



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Succession Cause 2855 of 2001
IN THE MATTER OF THE ESTATE OF ISHMAEL GICHUNGU MUONGI (DECEASED)

AND

IN THE MATTER OF SUMMONS FOR REVOCATION OR ANNULMENT OF GRANT

ISABEL GATHONI GICHUNGU:::APPLICANT

VERSUS

KENNETH MUONGI GICHUNGU:::RESPONDENT

RULING

The background information to this ruling is that one Kenneth Muongi Gichungu presented a petition for a grant of representation to the estate of one Ishmael Gichungu Muongi on the 25th October 2001.

In the affidavit in support of the application for a grant the following were named as beneficiaries or dependants.

- (a) Doris Wanjiku Gichungu – adult daughter 33 years.
- (b) Kenneth Muongi Gichungu – a son aged 31 years
- (c) Esther Njambi Gichungu – a daughter aged 29 years.
- (d) Annbel Wanjiru Gichungu- daughter aged 21 years
- (e) Isabel Gathoni Gichungu – a daughter aged 26 years.

The first grant was issued on the 18th day of May 2001 by Osiemo J. as he then was. There is on record a letter from the area chief dated 12/2/2001 and filed on 25th day of October 2001 which confirmed the five named in the affidavit in support of the application as the beneficiaries of the deceaseds' estate.

The application for confirmation traced on the record is dated 18th day of February, 2003 and filed on the 20th day of February 2003. A reading of paragraph 5 of the affidavit in support of the application for confirmation reveals that all the properties were to be registered in the name of the Administrators. There is no mention in the said affidavit that the other beneficiaries had been served with the application for confirmation or that they had consented to the properties

being registered in the name of the administrator. There is also no mention that the administrator was to hold the said property in trust for the other beneficiaries or that the other beneficiaries had renounced their claims to the said property.

The confirmed grant was issued on 9th April, 2003 and the sole beneficiary of the properties is shown as Kenneth Muongi Gichungu. The properties listed are:-

- Ngong/Ngong/3003
- Muguga/Gitaru/556
- Muguga/Gitaru/807
- Maelal/Ndabibi Block 2/29
- Nguga gakio Investment limited plot No. 16 Kahuho Kikuyu

On 31st March 2009, one Isabel Gathoni Gichungu presented an application by way of summons for revocation or Annulment of a grant. The grounds on which the same has been premised are:-

- The administrator obtained consents through fraud by cheating the objector that the consent was for obtaining a grant which he knew that it was for a different purpose.
 - The Applicant has been disinherited by the administrator.
 - There was concealment of some material facts. The Applicant was in control of some of the properties and is unmarried.
- The distribution of the estate is contrary to law.

In the supporting affidavit, it is deponed that she the Objector/Applicant gave a consent for obtaining a grant in the year 2000, but the administrator used it to confirm the grant. She also argues that the estate was distributed contrary to law and the Applicant has been disinherited. That although the grant was confirmed on 9th April 2003, the Applicant only came to notice this in the year 2009 hence the application. She confirms that she is a daughter of the deceased and she is unmarried and was disinherited yet she was left some property.

There is on record a return of service deponed by one Daniel G. Kuria on the 28th day of April 2009 and filed on the 15th May 2009. Vide paragraph 3 and 4 thereof, the process server alleges to have served the first Respondent Kenneth Muongi as first respondent at Ringiri village within Kikuyu Township on the same day at Kinoo Town he served the 4th and second respondent. They acknowledged receipt by signing on the reverse of the copy returned which has not been traced on the record. On 5th of November, 2009 the Applicant presented an application for preservative orders but it is not clear whether the same was heard or not.

Directions were taken on 27/4/2010 that the matters do proceed by way of affidavit. Written submissions were filed by the Applicant. The following were stressed.

- That the summons for revocation were served on the administrator and the beneficiaries of the estate but no

replies were filed in response to the same.

- The Applicant is a daughter of the deceased.
- Concedes consent was given but states that it was for obtaining a grant and not confirmation.
- It is her assertion that at the time of the deceased demise, the applicant had been allocated by the deceased and was in possession of land parcel number Muguga/Gitaru 867.
- That she entrusted the 1st Respondent with the consent because she believed that him 1st respondent being the only son would diligently administer the estate and give the applicant her rightful share of the estate.
- Contends that in the affidavit in support of the application for confirmation there is no mention that the shares of the beneficiaries had been determined.
- Contends that she was beneficially entitled to the estate property.
- That she has been disinherited by the administrator distributing the entire estate to himself.
- That the Applicant only came to learn of the distribution in January 2009, when the first respondent informed her that he had allocated the house the Applicant occupies to his wife and asked her to vacate the premises.
- Contends that the administrator did not faithfully administer the estate for the benefit of all the beneficiaries.
- Contends that the action of the first respondent are untenable in law and they should not be protected.

The court, was also asked to be guided by case law cited. There is the case of **EDWIN BET AND 3 OTHERS VERSUS MARY CHEPKIRUI CHUMO NAKURU HCCC NO. 382 OF 1998** decided by Koome J, on the 28th day of July 2006. At page 2 of the ruling the learned judge observed that *“the complaints raised were that the consent of the beneficiaries which was filed under the provision of the Probate and Administration Rules misled the court into confirming the grant, some of the beneficiaries of the deceased namely Betty Bett who survived one of the sons of the deceased was left out of the schedule of distribution and lastly that the distribution of the assets was against the letter and the spirit of the law.”* After due consideration of the relevant facts the court had this to say:-

“I have considered the matter raised in the application especially the allegation of fraud and forgeries of the documents that were presented to court, the basis upon which the grant was confirmed. This copied with the fact that some beneficiaries were not provided for and the fact that the estate of the deceased was not distributed according to the provisions of the law are sufficient reasons for this court to revoke the confirmed grant”

The case of **IN RE ESTATE OF KITTONY (20020 2KLR 720** decided by Nambuye J on November 22, 2002 where it was held inter alia that the distribution of a deceased persons estate has to take into consideration, the nature and amount of the deceased property, any past, present or future capital or income from any source of the dependants, whether the deceased had made any advancement or other gift to the dependants during his life time, the conduct of the dependant, the situation and circumstances of the deceased's other properties and as other dependants and the

beneficiaries under any will and the general circumstances of the case including so far as can be ascertained the testators reasons for not making provision for the dependant.

Due consideration has been made by this court, of all the relevant facts presented to this court, and the same considered in the light of the case law cited and in this courts', opinion the following are the findings on the same:-

1. There is no dispute that the Objector/Applicant and the first Respondent are a son and daughter of the deceased. This has been confirmed by the content of the affidavit in support of the application for grant and also the affidavit in support of the application for confirmation of the grant.
2. There is no dispute that a consent of all the beneficiaries who were then adults was obtained. The Applicant/Objector has stated that the said consent was only for purposes of obtaining of the grant and not distribution. There is no contrary deponement from the 1st Respondent and the other beneficiaries that this was not the correct position.
3. It is on record that the affidavit in support of the confirmation does not reveal that the same had been served on all the beneficiaries for them to consent or object to the mode of distribution indicated.
4. It is evident that on the day the grant was confirmed only the administrator or his representative attended.
5. There is nothing on record to show that after the grant was confirmed, the content was brought to the attention of the Objector/Applicant in order to controvert the Applicants assertion that she was not aware of the distribution of the estate of the deceased.
6. There is no dispute that the supporting affidavit as well as the confirmation order indicated that all the estate property was to go to. One Kenneth Muongi Gichungu . There is no mention that he was to hold the said property in trust for the other beneficiaries.
7. There is no evidence of the other beneficiaries to the estate of the deceased having renounced their entitlement in favour of Kenneth Muongi Gichungu.
8. There has been no opposition to the application for revocation.

By reason of what has been sated in number 1-8 above the court, is satisfied that the Objector/Applicant has made out a case to warrant the orders being sought being granted in her favour. In the absence of renunciation the 1st Respondent, had no right to disinherit her. The Applicant has a genuine grievance.

The court therefore proceeds to make the following orders:-

1. The confirmation of the grant made here in on 9th April 2003 be and is hereby revokes and or annulled.
2. The initial grant in the sole name of the 1st Respondent namely Kenneth Muongi Gichungu be and is hereby revoked.
3. The said Kenneth Muongi Gichungu is ordered to surrender both the 1st grant and the confirmed grant to court for cancellation within 30 days upon service upon him of the extracted orders of this ruling.

4. Afresh grant of representation will be issued in the name of the Objector/Applicant who will then proceed to apply for confirmation of the grant and distribution of the estate property with notice to all beneficiaries.
5. Thereafter parties to proceed according to law.
6. The Objector/Applicant will have costs from the 1st Respondent Kenneth Muongi Gichungi to be agreed, assessed and or taxed by the taxing master of this court.

DATED, READ AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2010.

R.N. NAMBUYE

JUDGE

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