



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Succession Cause 233 of 2004

IN THE MATTER OF THE ESTATE OF GATHUKU WAGOGI–DECEASED

JAMES NDUNGU THUNGU.....PETITIONER/RESPONDENT

Versus

MARTY MUMBI GATERU.....OBJECTOR/APPLICANT

JUDGMENT

The Respondent **JAMES NDUNG’U THUNGU** petitioned for the grant in respect of the Estate of the late Gathuku Wagogi on 26th May 2004. In so petitioning the Respondent deponed that the deceased died intestate and left surviving him the following:-

- (i) Mary Muthoni Wambugu – daughter-in-law
- (ii) James Ndung’u Thungu – Nephew
- (iii) Joseph Gathuku Thungu – Nephew
- (iv) Joseph Kimani Macharia – Purchaser

After gazetting the petition a grant was issued to the Respondent which grant was dated 27th July 2004. To date that grant has not been confirmed. The Applicant Mary Mumbi Gateru filed an objection to making a grant on 3rd September 2004. The objection was subsequently withdrawn in view of the fact that a grant had been issued. The Applicant has now filed a summons for revocation of grant which is the subject of this judgment. The Applicant prays that the grant issued herein to the Respondent be revoked or annulled on the grounds that:-

“1. That the grant was obtained by concealment from the court of something material in that no disclosure of the applicant who is entitled to a share of the Estate was made.

2. The person to whom the temporary grant was issued has failed to proceed diligently with the administration by causing the estate to be distributed without complying with Section 71 of the Succession Act.”

The hearing of this matter was ordered, during the hearing for direction, that it do proceed by way of viva voce evidence.

The Applicant stated in chief that she comes from Mahiga, Ugachiku sub location in Othaya division. She described herself as a farmer. She stated that the late Gathuku Wagogi was her uncle by virtue of her mother being his sister. Her mother, who is now deceased, was called Muthoni Wagogi. The late Muthoni Wagogi was unmarried and the Applicant also stated that she was unmarried. She has two other siblings who are all girls and are married. That the Respondent was related to the late Gathuku Wagogi by virtue of his late mother being a sister to the late Gathuku Wagogi. She further stated that she was living at Mukuyu and she decided to go and build a house on the land owned by the late Gathuku Wagogi. That she wanted to build on the portion of land which she said belonged to her late mother. That her late mother had been given that portion of land. She was, however, not allowed to build which led her to go to the chief who made a statement to her that she “had taken the land with the rope and thrown it in the river”. The Applicant did not understand what this statement meant and consequently she went to the District Officer. That it was the District Officer who advised her to go to court to file necessary application. On making a search at the lands office the Applicant discovered that the property of this Estate, namely **MAHIGA/UGACHIKU/646** had been sub-divided and the sub-divisions had been registered in the name of the Respondent. On making inquiries at court the Applicant found that the succession cause had not been confirmed. The Applicant, on being cross examined, stated that she works at Mukuyu but her home was at the property of the late Gathuku.

Applicant’s second witness was Jackson Waitiki Muruthi who stated that the late Gathuku Wagogi and his late father came from the same ‘house’. He confirmed the Applicant’s evidence on the relationship between the Applicant and the Respondent to the late Gathuku Wagogi. He also confirmed that the Applicant and her late mother were unmarried. That the late Gathuku Wagogi’s children were dead except for a married daughter. That the Respondent’s late mother was married to Kingori and that accordingly that Respondent came from a different ‘house’ to that of the late Gathuku Wagogi. That the Respondent has land in that other ‘house’. The witness confirmed that the Respondent sub divided the property **MAHIGA/UGACHIKU/646** into four portions and then had those portions registered in his name. He stated that the property of this Estate ought to be inherited by the Applicant and Ngatha. That Ngatha is the only surviving child of the late Gathuku Wagogi and that she is married.

P. W. 3 was Hannah Nyamathera said that she is the sister of the Applicant and the Respondent was a son of her aunt. She said that her late mother, who was also the mother of the Applicant never married and as a consequence she named her son after the late Gathuku Wagogi, her uncle. She confirmed that she too did not know about this present succession cause when it was filed by the Respondent.

The Respondent in chief stated that he had followed the correct procedure in filing the petition herein. The Respondent produced before court as an exhibit and agreement dated 18th February 1989 which the court did not appreciate its relevance to this matter because it refers to property **MAHIGA/UGACHIKU/213**. The Respondent in his evidence failed to explain its relevance. The Respondent stated that the property **MAHIGA/UGACHIKU/646** had a debt of Ksh85,000/- and accordingly the Respondent together with Mary Muthoni agreed to allocate some of the aforesaid property to a man called Kimani and in turn Kimani was to repay the aforesaid debt. On being cross-examined the Respondent confirmed that a grant was issued to him and that to date it had not been confirmed. On being asked about the sub-division of the Estate property he responded, “yes I changed it. That change of title was done by my advocate called Theuri.” On further being questioned Respondent denied that the sub divisions were in his name and again stated that it was his advocate who transacted the matter at the lands office.

D. W.2 was Gerald Muriithi. He said that during the life time of the wife of the late Gathuku Wagogi he lent to her Ksh.85,000/- and it was agreed that if she did not repay the amount Mr. Muriithi could use for cultivation the Estate property for 10 or 15 years. Within 1 ½ of his utilization of the land, the Respondent sought to stop him cultivating. It was later agreed that Mr. Muriithi be repaid his money by a Mr. Kimani then he would stop cultivating. Mr. Muriithi confirmed that he was repaid and he accordingly stopped using the property.

D. W. 3 was the daughter of the late Gathuku Wagogi. She referred to an oral will of her deceased father which said he made two years before his death whereby he left the Estate property to be inherited

by her late brother, Muriithi Murangi and the Respondent.

There are two issues that arise from the evidence presented before court. The first is whether indeed there was an oral will as stated by D. W. 3. *Section 9(1)* of the Law of Succession provides:-

“No oral Will shall be valid unless –

- (a) It is made before two or more competent witnesses; and***
- (b) The testator dies within a period of three months from the date of making the will;”***

There was no evidence presented before court to show that the oral Will was made by the deceased before two or more witnesses and more importantly D. W. 3 stated that the deceased made the alleged oral Will two years before his death. The alleged oral will does not pass the legal test of a valid Will and the court therefore finds that the deceased did not make a valid oral Will.

The second issue the court needs to consider is whether the grant issued herein to the Respondent ought to be revoked or annulled. The Respondent in oral evidence denied sub dividing the Estate property and registering the sub division in his name. He feigned an excuse that all matters relating to this succession were done by his advocate. The court did not find the Respondent a believable witness and his evidence was not supported by the affidavit evidence in this matter. The Respondent by his affidavit sworn on 6th May 2005 and filed the same day annexed his application to be registered as proprietor by transmission. That application was drawn by the Respondent personally. It is dated 2nd August 2004 and during that period the Respondent in this succession was acting in person. He indeed did not retain an advocate until 6th May 2005. The Respondent as has been adequately proved by the Applicant sub-divided the Estate property before confirmation of grant. That sub-division was illegal because it was done before the court was satisfied and had confirmed the respective identities and shares of persons beneficially entitled to the Estate property. The Respondent undoubtedly has proved that he is not a person who can administer the Estate in accordance with the law. For that reason in the court’s view, the grant issued to him ought to be revoked.

The judgment of this court therefore is that the grant issued by this court on 27th July 2004 to James Ndung’u Thungu is hereby revoked. The Respondent shall within 14 days from this date hereof surrender to the court the original of that grant. The court does further order that **L.R. NO. MAHIGA/UGACHIKU/646** do revert into the name of **GATHUKU WAGOI** (Deceased) and consequently the titles **MAHIGA/UGACHIKU/688, 689** and **690** are hereby revoked. The Respondent shall pay the costs of the Applicant hereof.

Dated at Nyeri this 23rd March 2007.

MARY KASANGO

JUDGE