



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

SUCCESSION CAUSE NO. 1 OF 2018

IN THE MATTER OF THE ESTATE OF KAMAU NG'ANG'A MATHONDU (DECEASED)

RAHAB WAMBUI WANJIRU.....PETITIONER

VERSUS

DAVID KIGOTHI NGANGA.....RESPONDENT

AND

LAURA WANJIRU MWANGI & 10 OTHERS.....OBJECTORS/APPLICANTS

Coram: Justice Reuben Nyakundi

Kilonzo & Aziz Co. Advocates

Gekanana & Co. Advocates

Katsoleh & Co. Advocates

RULING

This matter by way of Summons for Revocation or Annulment of grant filed in court on 23/12/2020 expressed to be brought under Article 40, 50(1) and 159 of the Constitution, section 1A, 1B, and 3A of the Civil Procedure Act, Section 76 of the Law of Succession, Rule 26, 44 and 73 of the Probate and Administration Rules sought the following declarations:

- (a) That the grant of probate issued to one Rahab Wambui Wanjiru of the estate of the late Kamau Ng'ang'a Muthondu (Deceased) as far as it concerns the parcel of land known as Land Reference Number LAMU/LAKE KENYATTA 1/923 be annulled and/or revoked.**
- (b) That the court do declare that the beneficiaries Laura Wanjiru Mwangi, Anthony Gaitho Gachanja, Teresia Wambui Gachanja, Galugalo Kilugu Yonah, Lucy Nyokabi, Teresia Wanjiru Gitau, Rahan Wanjiru Mureithi, Lawrence Kanyiri, Julieta Wanjiru Kamau, Mary Tendekeza Bonaya and Eddy Diribo Mahachi named by the Objectors/Applicants who were left out in the application for the grant and are beneficiaries to the estate are entitled to a share the assets in Land Reference Number LAMU/LAKE KENYATTA 1/923 of the estate of the late Kamau Ng'ang'a Mathondu.**
- (c) That the current status of Land Reference Number LAMU/LAKE KENYATTA 1/923 be preserved.**
- (d) An order directed to the OCS Kibaoni Police Station to ensure compliance with the order issued by this Honourable Court.**
- (e) The applicants/objectors be awarded costs.**

The summons and its supporting affidavit states that the grant issued on 6/11/2020 did not disclose material evidence of all the beneficiaries entitled to the estate. (2) That the Objectors claim right of the benefit to the estate of the deceased KAMAU NG'ANGA MATHONDU by virtual of having a purchasers' interest as denoted by the respective sale agreements. That thereafter, without disclosing existence of such liabilities to the court, the petitioner obtained the making of the grant of letters fraudulently. Further, the grant issued on the 6/11/2020 was obtained by deliberate years of untrue allegations of fact and essential material to justify its making. According to the Objectors, the estate as it stands has two grants of letters of administration, one issued on 11/6/2019 as confirmed on 28/6/2019. That the subsequent dares on Rahab Wambui Wanjiru petitioned and was issued with another grant of letters of administration dated 6/11/2020. Summons for revocation was

objected to by the petitioners in her grounds of opposition dated 12/1/2021. In its particulars in opposition, the petitioner averred that the Objectors consented to the confirmation of the grant to the estate of the deceased. That the property in question is governed under the Land Control Board Act and the Objectors have not applied nor procured the relevant Land Control Board avenues.

Background

As far as the estate of the deceased is concerned, one Kamau Ng'ang'a Mathondu died on 23/10/2000 at Malindi. The deceased is alleged to have domiciled at Malindi. It was immediately apparent that the heirs to the estate ought to petition for the court for grant of letters of administration. Indeed, on or about 18/1/2018 David Kigothi Nganga identified as a brother to the deceased with support of the letter from the locational chief dated 5/1/2018 filed the necessary forms, affidavits and consents for the making of the grant of administration. In the same letter, Rahab Wambui Wanjiru is identified as the daughter to the deceased whereas Kilugu Yona, Teresia Wambui and Gerald Njuguna are named as investors. The property subject matter of interstate is all that known as LR/LAMU/LAKE KENYATTA 1/923 registered in the name of the deceased.

On consideration of the matter, the court issued David Kigothi Ng'anga with the initial grant of letters of administration dated 27/2/2018. Subsequently on 28/6/2019 the court issued certificate of confirmation of grant with beneficiaries listed as David Kigothi Nganga, Rahab Wambui Wanjiru, Galugalo K. Yonah, Teresian Wambui Gachanja.

The prima facie rule in such cases of confirmed grant was for the administrator to file the probate account on expiry of six months' period as provided in section 53 of the Law of Succession. On 28/10/2019 Rahab Wanjiru moved the court, vide chamber summons filed in court on the same day seeking a declaration from the court that the grant of letters of administration issued to David Kingothi Nganga onn 27/2/2018 and confirmed on 29/6/2019 be revoked. The grounds in support to that application were that the administrator has not faithfully being administering the deceased estate in accordance with the Law of Succession. That the administrator of the estate has been disposing of part of the estate without consent from the other beneficiaries. That the administrator has almost sold the whole of the parcel of land to the extent of leaving the beneficiaries without an estate.

In this respect Peter Nganga Wanjiru filed a further affidavit in support seeking grant of letters be issued to one Rahab Wanjiru. It is not in doubt the court issued another grant to the estate of the deceased on 6/11/2020, which was later to be confirmed on the same day; to Rahab Wambui Wanjiru.

Having reviewed the affidavits, the grounds in opposition to the respective applications; one filed by Rahab Wanjiru against the administrator David Kigothi, and a further application by the objectors, there is a clear view of illegality and irregularity of the entire process of obtaining the two letter and certificates of confirmed grant.

Determination

It is not disputed that this was an intestacy succession as the deceased Kamau Ng'ang'a died without a will. The deceased estate was therefore to be distributed in accordance with the law of intestacy. From the letter extract of the chief its plain that the deceased is deemed to have passed on without leaving a spouse. The letter also names only Rahab Wambui Wanjiru as the bonafide daughter of the deceased. The rest of the beneficiaries are purported in the letter of David Kigotho a brother whereas the others are identified as investors.

In the succeeding proceedings of 3/11/2020, one Peter Nganga Wanjiru, presentably not listed as a son to the deceased sears an affidavit to the effect of being a son and a beneficially to the estate of the deceased.

Going by the definition under section 29 of the Law of Succession the primary dependants to the estate of the deceased are undemably Peter Nganga Wanjiru and Rahab Wambui Wanjiru. That therefore exceeds the investors, who claim the right to the estate under the category of purchasers' interest or commonly known as liabilities that may be genuinely factored during the making of the grant of letters of administration. The said Peter Nganga Wanjiru and Rahab Wambui Wanjiru are the ones contemplated in the Succession Act to inherit the estate of their deceased father. The objectors have never denied that the deceased was survived by the two children, a son and a daughter to that effect.

In that regard Peter Nganga Wanjiru should not have been omitted by the letter generated by the chief of the location in support of the petition lodged by David Kigotho – essentially a brother to the deceased. In short a review of the record shows clearly that the first petitioner David Kigotho, never obtained, consent from the son Peter Nganga Wanjiru when seeking leave of the court to be appointed an administrator to the estate of the deceased whichever way out looks at the matter to the estate of the deceased, the inescapable conclusion is the estate should have been distributed under section 38 of the Law of Succession which provides as follows:

“Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of section 41 and 42 divide upon the surviving child, if there be only one or be equally divided among the surviving children.”

This legal proposition was buttressed in the cases of; in the matter of the estate of George Karigwa Gitau (Deceased), Nairobi High Court No. 959 of 2001. The court held interalia **“That where the deceased is survived by children without a spouse, the estate is divided amongst the children in equal share.”** (See also in the matter of the estate of Elijah Warue Nthawa (Deceased) Nairobi High Court Succession Cause No. 971 OF 2001.

The court relying on section 38 of the Law of Succession found that the estate should be divided equally between the three survivors and rejected the application for confirmation to include other beneficiaries.

Section 3(2) of the Act defines child and children as follows:

“Referees in this Act to child or children shall include a child conceived but not yet born as long as that child subsequently born alive, and in relation to a female person, a child born to her out of wedlock and in relation to a male person, a child whom he has expressly recognized as infact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.”

So on the basis of the evidence the deceased was obliged to make adequate provision for the two children. The right to a grant is dependent upon the various classes of persons having beneficial interest in the estate. Whether there is a sustainable claim to an interest in the residuary estate depends upon the terms of the Succession Act. It is not disputed that David Kigotho who initially petitioned for grant of letters of administration was not a son or a child to the deceased.

Despite the grant of letters of administration issued to him on 27/2/2018 and later confirmed on 28/6/2019, in intestate succession, no other relatives of the deceased is entitled to a share of the estate so long as there is evidence of a surviving spouse, child or children. The rights of otheron relatives to the deceased had not crystalized . (See **the provisions under section 39(1) of the Law of Succession Act**).

Therefore, notwithstanding any letters of grant issued to David Kigotho as an administrator, in view of the existence of the children of the deceased, he had no *locus standi* to petition for the making of the grant to administer the estate of the deceased. More over the consent required from all the beneficiaries was never obtained in respect to one Peter Wanjiru.

In the instant case, David Kigotho did not search the legitimate counsel. It is also clear that he does not fall within the group of persons in the first list of inheritance eligible as such to petition for grant of letters of administration or as a heir independent to the estate under section 29 of the Law of Succession Act. The administrator gave no evidence to justify his action to make entry into the estate of the deceased survived by children.

The question in this case presents the rule on *locus standi* as a challenge to the first grant duly confirmed to David Kigotho. But as the record bears me witness, the administrator – David Kigotho upon obtaining leave of the court to act as such as a legal representative to the estate of the deceased began in earliest to intermeddle with the estate, in which he had been entrusted to administer faithfully. It is clear, that the administrator allocated himself 2.3Ha share as a benefit. He also overreached and distributed 0.5Ha to Galugalo Yonah and Teresiah Wambui Gachanja whom the chief’s letter named as investors.

To underline this point section 45 and 46 of the Succession Act provides detailed protective provisions concerning intermeddling with the deceased estate. Pausing here for a moment the blatant actions of intermeddling by the administrator are fortified by the agreements of sale entered on 19/12/2017 between himself and Teresia Wambui Gachanja in respect of title number LAMU/LAKE KENYATTA I/923 for a benefit far of 0.10Ha in her favor. The alleged intermeddling by the administrator did not stop there. He also entered into a sale agreement on 19/12/2017 with Galugalo Kilugu Yonah to pass on a portion of a share of 0.4Ha to be excised from title LAMU/LAKE KENYATTA I/923.

Coming back to the purported grant of letters of administration, it is quite clear that the court issued a certificate of confirmation of grant on 28/6/2019 but the sale of the estate was undertaken before the succession and petition for confirmation of grant.

I think this case as well facts within the principle encountered by **Makau J in Muruki Hassan v Rose Kanyua [2014] eKLR** where he held:

“The interested parties are not direct creditors of the deceased, before his death but purchasers from one of the deceased, in this case the illegally appointed administrator and the sale of land to them is challenged in this application. In such circumstances, the interested parties interest cannot be considered in this matter and the remedy for them is if they would be aggrieved by final court decision and distribution is to file suit against the said administrator.” (Emphasis underlined).

In addition, in the case of **Re Estate of John Gakinga Njoroge [2015] eKLR Mureithi J** held:

“A person can only deal with the estate of deceased person pursuant to a grant of representation made to him under the Law of Succession Act. In this regard, the jurisdiction of the court to protect the estate of a deceased person is set out in section 45 of the Law of Succession Act. For the transactions entered between the applicants and the beneficiaries of the estate to the deceased entered into before the grant of letters of administration to them and before the confirmed. The contracts of sale are invalid for offending the provisions of section 45 and 82 of the Law of Succession Act. Even if the sale transactions were by the administrators the dealing with immovable property of the estate is restricted by the provisions of the powers and details of the personal representatives under section 82(b) proviso (1) which provides that no immovable property shall be sold before confirmation of the grant.”

In **Morris Mwiti Mburugu v Denis Kimathi M’mbingu [2016] eKLR** the court held:

“Where any person interferes with the property of the deceased or deals with an estate of deceased person contrary to the provisions of section 45 and 82 of the Act that is intermeddling, is unlawful and cannot be protected by the court.”

The net effect of these principles and provisions makes it clear in the instant proceedings that key sale agreement entered into between David Kigotho Nganga and Galugalo Kilungu Yonah and Teresiah Wambui Gachanja on 19/12/2017 are null and void.

In my considered view the letters of grant of administration granted by the Honourable court though on concealed facts has been irregularly used into signing land transactions documents under the mistaken belief that the signature was of a genuine legal representative to the estate. The fraudulent transactions which were detrimental to the sanctity and integrity of the estate should not be allowed to stand it’s not difficult to say that the administrator sale objective of petitioning of grant of letters of administration was not for the benefit of the estate but to defraud. The estate with dubious transactions to illegally enrich himself.

I am also satisfied that the administrator has failed to account the estate property by failure to file an inventory and probate account within six months from the time of confirmation of grant as stipulated under section 83(2) (G) of the Act.

Given the facts of this case, wish to make it very clear, that the appointment of an administrator is not for the sale of the estate but to distribute the assets to the beneficiaries. In any event the administrator had no *locus standi* to petition for grant of letters of administration. As to the answer to the question raised in the objectors' proceedings and the averments that they were bonafide purchasers for virtue under section 93(1) of the Succession Act, I am of the considered view that the assets had not become due for disposal. Though the objectors prayed that their interest as purchaser for value be recognized, in this case there are material irregularities and substantial defect in the proceedings that the grant issued to the administrator is not tenable in law.

Among the powers which a personal representative has subject only to any limitations, imposed by the grant, is one to enforce the terms of the grant though illegally. So, the aftermath of the confirmed grant saw the administrator consolidate his powers with impropriety and irregularity to intermeddle with the estate fraudulently in circumstances which were injustice to the beneficiaries. It is found as a fact that the process leading to the obtaining of the confirmed grant was faulty and therefore to pass my title or interest to the purchasers. The objectors were duped to buy an asset which was not free for sale.

The **Black's Law Dictionary 6th Edition at pg 660** defines fraud as:

“An intentional perversion of truth for purposes of inducing another in reliance. Upon it, to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct or by false or misleading allegations or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury.” This opens the way for challenging the sale agreements.

Accordingly, the sale agreements over the asset of the deceased by the administrator were obtained against an invalid grant of letters of administration.

Looking at the terms of the grant of the letters of administration issued to David Kigotho Ng'ang'a and Rahab Wanjiru it would appear that the entire property of the deceased has been bequeathed to some persons not entitled to inherit even a dot of a portion of the property. It has basically made to benefit strangers who were never intended by the deceased nor his spirit during his lifetime.

With respect to the Objectors in so far as the transaction on the sale of land are concerned, each agreement executed and attested to was done in a manner which offence the laws of succession Act. On the face of it the both nonexistence shares of the property not available for distribution to anyone of them by way of purchase and sale. As I said the two Grant of letter of Administration issued and confirmed to David Kogoti Ng'ang'a and Rahab Wanjiru are tainted with impropriety, irregularity, and illegality, incapable of legal standing as instruments of the court to convey any share of an estate to the Objectors. In whatever way one looks at the matter both Grants of letter of Administration are in principle defective and any judgment issued conflicts with the provisions of Section 76 of the Act.

I have given due consideration of matters arising in these proceedings with regard to grant of Letters of Administration subsisting hearings, it is clear that the proceedings to obtain each of the Grant was defective, camouflaged with fraud and concealment of material factors from the court. The probate court therefore acted on misrepresentation falsity of the Affidavits in support of the making of the Grant of Letters of Administration.

From the foregoing the Grants of letter duly confirmed to David Kigotho Nga'nga on 28/6/2019 and the subsequent Grant issued to Rahab Wambui Wanjiru on 6/11/20 wrongly found their way to the Seal of the Court and for inclusion as legal instruments capable of administering the deceased estate.

The Grants are also revocable as the evidence shows that the Administrators have failed to produce to the Probate court any such inventory or account of the Administration of the state as required under Section 83 of the Act. In addition, to the above there are clear shortcomings on the part of the Administrators to intermeddle, dissipate, assign, transfer, sale and enter into transactions to execute agreement to convey the estate to strangers without legal authority hence depriving the beneficiaries their full inheritance.

In all these circumstances none of the strangers, or Objectors for that matter entered into a land sale agreement fit to enforce a valid contract. It's upon these findings and application of Section 76 of the Law of Succession Act I move to revoke both confirmed Grants of Letters of Administration as the defect, nondisclosure and intermeddling of the estate by the Administrators makes it just and fair to restore the estate to its original status. It means, therefore that all transactions on the sale of land entered into on diverse dates with effect from 2017, 2019 and 2020 are void abinitio and therefore have no effect in law. It follows that the surviving children of the deceased under Section 66 of the Act be issued with Grant of letters of Administration to administer the estate and thereafter be at liberty to apply for confirmation of the Certificate of Grant. What the revocation means to the Objectors is the right in all respect to sue for refund of the purchase price from David Kigotho Ng'anga and Rahab Wambui Wanjiru who had obtained Grants which were fatally defective. Further their acts and conduct of intermeddling with the estate is offensive with the provisions of the Law of Succession. In accordance to the above declarations, an order do issue for a restriction to be entered against **LR LAMU/ LAKE KENYATTA1/923** by the Land Registrar Lamu until further orders from this court. As a consequence, any such title or agreement purported to have been passed to the Objectors is illegal and fraudulent and is therefore cancelled forthwith. Save for the above declarations I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF APRIL 2021.

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R. NYAKUNDI

JUDGE

NB:

In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules. [maurice.kilonzo@yahoo.com, steveobaga@yahoo.com]