



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 2630 OF 2011

IN THE MATTER OF THE ESTATE OF NDERI KURIA - (DECEASED)

RULING

1. The application for determination is the Summons for Revocation of Grant dated 23rd November 2011. It is brought at the instance of Jane Njeri Nderi, John Kuria Nderi and Herman Njoroje Nderi, all children of the deceased.
2. The grounds upon which the said application is premised are not set out on the face of the application. However, they can be gleaned from the two affidavits in support sworn by Jane Njeri Nderi and John Kuria Nderi. They state that the deceased died testate, and not intestate as alleged by the administrator. They also say that the administrator did not consult them at the time she sought grant, and that the signatures on the papers she filed in court at the time, purported to be theirs, were forgeries. Both appear to be aggrieved by the orders made on the distribution of the estate.
3. To the application dated 23rd November 2011, the respondent, Rachael Wangare Nderi, the administrator herein, filed grounds of opposition on 10th March 2012 stating the grounds – that the application was misconceived, incompetent, bad in law and a grave abuse of the due process of the court; that the application had been overtaken by events; that it was fatally defective and untenable; and that it was frivolous and vexatious.
4. The grounds were followed up by a replying affidavit by the respondent sworn on 23rd September 2013. She explains that her marriage with the deceased was blessed with eight (8) children, being – Jackson Kariuki Nderi, John Kuria Nderi, Ruth Nyambura Kimani, Jane Njeri Nderi, Tabitha Waithera Nderi, James Ngomi Nderi, George Muya Nderi and Herman Njoroje Nderi. She filed **Githunguri SRMCSC No. 87 of 2003**, a grant of letters of administration intestate was made to her and the same was confirmed. All her children had consented to the process, she says. She asserts that there was no will, and if the applicant had possession of one, they ought to have produced it in **Githunguri SRMCS No. 87 of 2004**. At the confirmation the only asset making up the estate, being **Githunguri/Gathangari 1040**, was confirmed to her as sole heir. She thereafter subdivided the same into various portions and thereafter transferred the same to the children. She had the titles of the subdivided parcels issued in her name and she transferred them to each of the children and title deeds were issued in their names. The subdivision described as Githunguri/Gathangari/3005 is where the family homestead was and therefore where all the children had that semi-permanent residence. The administrators asked them to vacate the said parcel of land. All the children moved out of the said parcel of land except for the 1st applicant who refused to move out to parcel Githunguri/Gathangari/3596 which had been allocated to her. The administrator denies having deprived the 1st applicant of her inheritance. She asserts that the portion that the 1st applicant claims to be hers had in fact be allocated to her sister, Tabitha Waithera Nderi. Githunguri/Gathangari/3005 is the portion in question, the allottee – Tabitha Waithera Nderi – told the respondent to sell it and use it for her upkeep, which she did by selling to Peter Njuguna Kabucho.

5. It was ordered on 19th November 2013 that the said application be disposed of by way of written submissions. Both sides have filed their respective written submissions. The applicant's submissions were filed on 26th November 2013, while the respondent's submissions were filed on 11th December 2013.

6. The applicant submits that although the respondent obtained the representation to the estate of the deceased with the consent of all the beneficiaries, she proceeded to wrongly confirm the sole asset, Githunguri/Gathangari/1040, to herself instead of holding it in trust. She submits that the respondent subdivided the land into several portions for the purpose of transferring it to the beneficiaries but she illegally and irregularly sold Githunguri/Gathangari/3005 to a third party and failed to transfer shares to John Kuria Nderi and Herman Njoroge Nderi. She submits that she had done enormous developments on the said land. She further submits that the deceased left no will and had died intestate. She cites **Section 35(1)** of the Law of Succession Act to argue that the surviving spouse is entitled to the chattels absolutely and to life interest in the residue.

7. On her part, the respondent argues that the process of obtaining the grant was above board, as the applicants had been recognized and included in the petition as surviving heirs. Their consents had been properly obtained. She submits that she had the property confirmed to her name and thereafter subdivided the same for distribution among the survivors to avoid disputes after her own demise. She further submits that her subsequent subdivision and distribution of the said parcels of land was done in conformity with *Section 35(5)* of the Law of Succession Act. She says that the applicants got their respective shares but have refused to accept them.

8. The application dated 22nd November 2011 is premised on Section 76 the Law of Succession Act and Rule 44 of the Probate and Administration Rules. Section 76 of the Act provides for revocation of grants of representation, while Rule 44 of the Probate and Administration Rules prescribes the procedure for such applications. Under Section 76 of the Law of Succession Act, a grant will be revoked if it was obtained in a process that is defective, or it was obtained fraudulently by the making of a false statement; or it was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant being made; or that the grant holder has failed after due notice and without unreasonable cause to either apply for confirmation within one year or other longer period allowed him by the court or to proceed diligently with the administration of the estate within a prescribed period. The further ground for revocation is that the grant has become useless and inoperative.

9. The applicants raise three grounds on which they are seeking revocation of grant in this case. They assert that the deceased died testate and not intestate as stated by the respondent at the time she sought the grant. The second ground is that they were not consulted when the respondent sought the grant. Finally, they are unhappy with the distribution of the estate. The first two grounds are matters that fall within the prescriptions of **Section 76** of the Law of Succession Act, the third ground does not.

10. Did the deceased die testate? Did he leave a will, whether oral or written? It is the duty of the person alleging that there was a will to establish that fact. The allegation that the deceased died testate is made in paragraph 4 of the affidavit of the 1st applicant, Jane Njeri Nderi, sworn on 10th November 2011. She then contradicts this averment at paragraph 9 of the same affidavit, where she asserts that the deceased died intestate. No material was placed before me to establish the fact that the deceased had made a valid will during his lifetime. If such fact had been established, no doubt the proceedings founded on the intestacy of the deceased would have been defective, for the grant for making where a person died testate is either that of probate or of letters of administration with the will annexed, but not of letters of administration intestate.

11. On whether the applicants were consulted at the time the grant was sought, I have perused the copies of the proceedings in **Githunguri SRMCSC No. 87 of 2003**. The affidavit sworn in support of the petition listed all three applicants as survivors of the deceased. The consent to the making of the grant filed in the matter bears the correct name of 2nd applicant, John Kuria Nderi, but the other two applicants are listed as Jane Njeri Mbae and Harun Njoroge. All three did not sign the consent. Then there is the

consent to the confirmation of the grant; the same is executed by all the three applicants.

12. The issue then that arises is whether the process of obtaining the grant was defective or whether the obtaining of the grant was fraudulent. I note that all the children of the deceased were disclosed as having survived the deceased. The applicants do not allege that their names were suppressed. It would appear though that some of the children did not consent to the making of the grant to their mother. Was this fatal to the application for making of grant?

13. The answer to the question raised in paragraph 12 above lies in Section 66 of the Law of Succession Act, which sets out an order of preference of the persons who are entitled in intestacy to administer the estate of the intestate. Priority is given to the surviving spouse followed by the children, other blood relatives, the Public Trustee and creditors, in that order. Going by this provision, surviving spouses have a superior right of administration of the estate of their dead spouse over the children of the deceased.

14. **Section 66** of the Act, should be read together with Rule 26 of the Probate and Administration Rules. The relevant portions of Rule 26 state as follows:

“26(1). Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any person shall, in default of renunciation, or written consent in Form 38 or 89 by all persons so entitled in equal or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”

15. By dint of Rule 26, the consent to the making of a grant should be filed in cases where the petition is at the instance of a person who has equal or lesser right to that of other survivors. In this case, the petition was sought by a person who had a superior right to all the other survivors. The widow of the deceased had a superior right to administration compared with her children. She therefore did not have to obtain the consents of her children before making the application for grant. The fact that the applicants did not consent to her petition was of no effect. It did not amount to a defect in the proceeding to obtain the grant made to the respondent and it does not provide a basis for the revocation of the grant.

16. The applicants are principally complaining about the distribution of the estate. They state that the estate was conveyed to the respondent absolutely, instead of being devolved to her during her lifetime and ultimately to the children equally upon termination of life interest. Their argument is formidable. The deceased was survived by spouse and children, accordingly, under **Section 35(1)** of the Law of Succession Act, the estate should devolve upon the widow in the following terms:- absolutely so far as chattels are concerned, with life interest in the whole residence of the net intestate state.

17. Devolution in this case did not happen in accord with **Section 35(1)** of the Act. The estate devolved absolutely upon the widow. I have not had the benefit of perusing the record of the lower court, for the said record was not availed to me, but copies of the papers filed in support of the confirmation application have been exhibited to some of the affidavits placed before me. There is the affidavit of the respondent sworn on 16th December 2003. It lists all the ten (10) survivors of the deceased. There are signatures and impressions of thumbprints affixed against the said names, including those of the applicants in the application before me. There is also a consent form to the confirmation application dated 21st November 2003. It bears the names of all ten (10) survivors of the deceased, including the three applicants. Against all ten (10) names is affixed either a thumbprint or signature.

18. I note from the affidavits in support of the application that although the 2nd applicant, John Kuria Nderi, has renounced his signature in the consent form to the confirmation application, the 1st applicant has not. The 2nd applicant renounces his purported signature on the document as a forgery. Forgery is an offence created under the Penal Code. It is a serious accusation. The said applicant ought to have filed a

report with the police, who, no doubt, would have conducted investigations to determine whether or not the said signature belonged to the 2nd applicant. In short I have no material upon which I can hold that the applicants did not execute the said document to support the confirmation application. He who alleges must prove. It the applicants who allege that the signatures on the said document were not theirs, it equally them who should prove that fact to the satisfaction of the court. They have singularly failed in that respect.

19. Although I have noted that the estate of the deceased was not distributed in conformity with **Section 35(1)** of the Law of Succession Act, it is my holding, in view of what I have stated in paragraph 18 above, that the children of the deceased consented to the devolution of the estate against the provisions of **Section 35 (1) of the Act.**

20. The respondent has deponed that after the estate devolved wholly upon her she proceeded to subdivide it and distribute it equally among the children. This has not been controverted by the applicants in their replies to the respondent's affidavits. I find from the respondent's averments that all the children of the deceased have been catered for equally in the subdivision. The law envisages equal distribution of the estate of an intestate amongst his children. What the respondent did by subdividing the property equally amongst the children of the deceased is in keeping with the provisions of Part V of the Law of Succession Act.

21. The 1st applicant alleges that she has been disinherited, in the sense that she has not been given a share in the estate. The respondent says that she has allocated Githunguri/Gathangari 3596 to the said applicant. The said property is in the respondent's name and she says she is ready to transfer it to the said applicant. It would appear to me that the said applicant is unhappy with what was allocated to her. It is clear that she has not been disinherited. In division of the estate of a dead person heirs do not always get what they want or anticipate. Division in this case was equal and the 1st applicant was allocated a share equal to the rest of the survivors. She should be contented with what she got, Githunguri/Gathanga/3596.

22. It is said that she was eyeing Githunguri/Gathangari/3005. Unfortunately, this was allocated to her sister, Tabitha Waithera Nderi. The applicant has not contested that fact. What she says is that the said parcel Githunguri/Gathangari/3005 was illegally sold. She has not sought to demonstrate the illegality of the said sale. From the material before me I am unable to hold that the said sale was illegal.

23. In view of everything that I have said above, I have come to the conclusion that the Summons for Revocation of Grant dated 23rd November 2011 is wholly without merit. I hereby dismiss the same with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 24th DAY OF October 2014.

W. MUSYOKA

JUDGE