant and cause her maximum financial damage as she and her daughters live outside the jurisdiction and would have had to bear the costs of travel to and from Zimbabwe, and lodging in Kenya pending the hearing of the Application. Besides, other than seeing the face of each witness, the Applicant and the Respondents, *viva voce* evidence would not have added any new material to what the Applicant has pleaded in her Application and Affidavits, and what the Respondents have thrown against her in their joint affidavits. I think the material before court, from both the Applicant and the Respondents coupled with the respective submissions, will enable this court to determine the application herein.

THE DETERMINATION

19. In an application for revocation or annulment of a Grant of Letters of Administration or a Grant of Probate the Applicant must satisfy that the prescriptions laid in Section 76 of the Law of Succession Act, (*Cap. 160, Laws of Kenya*), granted that all the requirements as to compliance of the manner of application have been complied with. The prescription of Section 76 are -

1. that the proceedings to obtain the grant were defective in substance,

2. that 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,

3. ***that the grant was obtained by means of an untrue allegations of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.***

20. These are the grounds cited by the Applicant in her Application though the Section sets out other grounds for revocation or annulment of the Grant.

21. The issue or question here is whether the Applicant has discharged or demonstrated that the Respondents' obtention of the Grant in respect of the Deceased's Estate was defective in substance, or by failure to disclose to the court facts material to the Grant to the Respondents or, fraudulently by making a false statement or by concealment from the court material facts to the case.

22. I will now consider each of those grounds along with the submissions of the Applicant's as well as the Respondent's counsel.

23. It is the contention of the Respondents that their Petition, Grant and Confirmation thereof was all regular. They depone that their late father told them to respect the Applicant's husband as their father, that the Applicant's deceased husband lived on the parcel of land since the 1978, and that they had lived on the land since 1992, upon the demise of their father, and subsequently the demise of their two brothers. The Respondents also contend that Grant to them was made in strict compliance with the law. They obtained a letter from the area chief in terms of Section 46 of the Law of Succession Act, that their Petition was advertised in the Kenya Gazette, that there were no objections thereto. They obtained the Grant, which was subsequently confirmed when they inherited the land by way of transmission. They concluded that they did not apply for citations because they did not know where to trace the Deceased's family members, and hence the reason why they opted to Petition for Letters of Administration in the hope that once the Gazettment was done, objections would be lodged.

24. I have looked at the Petition keenly in light of the Application herein, and in light the Respondent's own Affidavits and contentions. The following are material falsehoods -

(1) Form P & A 5 – the Deceased was described as Stephen Gitau Kimemiah also known as Gideon Gitau – the deceased was known as Dr. Stephen Gitau Kimemiah, not Stephen Gitau Kimemiah alias Gedion Gitau. See for example the Title Deed issued to him on 22.03.1991, and Certificate of Official Search issued to the Respondents on 26th April 2010.

(2) Form P & A 5, the deceased was never survived by any of the thirteen children listed in paragraph 4 of the said form.

(3) Certificate of Death purportedly issued on 24th March 2010 was false. The Deceased did not die at Kipkelion on 11.05.2000. The deceased died in Harare on 19th May 2000. It is patently fraudulent to purport to issue a Death Certificate of a person who is still alive.

(4) The Chief's letter dated 8th April 2010 may be correct in relation to the Respondent's father, but it is patently false in relation to the Applicant's husband who had only the Applicant as his wife, and three daughters and not two wives and fourteen (14) children.

(5) Form 38 – (p. 26(2)) the purported beneficiary had no capacity to purport to consent to the Respondents taking out Letters of Administration to an estate they were not entitled to. Neither they nor the Respondents were children of the deceased.

25. As a matter of law, the Respondents and persons who purported to consent to their taking of Grant of Administration, breached the provisions of Section 51(1) of the Law of Succession Act. The Respondents gave deliberately false information as to -

- (1) the full names of the Deceased,**

- (2) **the date and place of his death,**
- (3) **the last known place of his residence,**
- (4) **the relationship of the Respondents to the deceased,**
- (5) **that the deceased left no will, when in fact he had.**

26. On this basis alone, the Respondents and their co-conspirators gave willful and reckless statements on the application for Grant, and committed an offence in terms of Section 52 of the Law of Succession Act, and are liable if convicted to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment.

27. Again as a matter of law, the Law of Succession Act is clear as to who is entitled to a Grant, and the preference in the event of intestacy. In the case of intestacy, (*which is not the position here as the deceased left a valid will*), the court has the final discretion as to the persons or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but as a general guide the following order of preference -

(1) the surviving spouse or spouses with or without association of other beneficiaries,

(2) other beneficiaries entitled in intestacy with priority in terms of Part V of the Act, and under Section 39, where a person dies intestate, without children or spouse priority goes to her parents, father, mother, brothers and sisters, and any child or children of deceased brothers, and sisters in equal shares, or if none,

(3) half brothers and half sisters and any child or children of deceased half-brothers and half-sisters, in equal shares, or if none,

(4) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

28. In the event of failure of any of the above legal heirs, the estate is said to escheat to the State, that is to say it is devolved upon the state and proceeds are paid into the Consolidated Fund.

29. The Respondents do not fall under any of the degrees of consanguinity referred in paragraphs 22-25 above. There was unmitigated greed for land which knew no bounds. The deceased even if he was their uncle, had only hired their father as a farm manager. If indeed their father told the Respondents that the deceased had given him the farm, there might have been some memorandum in writing as required under Section 3(3) of the Law of Contract Act, (*Cap. 23, Laws of Kenya*). In the absence of any memorandum in writing, no interest in land could have passed between the Respondents father, and the deceased, (*“uncle”*).

30. Consequently, I must find and hold -

“Firstly Stephen Gita Kimemiah died not intestate but died leaving a valid will and a Grant of Letters of Administration with a Will annexed of the deceased the said Stephen Gitau Kimemiah dated 5th May 2000 was issued to the Testamentary Executor one Cuthbert Mpame by the High Court of Zimbabwe on 31st May 2000, and that in the will the deceased bequeathed his movable and immovable properties to his daughters Pearl Nduta Kimemiah, Alexandria Nyambura and Michele Wangari.

Secondly one of the immovable properties so bequeathed is Title Number Kericho/Kipkelion Barsiele Block 2 (Kaplaba) 19 referred to in the Will as Kipkerion (Kericho East District, Rift Valley Province, Kenya).

Thirdly, the Respondents never adduced any evidence that the deceased Stephen Gitau Kimemiah ever

donated (by way of gift) the said parcel of land to the Respondents father in 1978, 1992 or other occasion when he visited Kenya.

Fourthly, the Grant dated 21st September 2010 and confirmed on 29th November 2010 was obtained by failing to disclose to this court material facts, that is to say that the deceased was survived by his one wife Auriel Marie Joy Kimemiah (the Applicant) and his three daughters with her, Pearl Nduta Kimemiah, Alexandria Nyambura and Michele Wangari, and none of the persons listed in the Form P&A 5 aforesaid.

Fifthly the proceedings to obtain the Grant were defective in substance as citations were not sent out to all dependants/beneficiaries of the estate of the deceased.

Sixth, the Grant was obtained fraudulently by the making of patently false statements and by the concealment from the court of material facts, including lack of consent of the Applicant to renounce her right to Petition for Letters of Administration at the time of presenting their Petition.

Seventh the Respondents are obviously intelligent people and could if they wanted have inquired at the High Commission of Zimbabwe, through the Kenya Ministry of Foreign Affairs, the whereabouts or condition of the family of the deceased, and instead even had a Certificate of Death issued even before he died.”

31. In the premises, the Grant made herein on 21st September 2010 and confirmed under a Certificate of Confirmation of a Grant made on 29th November 2010 are hereby revoked and annulled. All consequential acts and transactions of or by the Respondents are hereby set aside and quashed.

32. The Applicant shall also have the costs of her application dated 6th June 2011, and filed on 23rd June 2011.

33. There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 31st day of October, 2014

M. J. ANYARA EMUKULE

JUDGE