



In re Estate of Fedis Kang'onde M'airobi (Deceased) (Miscellaneous Succession Cause 35 of 2019) [2024] KEHC 1444 (KLR) (15 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1444 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
MISCELLANEOUS SUCCESSION CAUSE 35 OF 2019
LW GITARI, J
FEBRUARY 15, 2024**

BETWEEN

WINJOY GATWIRI GITONGA APPLICANT

AND

ELOSY GACHERI STEPHEN RESPONDENT

JUDGMENT

1. This succession cause is in respect to the Estate of Late Fedis Kang'onde M'airobi who died intestate on 20th October, 2014.
2. Presently before this Court is the Summons for Revocation and/or Annulment of Grant dated 5th September, 2019. The Applicant is seeking for the revocation of the grant of letters of administration issued to the Respondent and confirmed on 14th December, 2016. The Applicant also seeks for the title to the land parcel no. LRMwimbi/Ntuneni/78 (the "suit land"), currently in the Respondent's name, to be revoked and revert back to the name of the deceased for fresh distribution of the subject estate. The Applicant also prays for the cost of the said Application to be provided for.
3. The Application is based on the grounds (reproduced verbatim):
 - a. That the Respondent filed Chuka Chief Magistrate's Court Succession Cause No. 9 of 2016 secretly and obtained the grants thereof fraudulently by the making of a false statement or by concealment from the court of something material to the case in that the Respondent failed and/or ignored to inform the lower court that the Applicant was a deceased's dependant and most fit and proper person to have applied for Letters of Administration Intestate in respect of the deceased's estate at the first instance.
 - b. That the proceedings to obtain the Grant were defective in substance in that the Assistant Chief Ntueni Sub-Location one Bonface Marangu mislead the lower court with the letter dated 5th March 2016 that the deceased left a valid will in favour of the Respondent.



- 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, in that the Respondent misled the lower court that she was a deceased granddaughter while she was not.
 - d. That the Respondent failed and/or ignored to notify the Applicant for consent or issue the necessary citations to the Applicant before applying for the grant, as required in law.
4. In response to the Application, the Respondent filed a Replying Affidavit sworn on 2nd October, 2019. She deposed that she is the granddaughter to the deceased and that the Applicant is a step daughter of the deceased. Further, that the deceased had no children but was survived with her siblings, Peter Nkou and Cirindi Mwalimu.
 5. The Application was heard by way of viva voce evidence.
 6. Winjoy Gatwiri Gitonga testified as PW1. It was her testimony that the deceased was a sister of her late mother, Loice Kagendo Ndubi and the Respondent is her cousin. That the deceased had a brother called Peter Nkou and a sister called Grace Cirindi. According to her, the Respondent is a daughter to Peter Nkou whereas she (PW1) is a daughter to Grace Cirindi. It was further her testimony that the suit land was subdivided by the deceased.
 7. PW2 was Mary Kanjiru. It was her testimony that the Applicant is her niece by dint of being the daughter of her sister and that the Respondent is her cousin. That the deceased in this cause was her aunt as she was the sister of her mother. That before her demise, the deceased had sub-divided the suit land into land parcels no. 665, 666, and 667 and gave land parcel no. 665 to Godfrey Kinegeni, land parcel no. 666 to PW2, and land parcel no. 667 to the Respondent. In contradiction her testimony, PW2 stated that the deceased remained with the suit land and that it was the Applicant who was meant to inherit that land.
 8. PW3 was Brigid Kanjogu Nkonge. She corroborated PW1's testimony that the deceased did not have a child. That the deceased sold part of the property to PW3's son, Godfrey Kinegeni, gave a parcel to PW2 and gave a share to the Respondent.
 9. The Respondent, on the other hand, called Samwel Githinji (DW1) in opposition to the instant Application. DW1 stated that he works at the Ministry of Lands. It was DW1's testimony that the deceased left a letter dated 4th March, 2009 requesting for the subdivision of the suit land and subsequent transfer of the same to Godfrey Kinegeni Nkonge, Mary Kanjiru Nairobi, and the balance thereof to go to the Respondent. That her request was not allowed initially but upon filing an objection, the same was allowed and that the effect of that was that the suit land was subdivided into four portions. Further, that land parcel no. 665 was issued to Godfrey Kinegeni Nkonge, land parcel no. 666 was issued to PW2 while land parcel no. 667 was issued to the Respondent.

Background

The Succession was filed by Elosy Gacheri Stephene. As per Form P&A 5 the deceased was survived by Catherine Mwiii Kamundi and Elosy Gacheri Stephene. Elosy Gacheri purported to present the petition in her capacity as the granddaughter of the deceased. She listed plot No.78 Ntuneni Adjudication Section valued at Kshs.500,000/-. The grant was confirmed on 14/12/2016 and the estate was distributed to Elosy Gacheri Stephen who was to get the whole share of the estate.

The applicant Winjoy Gatwiri Gitonga then filed the summon for revocation of grant which is now pending determination by this court. In the submissions on her behalf filed



by Waklaw Advocates, the applicant claims that she is a dependant of the deceased who is the most fit and proper person to have applied for letters of administration. The applicant contends that herself and the respondent are grandchildren of the deceased. The applicant submits that she was supposed to get the entire estate of the deceased upon her demise as it is the deceased who took care of her upon the demise of her mother in the year 2000. She was and still is in occupation of the estate of the deceased a fact which the respondent did not disclose when obtaining the impugned grant. It is submitted that the grant ought to be revoked and fresh grant be issued granting the estate of the deceased to the applicant.

For the respondent it was submitted that the applicant had the burden to prove the grounds laid down under Section 76 of the Law of Succession which include that the proceedings to obtain the grant were defective in substance, the grant was obtained fraudulently by non-disclosure of material facts to the court and making a false statement and the grant was obtained by means of untrue allegations. The petitioner submits that she was not obligated to inform the applicant when she was filing the petition. That it was the intention of the deceased that the petitioner inherits Land Parcel No.78, which is the one in dispute. She also contends that the applicant went to the land after the death of the deceased. The Petitioner submits that she did not conceal material facts. That the applicant did not satisfy the threshold under Section 76 of the Law of Succession Act. The issues which arise for determination are:-

1. Revocation of Grant
2. Who are the beneficiaries entitled to the estate of the deceased.

The grounds for revocation of grant are anchored under Section 76 (a) (b) & c of the Law of Succession which provides 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.”

It is under this Section that the circumstances that can lead to the revocation of grant have been set out. The grant may be revoked by the court on its own motion or upon an application by a party where it is proved that the proceedings to obtain the grant were defective in substance, the grant was obtained fraudulently by making of a false statement or by concealment from court of something material to the case or that it was obtained by means of untrue allegations of facts essential on a point of law. The applicant need not prove all these circumstances, if any of these grounds is disclosed, the court will



move and revoke the grant. It is the duty of the Probate and Administration court to determine who the beneficiaries of the estate are, the estate itself and the respective shares of the beneficiaries. The court has to determine this before confirming the grant.

The proviso to Section 71 of the *Law of Succession Acts* states as follows:-

“Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled;

and when confirmed the grant shall specify all such persons and their respective shares.”

On the other hand Rule 40(4) of the Probate and Administration Rules states that-

“Where the deceased has died wholly or partially intestate the applicant shall satisfy the court that the identification and shares of all persons entitled to the estate have been ascertained and determined.”

The Petitioner did not disclose material facts that she had already benefited from the estate, she concealed material facts that the applicant who is a niece of the deceased was in occupation of the land and that she was entitled to a share of the estate of the deceased. The petitioner’s submission that she had no obligation to inform the applicant when she filed the succession cannot be sustained as she has not relinquished her claim to the estate. The petitioner misrepresented facts and concealed facts which were material. These are sufficient grounds to revoke the grant.

10. It is not in dispute that the deceased died without leaving a spouse or children. Under Section 39(1) of the *Law of Succession Act* it is provided that:

- “(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority—
- (a) father; or if dead
 - (b) mother; or if dead
 - (c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none
 - (d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
 - (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.”

11. Both the Applicant and the Respondent herein are claiming a beneficial interest in the estate of the deceased, that is, land parcel no. LR Mwimbi/Ntuneni/78 (the “suit land”). By dint of the certificate



of confirmation of grant dated 14th December, 2016, the suit land was wholly transferred to the Respondent herein.

12. At paragraph 3 of the affidavit in support of her application for confirmation of grant, the Respondent deposed that the deceased left behind Catherine Mwii Kamundi and Elosy Gacheri Stephen. In her affidavit evidence sworn on 25th October, 2019, the Respondent further deposed that the Applicant and her father left the suit land and never returned until the death of the deceased.
13. On record is an introductory letter from the area chief dated 5th March, 2016. The said letter indicates that the deceased was willing to transfer the suit land to the Respondent and that she had already transferred part of the land to Mr. Godfrey Kenegeni and another part to Mary Kanjiru (PW2).
14. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the Evidence Act provide as follows:

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- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

15. It is clear from the evidence on record that the Applicant is among the beneficiaries of the subject estate. As such, it follows from the contents of the petition and the summons for confirmation of grant that not all the beneficiaries of the estate were listed and neither was the consent of all beneficiaries sought prior to distribution of the estate. In addition, it is clear from the evidence adduced that whereas the suit land was allegedly subdivided and distributed to several persons, the Respondent still indicated that the same constituted the estate of the deceased. It therefore follows that the Respondent misrepresented the facts and/or concealed material facts in applying for and obtaining the impugned grant of letters of administration intestate. Furthermore the testimony by DW1 shows that the documents he produced were forgeries as the deceased did not either write or sign the letter dated 4/3/2009 to the District land adjudication officer (DLASO) and the same is misleading. The witness admitted that the search for Land Parcel No. Mwimbi/Ntuneni/78 in the name of Elosy Gacheri Stephene was a forgery simply because the owner can retain the number under adjudication but upon registration you get a new number. He admitted the land was registered in the name of Ellosy on 30/1/2017 long after the death of the deceased. It is not far fetched for this court to find that the letter dated 4/3/2009 was a forgery for the reason that the deceased was illiterate and she is purported to have been written by her. She was in her twilight years and totally illiterate and advanced in age. She could not have signed the said letter. DW1 admitted that the letter was signed on her behalf. The letter was seeking to transfer new numbers to three people and one remained and yet there were four resultant parcel. In my view the letter dated 4/3/2009 was a forgery. On the other hand if indeed the land was sub-divided into four portions, and the respondent was given two portions. There is a possibility that it was meant for the applicant. I find that the letter is a forgery and unreliable. It further shows that the respondent committed frauds and misrepresentations when she obtained the said grant. These are sufficient grounds for setting aside the grant.



Conclusion

16. From the foregoing analysis, it is my view that the present application is merited. For these reasons, the grant of letters of administration issued to the Respondent and confirmed on 14th December, 2016 ought to be revoked.

I find that the application for revocation of grant has merits. I order that-

1. The grant issued to the Petitioner on 14/12/2016 is revoked.
2. A fresh grant shall issue to the applicant.
3. All actions undertaken on the strength of the said grant is null and void ab initio and the estate shall revert to the deceased.
4. The petitioner admitted that she had benefited from the deceased by getting a portion of land during her lifetime.
5. The applicant to move the court with a summons for confirmation of grant
6. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 15TH DAY OF FEBRUARY 2024.

L.W. GITARI

JUDGE

