



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
SUCCESSION CAUSE 235 OF 1999
IN THE MATTER OF THE ESTATE OF MUTARU MAINA – DECEASED

ANN WANJIRU NDIAGA 1ST APPLICANT

NANCY WANGECHI MUTARU 2ND APPLICANT

VERSUS

SAMUEL NDIAGA MAINA 1ST RESPONDENT

JULIUS WAMBUGU MUTARU 2ND RESPONDENT

R U L I N G

On 13th July 2006, **Ann Wanjiru Ndiaga** jointly with **Nancy Wangechi Mutaru**, hereinafter referred to as “*the applicants*” took out a Summons for Revocation of grant pursuant to Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration rules. Their prayer was that the grant of letters of administration made herein to **Samuel Ndiaga Maina** and **Julius Wambugu Mutaru** on 18th December 1999 and confirmed on 14th March 2002 be revoked on the grounds that:-

- (a) **The proceedings in which the grant was obtained were defective in substance and in law.**
- (b) **The grant was obtained fraudulently by concealment from the court of something material to the case.**
- (c) **The grant was obtained by untrue allegations in law and in fact.**

The application was supported by the affidavits sworn by the two applicants. In the main the 1st applicant deponed that when **Mutaru Maina** died on 3rd May 1985 a grant of letters administration were issued to **Samuel Ndiaga Maina** and **Julius Wambugu Mutaru** hereinafter referred to as “*the respondents*”. The 1st applicant (Ann Wanjiru Ndiaga) however had earlier objected to the grant being issued to **Samuel Ndiaga Maina** her husband in particular. According to her she was objecting on behalf of herself and their children who were adults. The objection was however not heard. She has since however come to learn that the Succession cause number 81 of 1993 which had been initially filed in the SPM’s Court Nyeri, had been administratively transferred to this Court, and given the instant cause number. Thereafter the respondents colluded and had letters of administration issued to them on 18th December 1999. Thereafter the Respondents colluded again and apportioned the deceased’s 2 parcels of land namely **Thegenge/Unjiru/855** and **Thegenge/Unjiru/854** to themselves. It was her contention that having filed an objection to the grant, the same should not have been issued to the respondents without notice to her.

Finally she deponed that the 1st Respondent **Samuel Ndiaga Maina** who was her husband had since passed on. His estate though had yet to effect the transfer of **Thegeenge/Unjiru /854** due to him into his name. However the 2nd respondent had recently obtained title in respect of **Thegeenge/Unjiru/855**.

On her part, the 2nd respondent deponed in a nutshell as follows; that she was related to the deceased by being her unmarried daughter. She resides on land parcel **Tegenge/Unjiru/855** with her 3 children. The said parcel of land was given to the 2nd respondent by way of transmission. That she was not aware of the succession cause nor was her consent sought and obtained. As a consequence she had been totally disinherited.

As expected the application was opposed. Through the 2nd respondent, **Julius Wambugu Mutaru**, a replying affidavit was filed. In the main he deponed that the applicant was the wife of the late 1st respondent with whom the letters of administration had jointly been issued and confirmed. That the 1st applicant had initially objected to her husband being granted letters of administration but her objection was overruled through arbitration proceedings. Further in the succession proceedings the only asset she quoted was land parcel No. **Thegeenge/Unjiru/854** which in any event after the confirmation of grant had gone to her deceased husband. That neither the applicant nor her children ranked in priority to the late respondent with regard to the estate of the deceased who was the late respondent's brother. Finally he deponed that the proceedings in the lower court before transfer to this court show that the applicant had no basis to claim and had no interest in the deceased's estate and this application for the revocation of grant is simply aimed at frustrating the now ongoing succession cause for the estate of the 1st applicant's husband and is therefore misconceived.

On 23rd October 2008 the respondent filed yet a further affidavit. This was pursuant to an agreement reached herein between the parties that the application for revocation of grant be heard by way of affidavits on record and any other affidavits that parties may wish to file thereafter. In this further replying affidavit, the respondent deponed that the deceased was a brother to the husband of the applicant. That the property in issue was original land parcel number **Thegeenge/Unjiru/454** which the deceased subdivided on 23rd October 1996 with the intention of transferring resultant portion **Thegeenge/Unjiru/854** to the 1st applicant's husband, as he held the land in trust for himself and deceased. The 1st applicant's husband died on 19th June 2002 and therefore the applicant should not pretend to have the grant revoked against a deceased person. Finally he deponed that he has since contacted the 1st applicant's co-wife, **Mary Wamaita** who has confirmed that there is pending succession cause number 508 of 2002 involving the estate of the 1st applicant's husband, and that the only asset of the estate is **Thegeenge/Unjiru/854** and the applicant is the protestor.

On 21st November 2008 respective parties herein agreed that besides the affidavits on record, they would file and exchange written submissions in support of their respective positions in the matter. The same were subsequently filed and I have had the benefit of carefully reading and considering them.

From the affidavits on record as well as the written submissions, the story of this dispute appears to me to be as follows:-

This cause first begun in the Principal Magistrate's Court at Nyeri as Succession Cause No. 81 of 1993. There was then only one Petitioner, the late **Samuel Maina Ndiaga**, a brother to the deceased and husband to the applicant. The objectors were two – **Ann Wanjiru Ndiaga**, the deceased's sister-in-law and the 1st applicant herein and **Julius Wambugu Mutaru**, the deceased's son.

Sometime in the year 1999 the lower court file was administratively transferred to this court and given the present cause number. It is the 1st Applicant's case that she was never informed of the transfer and was never invited to participate in the proceedings thereafter. However after the transfer of the file to the High Court a consent order between the respondents and was recorded by which they became co-administrators of the estate of the deceased. Subsequent thereto properties then registered in the

deceased's names namely Title Nos. **Thegenge/Unjiru/854** and **Thegenge/Unjiru/855** were transferred and registered in the names of the two respectively by way of transmission. This latter consent order was recorded on 14th March 2002 and consequently the letters of administration were confirmed giving the 1st applicant's husband title No. **Thegenge/Unjiru/854**. The late respondent passed away on 19th June 2002 apparently without having obtained title to title No. **Thegenge/Unjiru/854** but the surviving respondent went on to obtain title to title No. **Thegenge/Unjiru/855** on 27th December 2005.

In any event the grant sought to be revoked was the subject of arbitration proceedings. The 1st applicant's objection was however thrown out on the basis that as a wife of the late respondent, she could not prevent her husband from proceeding with the succession cause against the estate of her husband's brother. That award still stands to date and has not been reviewed and set aside. It is therefore an abuse of the court process to seek to revisit the same issue herein. Though the late respondent passed on as aforesaid, title No. **Thegenge/Unjiru/854** had vested in him on 14th March 2002 and there is pending in this court Succession Cause No. 508 OF 2002 relating to his estate and therefore issues relating to title No. **Thegenge/Unjiru /854** should be determined in that cause.

As correctly submitted by **Mr. Keyonzo**, the 1st applicant's claim is on Title No. **Thegenge/Unjiru/854** which has now vested in the estate of her late husband. In view of that fact her claim can only be dealt with in the pending succession cause relating to that estate. Accordingly, the 1st applicant cannot legally seek the revocation of the grant on the basis that the proceedings were defective in law or was fraudulent and or that the grant was obtained by untrue allegations in law and fact. After all she is now the beneficiary of her late husband's estate. Her Advocate has conceded that much in his written submissions.

This then leaves the claim of the second Applicant, **Nancy Wangechi Mutaru**. **Mr. Keyonzo** states in his submissions that her claim is directed to land parcel number **Thegenge/Unjiru/855** now registered in the name of **Julius Wambugu Mutaru** a Co-administrator of the deceased's estate. Her complaint is that she is the unmarried daughter of the deceased and a sister to **Julius Wambugu Mutaru**. She lives on that land with her three children. Nowhere in the papers filed in court however does the 2nd respondent disclose that the deceased left behind an unmarried daughter who lives on the land. He did not obtain her consent to administer the deceased's estate and went only to solely inherit land parcel number **Thegenge/Unjiru/855** thus disinheriting her.

However I do not discern how the grant was obtained through defective means or by concealment from the court of something material to the case with regard to her. Neither have I been able to see how the proceedings were obtained by untrue allegations in law and in fact in so far as it relates to her.

The late respondent was the Petitioner in the lower court. The surviving respondent was merely appointed as a co-administrator but was not a co-petitioner. Accordingly the sins of the late respondent if at all cannot be visited upon him. As correctly submitted by **Mr. Ndirangu**, no fault can be ascribed to his having concealed any matters. Again and as correctly submitted by **Mr. Ndirangu**, the late respondent passed on in June, 2002. The question that arises is whether the application lies for revocation of a grant where one of the co-administrators is dead and without any new grant having been issued to any person to take up the position of the deceased administrator. I do not think so. A grant cannot be revoked in part. It must be whole. Yet this is what the applicants are bent on doing.

For all the foregoing reasons, I am satisfied that the applicants' have not made out a case to warrant the revocation of grant. The application dated 21st June 2006 is accordingly dismissed with no order as to costs.

Dated and delivered at Nyeri this 18th day of June 2009

M. S. A. MAKHANDIA

JUDGE

