



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Gitau s/o Thinji (Deceased) (Succession Cause
1106 of 2010) [2023] KEHC 3911 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 3911 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION CAUSE 1106 OF 2010**

FN MUCHEMI, J

MAY 4, 2023

BETWEEN

MARGARET WANGARI MUTERIA APPLICANT

AND

HELLEN WAMBUI MWANGI RESPONDENT

RULING

Brief facts

1. The parties agreed to consolidate two of their applications dated September 30, 2021 and January 17, 2023. In the first application 2021, the applicant seeks for the orders of revocation of grant issued to the respondent on 18th April 2016 and confirmed on 26th April 2019 and further that a new grant be issued in her name. The applicant further seeks that upon issuance of a fresh grant, the same be confirmed forthwith notwithstanding the expiry of six (6) months from the date of issuance.
2. The application dated January 17, 2023 sought for restraining orders against the respondent not to sub-divide or to fence L.R Othaya/Itemeyini/153 pending the hearing of the summons for revocation dated September 30, 2021. The orders were granted by the judge in chambers on interim basis on March 20, 2023. Now that the summons for revocation have been heard and pending ruling, the said interlocutory application dated January 17, 2023 has been sent.
3. The respondent opposes the applications dated September 30, 2021 vide her Replying Affidavits dated February 2, 2022 and February 6, 2023 respectively. The parties by consent were heard by way of viva voce evidence.

The Applicant's Case.

4. PW1, the applicant, testified that her husband, Muteria Gitau and the respondent's husband Wachira Gitau were brothers and that being the eldest between the two, she ought to be appointed as the



administrator. It was her evidence that the respondent obtained the grant fraudulently by concealing material facts and claimed that she was the sole beneficiary of the estate. Further that the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently. The applicant further contended that she was never involved in the succession proceedings.

5. On cross examination she testified that she did not have an advocate but her son Richard Gitau represented her in the succession proceedings. She further stated that he never used to give her feedback. She however stated that she used to attend court together with him sometimes.
6. The applicant testified that although she did not know that the cause was filed in 1985, she was aware that the three sons of the deceased, Johanna Thinji, Muteria Gitau and Joseph Gachira were pursuing their late father's estate and that his estate was shared amongst them. It was her further evidence that she was aggrieved by the mode of distribution as she was excluded from participating by the respondent and was therefore pursuing the interests of her late husband on behalf of her family.
7. PW2, Richard Gathanga Wachira testified that he is a grandson to the deceased as his father and the sons of the deceased were cousins. He further testified that he supports the applicant's prayers to revoke the grant as she was not aware of the succession proceedings and came to know about them in 2021 when she filed the present application.
8. On cross examination, PW2 stated he was not aware that the applicant's son Richard Gathanja Gitau, used to follow the succession proceedings on her behalf in this cause.
9. PW3, Lucy Nyawira Wanjohi, testified that she supports the revocation of grant as the applicant and her children were left out of the proceedings. On cross examination, the witness stated that she was not aware the applicant and her son Richard were represented by an advocate during the proceedings. Nor was she aware that Richard represented the applicant during the succession proceedings.

The Respondent's Case

10. The respondent relied on her affidavit dated 2nd February 2022 and testified that her husband and his two brothers had filed a petition in this succession cause in pursuit of their father's estate. It was stated that she applied to be substituted in her husband's place when he died in 2016. According to the respondent, the applicant was represented by an advocate and she is not being truthful by stating that she was not aware of the case and that she was left out.
11. The respondent further testified that the estate was shared equally amongst the three sons and their families including the applicant reside on their respective portions of land.
12. On cross examination, the respondent stated that the applicant's son always attended court as he was representing his mother and that the Deputy Registrar signed the transmission documents after the applicant refused to execute the same.



The Law

Whether the applicant has presented sufficient evidence to warrant revocation or annulment of the grant.

13. Section 76 of the *Law of Succession Act* gives the court the powers to revoke a grant provided the conditions stipulated therein have been met. It states that:-

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
 - iv. The grant has become useless and inoperative through subsequent circumstances.
14. The applicant contends that she was never aware of the succession proceedings in this cause and thus her and her children were excluded from inheriting from the deceased. Further that the respondent concealed material facts and claimed that she was the sole beneficiary of the estate. The respondent contends that the applicant is not being truthful as she was represented by counsel during the succession proceedings and further her son, Richard Gitau used to attend court as her representative in the cause.
15. On perusal of the court record, it is evident that the deceased died in 1944 and he was survived by three sons, Joseph Wachira Gitau, Muteria Gitau and Johana Thinji Gitau. The three sons petitioned for letters of administration and by the time the summons for confirmation of grant were being heard on 19th December 2013, the only surviving administrator was Joseph Wachira Gitau. In his application, he proposed to have the deceased's estate comprising of LR No. Othaya/Itemeni/153 measuring approximately 2.2 acres, to be shared equally amongst himself and his two brothers and he named their respective survivors.



16. In opposition to the Summons for Confirmation of grant, Richard Gitau Mutiria, the son to the applicant, filed a protest, deposing that he was the son of deceased's son one Muteria Gitau and that his mother Margaret Wangari Muteria also survived him. He proposed to have the estate shared between his father's house and that of Johana Thinji Gitau. The administrator Joseph Gachira Gitau died on April 10, 2014 while the Summons for confirmation of grant was pending. On April 18, 2016 Joseph Wachira Gitau was substituted as administrator by his wife, the respondent.
17. The court found no merit in the protest filed by Richard Gitau Mutiria and dismissed it. Since the respondent had only applied to substitute her husband in the confirmation proceedings, the court invoked Section 47 of the [Law of Succession Act](#) and Rule 73 of the [Probate & Administration Rules](#) and appointed the respondent as the administratrix of the estate. The court took into consideration that the succession cause was lodged in 1985 and had been pending in the courts for 34 years. It was in the interests of justice that the court found it prudent to appoint an administrator instead of tasking the parties to go back to the drawing board and make the requisite application. Therefore the contentions by the applicant that the respondent concealed material facts from the court and claimed that she was the sole beneficiary is not borne by the record. The court exercised its discretion under Section 47 of the [Law of Succession Act](#) and appointed the respondent as the administrator of the estate.
18. Considering the evidence adduced herein and the record, I am convinced that the applicant is not being truthful. Richard Gitau Mutiria son of the applicant was the protestor during the proceedings for confirmation of grant. He even informed the court that his mother, the applicant had survived his father and his proposed mode of distribution included his mother. Additionally, he was represented by an advocate. On the applicant's own admission, she stated that she used to attend court sometimes with her son during the hearings. The judgment for confirmation of grant was delivered on April 26, 2019 in open court where both parties were represented by their advocate. After the judgment, the applicant did not lodge an appeal or make any application for review until 2021. The assertion that the applicant came to know of this cause in 2021 when she filed this application is not true. The counsel of Richard Gitau was present in court at the time the judgement was delivered. It is therefore my considered view that the applicant was aware of the succession proceedings at every stage after the death of her husband until the court rendered its judgement.
19. Furthermore, the applicant contends that her children and herself were excluded from the distribution of the estate. The court when distributing the estate, shared it equally amongst the three houses of the deceased's sons. This fact has also been confirmed by all the parties in their testimonies when they stated that they all live and occupy their respective parcels of land. It is evident that the respondent has administered the estate and caused the suit property to be sub-divided into three portions in the names of the three beneficiaries. The respondent has annexed three Certificates of Titles as proof of execution of the grant.
20. It is my considered opinion that the applicant has not satisfied the threshold set out for revocation of grant under Section 76 of the [Law of Succession Act](#) and her case must fail.
21. Consequently, I find that the Summons for Revocation dated September 30, 2021 lacks merit and is dismissed.
22. Each party will meet their own costs.
23. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS TH DAY OF MAY, 2023.

F. MUCHEMI



JUDGE

RULING DELIVERED THROUGH VIDEOLINK THIS 4TH DAY OF MAY, 2023

