



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO. 1126 OF 2016

IN THE MATTER OF THE ESTATE OF MARY WAMBUI MUTHAMI (DECEASED)

JOHN GITAU MUTHAMI.....1ST APPLICANT
PETER KIMANI MUTHAMI.....2ND APPLICANT
PAUL KARIUKI MUTHAMI.....3RD APPLICANT

VERSUS

ELIZABETH NJOKI MUTHAMI.....1ST RESPONDENT
RUTH NYAMBURA NGANGA.....2ND RESPONDENT

RULING

1. The deceased Mary Wambui Muthami was the mother of the applicants John Gitau Muthami, Peter Kimani Muthami and Paul Kariuki Muthami and their brother James Thandi Muthami. She was also the mother of the respondents Elizabeth Njoki Muthami and Ruth Nyambura Ng'ang'a and their sisters Jane Njambi Kinyanjui and Margaret Gichiku Muthami. She died intestate on 4th June 1998, leaving parcels Dagoretti/Thogoto/813 and Dagoretti/Thogoto/ T.532. On 11th July 2016 the respondents petitioned the court for the grant of letters of administration intestate. The grant was issued on 22nd September 2016, and confirmed on 19th June 2018. The parcels were to each be equally shared by the respondents and their sisters Jane Njambi Kinyanjui and Margaret Gichiki Muthami. Their brothers did not benefit.
2. The petition and the application for the confirmation of the grant each indicated that the applicants had each provided a consent. The court record further showed that each of the applicants was present in court during the confirmation of the grant. The widower of the deceased was also present. He is Muthami Matiru.
3. The applicants filed application dated 25th November 2020 seeking the revocation of the grant as confirmed. They alleged that they, as sons of the deceased, had been defrauded by their sisters, including the respondents, who had colluded to disinherit them. They claimed that the respondents had concealed from the court that they (the applicants) were beneficiaries of the estate of the deceased and that the respondents had failed to move diligently to administer the estate of the deceased.
4. The respondents opposed the application and stated that after the death of their mother, their father called a family meeting which all the children attended. Their father asked that the two properties would be inherited by the daughters only as the sons had already been provided for. It was on that basis that the petition was filed, grant issued and the same confirmed. It was much later, the respondents stated, that the applicants changed their mind and filed the application for revocation. It was stated that the applicants had appended their signatures to the deliberations.
5. In dismissing the application for revocation, I took into consideration these averments and the fact that the petition and the application for the confirmation of the grant had each received the consent of each applicant.
6. The present application dated 22nd July 2021 by the applicants seeks that the court reviews its ruling dated 16th June 2021 that dismissed their application for revocation. Their case was that, following the ruling that indicated that they had provided their consent to the proceedings, they got a documents examiner to examine the said signatures and he returned the verdict that they had not been made by them; that the signatures attributed to them were each a forgery. Further, that one Hezron Kinuthia Nganga had come forth to say that he was one of the persons who had impersonated the applicants in open court on the day that the grant was confirmed. The said Hezron had confessed that he and the others had been hired by the respondents to come to court to say they were the applicants. Hezron swore an affidavit to support this application to say that he and one Daniel Njuguna, one Charles Kuria, one Peter Ngugi and two other people had been recruited by the respondents and each paid Kshs.2000/= to come to court to say that they were the applicants and were consenting to the application for confirmation. It was on the basis of that confession that the applicants had got the documents examiner to look at the said signature.
7. The respondents did not file a response to the application.
8. The application was filed under **Order 45** of the **Civil Procedure Rules** and **sections 1A, 1B, 3A, 3B, 99 and 100 of the Civil**

Procedure Rules. It was based on the ground that applicants had come by new and important evidence that was not within their knowledge at the time the application for revocation was heard. The evidence was the impersonation by Hezron and others and the forgery of their signatures.

9. **Order 45 rule 1** of the **Civil Procedure Rules** provides that: -

“Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

10. I have read the written submissions by counsel for the applicants, and considered the material before court. In **Tokesi Mambili & Others –v- Simon Litsanga [2014]eKLR**, it was held that in order to obtain review on the stated ground the applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order was made. Counsel further relied on **Mzee Wanjie & 93 Others –v- A.K. Sakwa & 3 Others [1982-88] 1 KAR 465** in which it was held that, for the applicant to succeed he has to show that:-

a) the evidence could not have been obtained with reasonable diligence for use at trial;

b) the evidence must be such that, if given, could probably have an important influence on the result of the case, though need not be decisive; and

c) the evidence must be such as it is presumably to be believed, or in other words, it must be apparently be credible, though it is not incontrovertible.

11. When the applicants filed the application for revocation they did not depone that the signatures attributed to them, both in the petition and for the confirmation of the grant, were not theirs or that they had been forged. If the signatures had indeed been forged, they did not at that point seek to have them examined by a forensic expert. The record showed that they were present in court during the confirmation of the grant to the respondents. They made no reference to the attendance in the application for the revocation of the grant as confirmed.

12. The court record shows that the parties’ father Muthami Matiru was present during the confirmation of the grant. If he is available, it would have been interesting to see what he says about the events of that day when the grant was confirmed.

13. Further, I should caution myself about the evidence of Hezron who has confessed that the was bribed to impersonate the applicants in open court. Usually such a witness is not worthy of credit.

14. But more important, the claims by the applicants are criminal in nature. If they are true, they ought to have been handed over to the police to investigate and have the respondents prosecuted for forgery and uttering false documents. No reason was given why this cause of action was not preferred. A conclusive finding by the criminal court of forgery by the respondents could automatically lead to revocation of the grant and cancellation of the certificate of confirmation.

15. My conclusion is that the applicants have not proved to my satisfaction that they have come by new and important evidence that they could not have reasonably obtained at the time when the application for revocation was heard. The consequence is that I dismiss the application.

16. Usually costs follow the event. In this application, the respondents filed no response and did not attend. They will not have costs.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY 2022.

A.O. MUCHELULE

JUDGE