



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO.2 OF 1999

IN THE MATTER OF THE ESTATE OF:

KIHARA GACHAU.....DECEASED

AND

RICHARD NDIANG'UI WAHOME.....APPLICANT

AND

ESTHER GACHIGI WAHOME

BEATRICE WAIRIMU GATHIRU.....PETITIONERS/RESPONDENTS

RULING

By an application dated 8th July 2011 under **Rule 49** of **P&A Rules** the applicant RICHARD NDIANG'UI WAHOME moved the court for an order that:-

- 1. The name of MARY WANJIRU WARURU be expunged from the proceedings in this file;*
- 2. The confirmation of the grant be revoked as the same was issued when James Waruru Kihara one of the persons in whose favour it was confirmed was already dead;*
- 3. Forms RL7 and RL19 be revoked as the same were irregularly filled up;*
- 4. It be clarified who the three (3) houses of the deceased are;*
- 5. The person to inherit the land be those who have occupied the same since the deceased was dead when the land was registered in his name;*
- 6. Alternatively and without prejudice the administration of the deceased estate do start at the time the grant was issued i.e. 18th September 2002 to the petitioner and the objector and all subsequent proceedings and pleadings be expunged from the record.*

The application was supported by the affidavit of RICHARD NDIANGUI WAHOME where it was deponed that the deceased who was his grandfather died sometime in 1953 before land consolidation and demarcation was carried out and therefore the land known as AGUTHI/MURUGURU/339 was registered in the deceased's name long after his death.

It was deponed that he was a grandson of the deceased from the house of Nyakarime and that one of the deceased's wives died many years before the deceased and her son James Waruru left home in 1948 never to return. It was deponed that when the land was registered only two wives were considered that is of Nyakarime and Nyaichunga.

It was further deponed that the land was registered in two parcels AGUTHI/MURUGURU/338 and 339 with AGUTHI/MURUGURU/338 belonging to Nyoichango hence being registered in the name of her grandson JOSEPH NDIRITU GACHERI while 339 was registered in the name of the deceased though it was known that it belonged to Nyokarima whose members moved into it and have been so therein.

It was deponed that BEATRICE WAIRIMU GATHIRI whose son is registered owner of No.338 filed the cause without the consent of those who occupy No.339 and the applicants' mother filed an objection to the petition on 18th September 2002. The grant was issued to Beatrice Wairimu Gathoni and Esther Wambui Wahome which was confirmed for distribution equally among three houses which were not named.

On 28th July 2008 application for confirmation of grant was made in favour of Beatrice Wairimu Gathiru, Esther Wambui Wahome and James Waruru Kihara who had died on 14th August 2009 application was made for the Deputy Registrar to sign all document in place of Esther wambui Wahome but nothing was said about James Waruru Kihara deceased. On 28th July 2008 application for confirmation of grant was made in favour of Beatrice Wairimu Gathiru, Esther Wambui Wahome and James Waruru Kihara who had died on 14th August 2009 application was made for the Deputy Registrar to sign all document in place of Esther Wambui Wahome but nothing was said about James Waruru Kihara deceased.

It was further deponed that on 11th March 2010 a petition debonis non was made by MARY WANJIRU WARURU in respect of James Waruru Kihara which was issued on 16th April 2010. It was therefore deponed that the following irregularities were apparent:-

- a. MARY WANJIRU WARURU became a party;*
- b. Grant is confirmed in the name of a person since died;*
- c. Advocate on record by-passed without notice;*
- d. Copies of proceeding meant to be served upon Beatrice Wairimu Gathiru are received and signed by one Joseph N. Gathiru;*
- e. Beatrice Wairumu Gathiru and Esther Wambui Wahome are daughters in-law to the deceased and therefore cannot be said to automatically represent the houses of the deceased.*

In reply to the said application Beatrice Wairimu Gathiru filed a replying affidavit in which she deponed that she had since completed administration as per the confirmed grant. It was deponed that the applicant was questioning the registration of the deceased as proprietor which is a matter outside the jurisdiction of the court.

It was deponed that the issue of occupation was outside these proceedings and last the applicant had filed Nyeri HCCC No.132 of 2011 (O.S) which is still pending before the court and that the shares of James Waruru Kihara was procedurally and with the blessings of the court distributed to his wife MARY WANJIRU WARURU.

On behalf of the applicant it was submitted that nothing is legal that is illegal. It was submitted that AGUTHI/MURUGURU/339 was in 1958 illegally registered in the names of KIHARA GACHAU and grant confirmed to among those who had died. It was submitted that the widow of James Waruru Kihara was not an administrator of the estate of the deceased and therefore could not complete the administration of his estate. Further the name was not as one of the beneficiaries.

It was submitted that the three houses to whom the property was to be shared were not identified. It was submitted further that the events after Juma J. as he then was issued the grant cannot be allowed to remain on record reliance was placed on **Court of Appeal Civil Appeal No.84 of 2004 Fred C. Fedha & another -vs- Edwin E. Asava Majani** where the Court of Appeal refused to allow that state of affairs that had been a chairman illegally to remain.

It was submitted that the current proprietors were active perpetrators of the illegal acts after grant was issued on 18th September 2002 and therefore all the acts after the said date should be expunged from the record and steps taken to administer the estate according to the law.

On behalf of the respondent it was submitted that the only way to challenge a grant is through revocation and or annulment as provided under **Section 76 Law of Succession** and **Rule 44 P&A Rules**. It was submitted that the present application includes prayer for revocation of grant though the court is moved through a Summons General under **Rule 49** so the application is incompetent.

It was submitted that the application lacks the specific grounds for revocation of grant. It was submitted that the issue of adverse possession is the subject of **Nyeri Civil Suit No.132 of 2011 (O.S)**. It was further submitted that the applicant is attempting to reopen the proceedings his mother having litigated on the same claim previously and that the survivors highlighted in the applicant's affidavit are frivolous.

I have looked at the proceedings herein and confirm the following from the court record:-

- a. Order by consent, Grant of Letters of Administration to issue to both parties. Later the Grant to be confirmed and land distributed equally among the three houses.*
- b. On 16 October 2006 MSA Makhandia, J. as he then was directed that the protest and application for confirmation of grant be heard by way of viva voce evidence.*
- c. On 22nd January 2009 the protest was dismissed with no order as to cost and the grant confirmed.*
- d. On 19th October 2009 Sergon J. allowed an application dated 14th August 2009 which authorized the DR to sign all transmission documents on behalf of ESTHER WAMBUI WAHOME to give effect to the grant.*
- e. On 12th April 2011 application dated 28th February 2011 for survey of the land was authorized.*
- f. On 8th July 2011 the applicant withdrew his application dated 4th January 2011 for revocation of grant with cost.*

The issue therefore for determination in this matter is whether a confirmed grant should be revoked on the basis that it was issued when one of the beneficiaries is dead and what would be the next effect should the court expunge proceedings from the record since 18th September 2002?

The powers of the court to revoke grants are provided for under **Section 76 of Cap 160** and for the purposes of this rule I hereby set out the same:-

- a. That the proceedings to obtain the grant were different in substance;*
- b. That the grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case;*
- c. That the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegations was made in ignorance or inadvertently;*
- d. That the person to whom the grant was made has failed after due notice and without reasonable*

cause either:-

- i. to apply for confirmation of grant within one year from the date thereof or such longer period as the court has ordered or allowed; or*
- ii. to proceed diligently with the administration of the Estate; or*
- iii. to produce to court with the time prescribed any such inventory or accounts of administration as is required by the provision of paragraph (e) and (g) of **Section 83** or has produced any such inventory or accounts which is false in any material particular; or*
- iv. that the grant has become useless and in operation though subsequent circumstances.*

A clear reading of the same provision of the law shows that the fact that a beneficiary is dead is not one of the grounds for revocation of the grant unless it was material to the said grant and since there is no dispute that James Waruru Kihara was a beneficiary of the estate herein, I see no prejudice that was suffered by the applicant.

Where as it is clear that the widow of the said James Waruru Kihara was irregularly appointed as administrator of the estate of the same in this cause, it is clear that she was not appointed an administrator of the estate of the deceased herein and therefore that appointment did not affect the administrator of the estate of KIHARA GACHAU.

No application was made by the applicant to set aside the order that Deputy Registrar do sign all the documents on behalf of the objector and neither has any been made. I am therefore unable to make any order as regards the said decision. It is also not in dispute that the issue of occupation of the suit land is a subject of litigation in **Nyeri High Court Civil Suit No.132 of 2011 (O.S)** which court is better placed to deal with these issues.

I therefore find that the applicant has not placed before the court enough material to enable me revoke the grant issued herein and would therefore dismiss the application dated 8th July 2011. This being a court of justice, the parties of having confirmed the existence of Civil Suit No.132 of 2011 (O.S) the outcome of which might affect the grant herein and I hereby stay further execution of the confirmed grant issued herein on 22nd January 2009 pending the final determination of the originating summons in Civil Suit No.132 of 2011.

This matter to be mentioned before the Resident Judge for purposes of confirming the current position as regards prosecution of civil suit No.132 of 2011 and for further orders.

Signed and dated this day of 2014

J. WAKIAGA

JUDGE.

Delivered by Justice J. Ngaah on behalf of Justice Wakiaga this 25th day of November, 2014

J. NGAAH

JUDGE.

In the presence of:

----- for Applicant

----- for Petitioners

