



REPUBLIC OF KENYA



In re Estate of of the Late Johana Kariuki Githinji (Deceased) (Succession Cause 647 of 2015) [2023] KEHC 22695 (KLR) (25 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22695 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 647 OF 2015
TA ODERA, J
SEPTEMBER 25, 2023
IN THE MATTER OF THE ESTATE OF THE LATE
JOHANA KARIUKI GITHINJI (DECEASED)
GABRIEL WARURII KARIUKI.....APPLICANT
VS
WANJIKU KARIUKI.....PETITIONER/RESPONDENT**

RULING

1. Gabriel Warurii Kariuki filed the application dated 17.9.2018 seeking ;
 - a. Spent
 - b. Spent
 - c. Annulment of the confirmed grant dated 20.5.16 under section 76 of the *law of Succession Act*, rules 44 and 73 of the *probate and administration Rules*.
 - d. Revocation of any resultant titles or shares and the properties to revert back to the name of deceased .
 - e. Fresh distribution of the Estate of the deceased.
 - f. The application is based on the annexed affidavit of Gabriel Warurii Kariuki and the grounds ;
 - i. The deceased had two wives and the respondent was the 2nd wife while the mother of applicant was the 1st wife and thus the estate ought to have been shared between the two houses as per the number of children .
 - ii. The administrators had the net estate bequeathed to the respondent either wilfully or fraudulently.
 - iii. That the confirmed grant was obtained fraudulently by making false statement of fact.



- iv. The administrator misrepresented to the applicant that the documents were meant for appointment of an administrator.
 - v. In his supporting affidavit, the applicant said the administrators got him and the other survivors of deceased to sign documents which they said were to enable them obtain letters of administration. He thereafter saw an advertisement for sale of part of the estate of the deceased to an entity which intended to put up a petrol station on the and he instructed his advocates to oppose the same through the County authorities and he also filed summons for the respondent to produce the grant of letters of administration. (See letters GWK1 and GWK 2). He said he has been advised by his counsel that the survivors have a beneficial interest in the estate of the deceased and that the administrators had no power to vest interest in the respondent contrary to the law.
2. James Peter Kariuki Mararo , the 1st administrator herein Swore the replying affidavit dated 21.10.18 on his own behalf and that of 2nd administrator and the respondent herein. He said the applicant who is his brother from the same mother lied to court that he was not aware of the confirmation yet he signed the consent on distribution and attended court during confirmation of the grant and that the family agreed to transfer the land parcels to the name of their mother (respondent) who would have later transferred the same to the survivors of deceased. Also that the family agreed that Land Parcel No. Bahati /Kabatini 1 /14 be sold and the proceeds were to be used to process subdivision and transmission of the estate of deceased. He annexed a copy of mutation form (JPKM1) showing subdivision of the said land parcel No. Bahati /Kabatini 1 into 14 plots with the proposed numbers running from 177718-17729. Further that the family agreed to sell a portion of that land and the proceeds be utilized to maintain the respondent who is of advanced age. He said that no survivor has been disenfranchised as alleged by applicant who is a lone ranger in his application. He accused the applicant of coming to court with unclean hands and hence the application is incompetent, ambiguous, vexatious and does not disclose any cause of action.
3. James Peter Kariuki Mararo filed a further affidavit dated 9.10.19 and told this court that he is the 1st administrator herein. He said the estate of deceased herein comprises of land parcel No. Bahati/ Kabatini /Block 1 /14 (1.6 acres) and Rongai /Lengenet Block 5 /55 (3.0 acres). He said that land parcel Rongai /Lengenet Block 5/55 had been bequeathed to 2nd administrator and Harision Githinji who is now deceased but the same was sold at a consideration of kshs 690,000/= as per statement of respondent (JPK 1) which had not been accounted for. He said there was no consultation before subdivision of land parcel no. Bahati /Kabatini /Block 1 /14 Bahati /Kabatini /Block 1 /14 which the family agreed that it be leased out but the respondent instead sold it .
4. He urged the court to order respondent to give an accurate account of the estate of deceased and that land parcel no. Bahati /Kabatini /Block 1 /14 be shared equally and that the proceeds of land parcel Rongai /Lengenet Block 5/55 be also shared out equally amongst the beneficiaries .
5. The application proceeded by way of viva voce evidence . Gabriel Warurii kariuki the applicant herein testified as PW1 and he adopted the supporting affidavit in support of his application dated 17.9.18 as his evidence herein.
6. James Peter Kariuki Mararo testified as Pw2. He also adopted his further affidavit dated 9.12.2019 filed herein as his evidence in this case. He supported the evidence of Pw1 in all material aspects. On cross examination, he said land parcel Bahati /Kabatini /Block 1 /14 was bought by his mother and father. In his evidence he proposed that Land parcel Bahati /Kabatini /Block 1 /14 be subdivided into 12 plots and his mother's house to get 8 plots while that of respondent to get 4 plots.



7. I have seen the record of 1.11.18 in relation to application dated 17.9.12018 here Justice A Ndungu recorded a partial consent order to the effect that land parcel no. Bahati /Kabatini /Block 1 /14 be shared out equally amongst the beneficiaries and the administrators were granted 60 days to render accounts of the estate. The said orders have not been vacated. I have seen a statement report filed by Francis Kimotho Kariuki the 2nd administrator herein the same is indicated to be in relation to Rongai Plot. It is indicated that the plot was sold at Kshs.690,000/= which was spent as follows ;
- i. Cost of procuring certificate of death 5000/=
 - ii. Kshs.90,000/= for agents /brokers fees.
 - iii. Costs of filling succession 25,000/=
 - iv. Costs of subdivision of land no Bahati /Kabatini Block 1 /14 –Kshs 150,000/= .
 - v. Misc Kshs 20,000/=
 - vi. Balance of Kshs. 400,000/= deposited in the account of the respondent.
8. The 1st administrator has disowned the accounts saying he was not involved in the same.

Submissions

9. The applicant submitted that upon confirmation of the grant the respondent started selling part of the estate of deceased i.e 2 portions land parcel Bahati /Kabatini Block 1 /14 and also Land parcel Rongai / Lengenet Block 5/55 without consulting the administrators or the 1st house. Also that distribution of the estate of a polygamous man is per house and according to the number of children and that any surviving with shall be an additional unit. Also that the administrators failed to wind up the estate under section 83 and 40 of the Act and thus transferred the property to one person. Further that the respondent did not controvert the case of the applicant. He proposed that the Bahati land be divided into 12 portion and of 1/8 of an acres and the 1st house to get 8 plots and the 2nd house 4 plots. He said the 2 extra plots will compensate for the Rongai land sold by the respondent.
10. The respondent submitted that the family agreed to sell the Bahati plot and the proceeds be used to maintain her and also to foot expenses as per the report filed herein. and she termed the application and after thought . she denied that she wanted to disinherit the applicant and other survivors . also that the Bahati land has been subdivided into 12 portions which she proposes to be share out equally amongst the beneficiaries . She submitted that the applicant has not met the threshold for revocation of grant under section 76 of the [*law of succession Act*](#).

Issues for Determination

11. From a careful analysis of the summons, the supporting affidavit, the replying affidavit and the submissions filed the only issue that arises for determination is whether the applicant/objector has presented sufficient evidence to warrant revocation or annulment of the grant;

The Law

12. 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 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
13. Notably, the power to revoke or uphold a grant is a discretionary one. This principle was enunciated in the case of *Albert Imbuga Kisigwa vs Recho Kavai Kisigwa* Succession Cause No. 158 of 2000 where Mwita J stated:-
- “Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”
14. On whether the proceedings to obtain the grant were defective in substance, the applicant told this court that the administrators lured him to sign documents by telling him they were for appointment of administrators. 2nd administrator denied this saying the allegation is untrue and that the applicant signed the consent forms voluntarily and was also present in court during confirmation. The 1st administrator responded that they did not intend that the entire land be transmitted to their mother absolutely. The court record of 20.5.16 is clear that all parties were present but the 2nd administrator did not testify to answer to the allegations of applicant that he was duped to believe that the documents he as signing were for obtaining letters of administration. The respondent also did not testify. The evidence of applicant on this point is not controverted. The applicant was acting in person from the time the matter was filed till its conclusion. I find that there is evidence that the proceedings to obtain the grant were defective in substance.
15. On whether that the person to whom the grant was made has failed, after due notice and without reasonable cause either, to proceed diligently with the administration of the estate or has produced any such inventory or account which is false in any material particular. The applicant accused the respondent of wasting the estate of deceased by selling the Bahati land without consent of the family and failing to account for the monies. The 1st administrator supported the applicant on this issue. The



1st administrator has disowned the accounts saying he was not involved in the same and I note that he has also not appended his signature on it. None of the amounts indicated in the report is supported by any evidence or receipt. the amounts are also exaggerated as this court taken judicial notice that the Government charges Kshs 150/= for processing of a death certificate. Also that this cause was filed by the administrators in person yet Kshs 25,000/= was said to have been spent. If indeed the Kshs 400,000/= was deposited in the account of respondent as alleged, then a deposit slip ought to have been produced .The role of the brokers who were allegedly paid Kshs 90,000/= is not clear. The sums in the accounts are exaggerated, unsupported by receipts, some are for undisclosed services and are obviously questionable and thus clearly false.

16. I find that both administrators herein had a duty to ensure that the estate is distributed within one year of confirmation of grant, to administer the estate faithfully, diligently and efficiently but they failed in that duty. In the case of *Albert Imbuga Kisigwa v Recho Kavai Kisigwa*, Succession Cause No.158 of 2000, Mwita J held;

“(13) Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased’s estate and ensure that the action taken will be for the interest of justice.”

17. It is imperative that the estate gets new administrators who will effectively administer it.
18. I thus proceed to exercise my powers under section 76 of the succession Act and revoke letters of administration issued to on 1.12.15 and confirmed dated 20.5.16 grant on the ground that the 2nd administrator rendered false accounts to this court and thus cannot be trusted to continue administering the estate.
19. On whether this court should preserve the estate of the deceased, there was an allegation that the respondent had sold part of the Bahati land without consulting the survivors and the 1st administrator This is admitted by the 2nd administrator told this court that it was sold to raise funds to transmit the estate to the survivors and for maintenance of the respondent herein. This was denied by the 1st administrator and I have already dismissed the accounts as false. Section 35 of the *law of Succession Act* provides;

“35. Where intestate has left one surviving spouse and child or children

- (1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-
- (a) the personal and household effects of the deceased absolutely; and
 - (b) a life interest in the whole residue of the net intestate estate:
- Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person.

20. It is clear that respondent is a widow to the deceased and has only life interest in the net estate of the deceased.



21. Section 47 of the *Law of Succession Act* vests court with wide discretion in granting protective powers for purposes of safeguarding the estate of a deceased person. It provides that:

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”

Likewise, rule 73 of the *Probate and Administration Rules* provides that: -

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

22. Considering the circumstances of this case, it would be in the best interest of the estate that that it be preserved until the grant goes through a fresh process of confirmation.

23. In the upshot, I thus makes the following orders;

- i. The letters of administration issued to the petitioners herein on December 1, 2015 and confirmed on May 20, 2016 be and are hereby revoked .
- ii. Respondent Wanjiku Kariuki to return the revoked letters of administration and confirmed grant to court within 14 days from today .
- iii. Land parcels numbers Bahati /Kabatini /Block 1 /14 and Rongai /Lengenet Block 5 /55 be reverted back to the name of the deceased herein
- iv. An order be and is hereby issued to land registrar to preserve the estate of the deceased by placing restrictions on any dealings on land parcels numbers Bahati /Kabatini /Block 1 /14 and Rongai /Lengenet Block 5 /55 or any titles born from them until an administrator is appointed by the court .
- v. Each party to bear his own costs as this is a family matter.
- vi. Mention on 22/11/2023.

24. 30 days Right of Appeal.

RULING DELIVERED VIRTUALLY ON 25TH DAY OF SEPTEMBER, 2023 VIA TEAMS PLATFORM.

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T. A. ODERA

JUDGE

