



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Succession Cause 569 of 2005

IN THE RE ESTATE OF DOUGLAS KIMWE GITU

AMOS MUGA GITU

ELIUD GACHEGE MUGA

PETER GITU MUGA

SAMUEL NJENGA MUGA

BENARD KAGUNDA MUGA

DUNCAN NJOROGE MUGA

SIMON NG'ANG'A APPLICANTS

VERSUS

MARGARET WANJIRU KIMWE

PETER MUNGAI KIMWE RESPONDENTS

JUDGMENT

Amos Muga Gitu the applicant herein together with his (6) six sons applied for the revocation of the grant that was issued on 2nd May, 2003 to Margaret Wanjiru and Peter Mungai the respondents herein. The grant was confirmed on 15th December, 2003 to the two petitioners who are widow and son of the deceased respectively.

The grounds upon which this application is predicated on are that the grant was obtained fraudulently by making of false statements and concealment from the court of material factors. The applicants also complained that the grant was obtained by means of untrue allegations of fact essential in law to justify the grant. The petitioners failed to disclose to court that they (applicants) were settled on the estate of the deceased since 1964 and entirely depended on it. This succession cause was secretly filed and the applicants came to know about it at the distribution stage.

These grounds are further elaborated on in greater detail by the applicant's affidavit sworn in support of the summons for revocation.

According to the applicant, he was a brother of the late Douglas Kimwe Gitu who is the original registered owner of LR No. Nyandarua/Ol'kalou Central/397 who died on 20th January, 2002 intestate. The applicant depones in the said affidavit that his deceased brother invited him in 1964 to take occupation of the suit land, where they carried out farming and other activities thereby he contributed to the development, and the re-payment of loans to the Settlement Fund Trustees who allocated the land to the deceased. Subsequently the applicant states that he was joined by his wife and his children who were born and raised on the suit premises as it was a common understanding between the applicant and the deceased that the land belonged to them jointly with their respective families and during the lifetime of the deceased there was absolute harmony. Problems started in May, 2004 when the petitioners sent a surveyor on the suit premises and the 1st petitioner became hostile and ordered the applicants to move out of the land. This problem dawned on the applicant when he conducted a search on the 9th November, 2004 and found that the suit premises had been subdivided and registered in the names of the petitioner on behalf of her children leaving out the applicant and his children who depended on the land. Thus the applicant urged this court to revoke the grant, they having been dependants of the deceased as per the provisions of section 29 of the Law of Succession; they ought to have been considered before the grant was confirmed.

This application was opposed by the respondents/petitioners. They relied on a replying affidavit of the 1st petitioner which was sworn on 10th August, 2005 and a supplementary affidavit sworn on 15th February, 2006. According to the petitioners, the grant was properly issued and all the procedures as laid down in the Law of Succession were duly followed. The petitioners are the widow and son of the deceased respectively and they argued that they are the persons with priority to be granted with letters of administration.

As regards the claim by the applicants, the petitioners denied that they had any beneficial interest in the estate of the deceased as they were licenced by the deceased and the licence ceased upon the demise of the deceased and they have now been asked to vacate the suit premises.

Counsel for the petitioners further submitted that by revoking the grant no useful purpose will be served. The above is the summary of the applicants and petitioners case out of which I have identified the following issues for determination;

- 1 Whether the grant was issued to the petitioners fraudulently through concealment of material factors.**
- 2 Whether the applicants are beneficiaries of the deceased estate who should be given an opportunity to agitate their beneficial interests by virtue of section 29 of the Law of Succession.**
- 3 Whether the grant should be revoked.**

There is no dispute at all that the deceased died intestate on 20th January, 2002 and was survived by the widow, the 1st petitioner and all the children named under paragraph 4 of form P&A 5 the affidavit in support of the petition.

According to section 66 of the Law of Succession read together with rules 7(7) of the P&A rules the order of preference to be given to persons who should administer the estate of an intestate estate.

Section 66 states:

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference –

- a) a surviving spouse or spouses, with or without association of other beneficiaries.**

The petitioners being persons who are ranked in priority had no obligation to issue notices to interested parties. Rule 7(7) of the P&A rules only enjoin a person who is not ranked in priority to furnish the court with evidence of:

- a) *renunciation of rights of persons having priority*
- b) *consent of the persons having priority*
- c) *Citations issued calling upon the persons having priority to renounce such right to apply for the grant.*

In view of the above provisions of the law I see no defect in the manner in which the proceedings to obtain the grant were conducted and the grant was properly issued to the persons with priority such that even if this court were to revoke the grant and conduct the whole process again, the outcome would be the same.

The fact that the applicants did not get to know of the application in time to enable them file their claim under section 29 of the Law of Succession cannot be faulted on the part of the petitioners. The matter was duly published in the Kenya Gazette, had they been vigilant of their rights they would have filed their claim either under section 29 of the Law of Succession or taken out an originating summons under rule 41(3) of the P&A rules to seek a determination of their share of land from the deceased parcel of land that they have been occupying.

Even now I do not think that the doors of justice are shut to the applicants because they can file a suit against the Administrators to recover the properties they claim were held in trust by the deceased. The dilemma that the applicants find themselves in this case is so common where parties have always failed to distinguish that succession matters are very specialized proceedings whereby the focus is the determination of the estate of the deceased, the heirs and how the estate should be distributed. Other issues of trust are outside the purview of the Law of Succession and separate proceedings are always to be undertaken. However litigants with a claim on the deceased estate who are not ranked in priority routinely seek to agitate their claims in the succession cause. I hope legal counsels can advise their clients appropriately.

In this regard, I find that the applicants are not ranked in priority and I accordingly dismiss the application dated 6th June, 2006. This being a family matter I will order each party to bear their own costs.

It is so ordered.

Ruling read and signed in Nakuru this 7th July, 2006

M. KOOME

JUDGE