



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU
SUCCESSION CAUSE NO. 285 OF 1990

IN THE MATTER OF THE ESTATE OF GEOFFREY NDUNG’U GATHOGA
(DECEASED)

JAMES GATHOGA NDUNG’U.....1ST APPLICANT

BEATRICE JANE NJERI.....2ND APPLICANT

VERSUS

MARY WANJIKU GATHOGA.....RESPONDENT

RULING

The Summons of Annulment of Grant has been brought under Sec. 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules. The same seeks the following orders:

- 1. That the grant of letters of administration intestate issued to the Respondent on 12th September, 1991 and confirmed on 15th June, 1999 be revoked.***
- 2. That costs of this application be borne by the Respondent.***

The application has been supported by the grounds on the surface of the same. During the hearing of the application, the Applicant was ably represented by Mr. Gacheru while the interested party was represented by Mr. Ndegwa. On the other hand, Mr. Nyamwange represented the Respondent.

According to Mr. Gacheru the Respondent never revealed that the two Applicants are the children of the deceased. In addition to the above, Mr. Gacheru submitted that the Respondent never sought the Consent of the Applicants nor did she cite them. The application has been supported by the affidavit of James Gathoga Ndung’u which states very clearly that the deceased was married to two wives. One of the wives was Joyce Njoki Gathoga who was later divorced. The said divorced woman is the mother to the Applicants.

The second wife to the deceased is Mary Wanjiku Gathoga. When the deceased died on 3rd July, 1990 he left behind the following parcels of land:

- 1. Loc 5 Mariaini/1309*
- 2. Loc 17 Saba Saba T496*
- 3. Loc 17 T497*

4. *Loc 17 Saba Saba/165*

5. *Loc 5 Mariaini/1308.*

All the above parcels of land are located in Muranga District. Mr. Gacheru further submitted that the Applicants also have a right to inherit the above parcels of land and that is why they were seeking revocation of the said grant.

Apart from the above, Mr. Gacheru also submitted that the Applicants were **not** aware of the Succession Cause that was filed in Nakuru instead of the same being filed where the property was situated. As far as the interested party viz, Rosemary Ndung'u was concerned, the Counsel submitted that he was a purchaser who bought the land – **Parcel No. Loc 5 Mariaini/1308**. However, he was categorical that Rosemary Ndung'u never survived the deceased and hence should **not** have been given the parcel of land.

On the other hand, Mr. Nyamwange opposed the application and relied on the replying affidavit. According to Mr. Nyamwange, Sec. 30 of the Law of Succession Act provides that **no** application for dependants shall be made after the confirmation of the grant. Apart from the above, he also argued that before the letters of administration were issued the same were advertised in the Kenya Gazette and that the same was sufficient notice to everybody who had an interest in the Estate of the deceased. Subsequently, the Applicants never filed any objections and hence they should be estopped from pleading ignorance of the Succession Cause. Besides the above, Mr. Nyamwange also submitted that the deceased used to work for gain at the Egerton University which is within the jurisdiction of this Honourable Court and hence there was no mischief on the part of the Respondent in filing the Succession Cause in Nakuru.

In conclusion, Mr. Nyamwange submitted that the Applicants are guilty of laches and acquiescence since they filed the application, 13 years after the Succession Cause was filed. In support of his submissions he referred the Court to **"The Law of Succession"** by *Sir David Hughes* which stated that the Court will **not** disturb a grant of administration arbitrarily.

Apart from the above, he also submitted that the Interested Party is also entitled to the land that she had purchased and does **not** need to make any different application. On his part, Mr. Ndegwa also opposed the application while relying on the affidavit of Rosemary Ndung'u. Mr. Ndegwa invited the Court to peruse the Sale Agreement dated 17th November, 1987 and the Title Deed in favour of the Interested Party. According to Mr. Ndegwa, the Interested Party was a bona fide purchaser and that the same had **not** been disputed by any party. He submitted that he opposed the application to the extent that it intends to extinguish the rights of the Interested Party. Further to the above, he referred the Court to Sec. 93 of the Law of Succession Act, Cap. 160, Laws of Kenya and added that if the application was granted then it will cause irreparable loss. He urged the Court **not** to interfere with the portion that had already been transferred.

This Court has carefully perused the submissions by all the three Counsels. Sec. 76 of the Law of Succession Act states as follows:

*"A grant of representation, whether or **not** confirmed, may at any time be revoked or annulled if the Court decides, either on application by any interested party or of its own motion –*

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by the making of a false statement or by the 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 allegation 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 the 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 the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

Interestingly both Mr. Nyamwange and Mr. Ndegwa never challenged the fact that the Applicants are children to the deceased. They also never challenged the fact that the deceased had another wife viz, Joyce Njoki Gathoga whom he later divorced. They also never denied that the identity and relationship of the Applicants was **not** revealed to the Court.

Unfortunately, the submissions of Mr. Nyamwange were way off the mark because they never took the full import of Sec. 29 of the Law of Succession Act. That section defines “**Dependant**” to include children of the deceased whether or **not** maintained by the deceased immediately prior to his death. With respect to Mr. Nyamwange his submissions on Sec. 30 of the Law of Succession Act were also **not** applicable because this application has been brought under Sec. 76 of the Act and R. 44 of the Probate and Administration Rules.

The same provides as follows:

“Where any person interested in the estate of the deceased seeks pursuant to the provisions of Sec. 76 of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court Registry situated nearest to that Resident Magistrate’s Registry.”

Though the Court concurs with Mr. Nyamwange that the Applicants are guilty of laches – having delayed to bring the application till after 10 years – the concealment that was perpetrated by the Respondent is **not** excusable under the law. The Respondent should have been candid and transparent to the Court to enable it to make an informed and reasonable decision after being alerted to all the relevant facts. It would **not** be proper for this Court to be seen to be condoning the kind of conduct that the Respondent perpetrated. In view of the above, I hereby revoke the Grant of Letters of Administration that were confirmed on 15th June, 1999 due to concealment of material facts. However, the Court will not interfere with the portion of land that had been bought by the Interested Party. She had already bought the said land Loc. 5/Mariaini/1308 for value. There was no evidence that she involved in any concealment.

The Application is only allowed to that extent. Costs to the Applicant in any event.

MUGA APONDI

JUDGE

31ST MARCH 2005

Ruling read, signed and delivered in Open Court in the presence of

MUGA APONDI

JUDGE

28TH APRIL 2005