



**Gwaro v Nyangau & another (Succession Cause 302 of 1995)
[2023] KEHC 20242 (KLR) (12 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20242 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
SUCCESSION CAUSE 302 OF 1995
REA OUGO, J
JULY 12, 2023**

BETWEEN

GRACE NYANCHAMA GWARO PETITIONER

AND

ROSE MORAA NYANGAU 1ST OBJECTOR

**JOHN GWARO (SUING AS PERSONAL AND LEGAL REPRESENTATIVE TO
THE ESTATE OF SAMUEL GWARO) 2ND OBJECTOR**

RULING

1. Joseph Gwaro Ondande the deceased died on the 10th April 1989. Grace Nyanachama Gwaro the petitioner (“Grace”) filed a petition for letters of administration intestate on the 18th July 1995. In her affidavit she averred that the deceased died intestate and left her as his widow and 2 sons who were minors then, namely Peter Gwaro and Samwel Gwaro. A grant of letters of administration intestate was issued to the Grace on the 5th September 1995. The estate of the deceased comprised of L.R. Nyabibari/ Chache/B/B/Boburia/2904 (“the suit property”). The petitioner applied for confirmation of the grant on the 18/9/1995.
2. On the 2nd December 2009 the late Samwel Gwaro husband to Rose Gwaro filed an application to revoke/ annul the grant of letters of administration issued on the 5th September 1995. Vide an order issued on the 25th November 2013 Rose Moraa Nyangau and John Gwaro were allowed to take the place of Samwel Gwaro (Samwel) who died before the objection was heard.
3. Directions were given by the court. The petitioner and objectors filed written statements and the matter proceeded by way of viva voce evidence.
4. The objector Rose Moraa Nyangau (Pw1) adopted her statement filed in court on the 10th June 2014. This is her evidence; her late husband was the son of the deceased Joseph Lukas Gwaro. The deceased had two wives Eunice Bina Gwaro (Eunice) and Grace Nyanachama Gwaro (Grace). Eunice settled in



their ancestral home in Mwembe. That according to the deceased's wishes the land in Mwembe was to be subdivided for the benefit of the family. Samwel Gwaro was buried in Mwembe. Samwel was not given any portion of the land. During cross-examination she admitted that she was built a house in the land in Mwembe but was not given the parcel number. She also admitted that Grace did name Samwel as one of the beneficiaries of the deceased's estate. She denied that Samwel declined to take his portion of the land. She wants the land parcel to revert to the original numbers. Mario Kerubo (Pw2) too adopted her written statement dated 10th June 2014. She is the elder sister of the deceased. According to her Samwel's mother Askah died when he was a child. She took care of Samwel. The deceased later took him to school. When the deceased died Samwel was at Kabete Approved School. Samwel later on married Rose Moraa in 1999. Samwel was buried in his ancestral home. Samwel had bought land in Mwembe where he settled Askah and Grace and their families. Samwel constructed his house in Mwembe. He later learnt that Grace had sold a portion of the land. The dispute was taken to the tribunal. The tribunal decided that Samwel retains parcel numbers 7753, 7754 and 7751. The deceased had during his life time given part of his land to his sister Cecilia Nyamwaya alias Sabina Moraa (Cecilia). She testified that the land at Mwembe was to be subdivided amongst Samwel, Grace and the portion given to Cecilia. That Grace should be accountable to the purchasers. During cross-examination she admitted that Grace showed Samwel where to build and that Rose Moraa does not live here, but the house Samwel built is still there. John Gwaro (Pw3) testified that Samwel was his step brother and Grace the youngest widow of the deceased. That the deceased settled the family of Eunice at the ancestral home at Gekomu and had purchased land within Mwembe in Kisii where he earmarked to settle Samuel Gwaro's family and the family of his youngest wife Grace. That the land in Mwembe should be distributed amongst Samuel Gwaro's family and Grace save for the portion of land given to his father's sister Cecilia Nyamchama Gwaro. That the persons to whom Grace has purported to sell portions of the deceased's land should claim from the land due to Grace. During cross examination he admitted that Samwel was shown where to build and that is where he was buried. That Grace did not include Samwel's name at the time she filed the succession cause.

5. Grace Gwaro the petitioner adopted her statement filed in court on the 22.1.21. she denied that she concealed material facts as alleged. In her statement she avers that the Samwel was brought up by the sister-in-law Maria (Pw2). That after the death of her husband she lodged probate proceedings for purposes of distributing the estate of the deceased to the respective beneficiaries. That pursuant to the confirmation of grant in 2006 she sub-divided the original parcels of land into several portions, 5 parcels of land and distributed them as follows;
 - a. LR No. Nyaribari Chache/B/B/Boburia/7751- to her son Peter Junior Gwaro
 - b. LR No. Nyaribari Chache/B/B/Boburia/7752 -sold to Dinah Kemunto Omurwa to off-set the loan with Commercial Bank
 - c. LR No. Nyaribari Chache/B/B/Boburia/7753 – subdivided into 7862&7863 and 7863 given to Hellen Abea
 - d. LR No. Nyaribari Chache/B/B/Boburia/7754 -sold to Gekomu S.D.A church for purposes of obtaining school fees for her children in private universities
 - e. LR No. Nyaribari Chache/B/B/ Boburia/ 7755 – to be transferred to as a gift from the deceased to Cecilia Moraa Nyamwaya
 - f. LR No. Nyaribari Chache/B/B/ Boruria/7862- Grace Nyanchama Gwaro (the share for Samwel Gwaro).



6. During cross examination Grace admitted that she did not include the family of the 1st wife in the petition but she included Samwel. She argued that the deceased's 1st wife had her own portion of the land where the deceased had settled her. That the objector would get the portion of land, 0.05Ha and that she would share her portion with her son Peter. That she distributed the parcel of land fairly.
7. The parties filed written submissions. A summary of the objectors' submission is as follows; apart from summarizing the evidence it was submitted that the issues for determination were as follows that;
 - i. The grant was obtained by fraud without the consent of all the beneficiaries.
 - ii. The grant was obtained by making false statement and/or by concealing from the court material facts.
 - iii. That the petitioner was incapable of administering the estate of the deceased due to the existing grudges and all verdant between her and the beneficiaries of the estate.
 - iv. That she failed to include all beneficiaries of the deceased
8. It was submitted that the petitioner had concealed material facts by failing to disclose all the beneficiaries of the estate whether or not they were going to inherit a share of the estate of the deceased neither did she get the requisite consent from all the beneficiaries to file the petition and/or apply for confirmation. That there was gross injustice in the distribution of the estate.
9. The petitioner submitted that the issues for determination were as follows;
 - i. Whether the grant issued to the petitioner was obtained by way of fraud.
 - ii. Whether the petitioner required consents of other beneficiaries when petitioning for the said grant.
 - iii. Whether the petitioner concealed material facts when applying for the grant.
 - iv. Whether it was necessary to enjoin all interested parties including but not limited to beneficiaries and/or purchasers in the instant proceedings.
 - v. Whether the estate of the deceased ought to have been distributed equally between the petitioner and the objector
 - vi. Whether the objector has proved his case on a balance of probabilities.
10. I have carefully considered the evidence adduce by the parties, their submissions and the law as provided under the *Law of Succession Act* Cap. 160. I need not repeat the issues raised by the parties as stated in paragraphs 7 and 9 of this ruling. In my view the issue for determination is whether the grant issued to the petitioner should be revoked on the basis of the grounds raised in the application filed by the applicant.
11. The issues not in dispute are as follows; that Samwel was taken to the deceased's home by his mother Aska. Samwel is the deceased's son. Aska did not marry the deceased Samwel was taken in by the aunty Maria. That the deceased had two wives and that he settled the first wife in their ancestral home together with her children. That is also no dispute that the property the subject of this application is the portion of land the deceased settled the petitioner and her children.
12. Section 76 of the *Law of Succession Act* Cap. 160 (Act) relied on by the objector 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;
- (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 order or allow; 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

13. It is the duty of the objector to prove the grounds set out in section 76 of the Act and as particularized in his application. In the affidavit in support of the petition the petitioner indicated the only asset of the deceased as Land Parcel No. B/B/Borubia/2904 and that the deceased died intestate and left the following surviving him; Grace Nyanchama Gwaro, Peter Gwaro and Samwel Gwaro. That Peter and Samwel were minors in 1995 when the petition was filed. No liabilities were listed in the said petition. A grant was issued to the petitioner on the 5th September 1995. According to the petitioner the grant was confirmed in the year 2006. I have looked for the confirmed certificate of grant in the court file but was unable to locate it nor are there court proceedings indicating that the grant issued to the petitioner was confirmed.
14. The objector alleges that the grant of letters was obtained by fraudulently and that the petitioner concealed material facts. Fraud must be proved. It has to be particularized and proved by way of evidence (see *Vijay Morajaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR). The objector has failed to prove fraud on the part of the petitioner.
15. On concealment of material facts. The petitioner in her petition listed her Son Peter Gwaro and the Objector Samwel. Samwel was listed as a minor. It has been submitted that Samwel was not a minor then but was an adult and was 23 years old. A burial permit attached to the Notice of Motion dated the 25th November 2013 indicates that the objector was 44 years when he died in 2013. Therefore in 1995 Samwel was about 26 years old and was not a minor. What was deponed by the petitioner was therefore not a true fact. The 2nd issue is that the petitioner did not list all beneficiaries to the deceased's estate. The petitioner admits that she had a co-wife the mother of Pw3, who has settled in their ancestral home. Under Rule 40 (30) (b) of the Probate and Administration Rules the petitioner had a duty to disclose to the court that the deceased had another wife and children. Having chosen to petition for a letters of administration intestate it was her duty to disclose to the court all material facts and to inform all the beneficiaries of the deceased's that she had filed a petition in court seeking a grant to administer



- the deceased's estate. This too was a material fact. I however note that the beneficiaries of the said house are not part the objection proceedings.
16. The objector did not lead any evidence to prove that the proceedings were defective in substance. Further there was no evidence adduced to demonstrate that the petitioner is incapable of administering the estate of the deceased owing to the existing grudge and or vendetta between her and the other beneficiaries.
 17. The objector raised the issue that the petitioner transferred property to her name and other people and effectively intermeddled with the estate of the deceased person. The petitioner in her statement states as follows; in 2006 she sub-divided the original land parcel into 5 parcels and distributed the said 5 parcels as follows;
 - i. LR No. Nyaribari Chache/B/B/Boburia/7551- her son Peter Gwaro
 - ii. LR No. Nyaribari Chache/B/B/Boburia/7752- sold to Dinah Kemunto Omurwa to off-set the loan with Commercial Bank.
 - iii. LR No. Nyaribari Chache/B/B/Boburia/7753- subdivided into 7862 & 7863 and &863 was given to Hellen Abea.
 - iv. LR No. Nyaribari Chache/B/B/Boruria/7754- sold to Gekomu S.D.A. church for purposes of obtaining school fees for her children in private universities.
 - v. LR No. Nyaribari Chache/B/B/Boruria/7755- to be transferred to as a gift from the deceased Cecilia Moraa Namwaya.
 - vi. LR No. Nyaribari Chache/B/B/Boburia/7862- Grace Nyanchama Gwaro – share of Samwel Gwaro.
 18. I have carefully gone through her annexures attached to response and I find as follows; the petitioner filed the petition in July 1995. She was issued with a grant of letters of administration intestate (P&A 41) on the 5th September 1995. She sought to confirm the grant vide her application dated 18th September 1995, a period less than the six months required in law . In her application dated 18.9.1995 she referred to a grant issued on 11th July 1995. There was no grant issued on the 11th July 1995. The grant in the court file was issued on the 18th September 1995. She was to apply for a confirmation of the said grant after six months from the date it was issued. It is apparent that this did not happen, but an application was filed in the month of September 1995.
 19. From the list of documents filed in court on the 27th January 2021, the parcel no. 7751 measuring 0.43 Ha belongs to Peter Gwaro. The title was issued on the 1.11. 2006. Parcel no. 7752 measuring 0.09Ha belongs to Dinah Kemunto Omurwa the title deed was issued on the 10.11.2015. Parcel No. 7862 measuring 0.05Ha belongs to Grace Nyanchama Gwaro , the title was issued on the 9.8.2006. Parcel No. 7754 measuring 0.10Ha belongs to S.D.A church the title was issued on the 15.10.09 and Parcel No. 7755 measuring 0.06 Ha belongs to Grace Nyamchama Gwaro , the title was issued on the 10.11.04. there is also a copy of title of Land Parcel No. Nyaribari Chache/B/B/ Boruria/2904 measuring 0.8Ha issued to Grace Nyanchama Gwaro on the 23rd October 1995. It is not clear how the petitioner got this title issued to her before confirmation of the grant.
 20. Should the grant issued on the 5th September 1995 be revoked as sought by the objector? The petitioner did conceal material facts plus she sold parts of the land parcel of the estate without a certificate of confirmation of the grant contrary to the law.. In the circumstances its only appropriate that the grant issued on the 5th September 1995 be revoked. I revoke the said grant. Any transaction made on the



basis of the grant dated 5.9.1995 is hereby nullified. Rose Moraa has a right to pursue the inheritance due to Samwel. To enable the parties move in the matter a fresh grant will be issued in the names of Grace Gwaro and Rose Moraa forthwith. Any of the administrators shall be at liberty to apply for confirmation of grant within 60 days from the date grant is issued. Since this is family matter each party shall bear its own costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 12TH DAY OF JULY 2023.

R.E.OUGO

JUDGE

In the presence of;

Mr. Mulisa For the Petitioner

Mr. Soire For the Objectors - Absent

Aphline C/A

