



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NYERI**

**SUCCESSION CAUSE NO. 878 OF 2014**

**HENRY KIAMBI M'MUGWIKA.....OBJECTOR/APPLICANT**

**VERSUS**

**NEWTON KIMATHI M'MUGWIKA.....1<sup>ST</sup> RESPONDENT**

**MERCY MWARI M'MUGWIKA.....2<sup>nd</sup> RESPONDENT**

**EMILY WANJA M'MUGWIKA.....3<sup>RD</sup> RESPONDENT**

**RULING**

**Brief facts**

1. The application dated 16<sup>th</sup> August 2019 brought under Section 47 and 76 of the Law of Succession Act seeks for order for revocation or annulment of grant of letters of administration confirmed on 7<sup>th</sup> June 2019.
2. In opposition to the application, the respondents filed a replying affidavit dated 25<sup>th</sup> January 2020.

**The Applicant's case**

3. It is the applicant's case that his sister Gladys Kinya M'Baichu now deceased and her child were left out in the distribution of the deceased's estate who was their father and grandfather respectively. As such, the children of Gladys ought to inherit a share in the estate in place of their mother. She was survived by five children namely Jeremy Gikunda, Purity Karimi, Joseph Kimathi, David Kinyua and Paul Mwirigi.
4. The applicant contends that the respondents cannot claim not to have known that their sister was not given a share in the estate. They neglected to disclose to the Honourable court that there were other beneficiaries, which information they had but all along but failed to disclose to the court.
5. The applicant further states that since he was left in custody of all the title deeds of the assets of the deceased, he cannot turn a blind eye and allow his deceased sister's children suffer injustice and unfairness by the respondents.
6. The applicant contends that it is in the interest of justice that the grant herein be revoked to enable him and his deceased sister's children have an equitable share of his deceased father's estate. He further stated that the District surveyor has served him with a letter wishing to implement the grant orders in regard to subdivision. The matter should therefore be acted upon expeditiously. The applicant further contends that he has reliable information that the respondents have begun the process of alienating the estate of the deceased by wanting to sell part of the estate of the deceased to a third party thus actualising the act of disinheriting the children of his deceased sister.

**The Respondents' Case**

7. The respondents contend that and that it has brought this application in bad faith, the application is frivolous, vexatious and an abuse of the court process. The respondent stated further that applicant fully participated in the hearing of this cause and never raised the issue he is purporting to raise herein. Further, the applicant has no locus to institute the claim on behalf of their sister.
8. Notably, the children of their deceased sister were fully represented in the proceedings by one of them Remmy Kinyua M'Mugwika. The deceased's estate comprises of Land Parcel No. NANYUKI/MARURA BLK 6/3605 (NTURUKUMA) which has been registered in the name of Joseph Kimathi Anthony, a twin brother to Remmy Kinyua M'Mugwika which caters for the interests of all the deceased sister's children.

9. The respondent further states that since the children's needs are catered for, this application serves as a fishing expedition meant to delay the realization of the benefits of the grant thereby delaying the conclusion of this matter. It is the respondents' further contention that the applicant is appealing against this court's judgment herein through the back door.

10. The applicant filed a further affidavit dated 18<sup>th</sup> February 2020 and filed in court on 11<sup>th</sup> March 2020 in which he reiterates the averments he made in his affidavit sworn on 16<sup>th</sup> August 2019 and further adds that the respondents' averments that his sister's interests are represented by Remmy Kinyua M'Mugwika are completely false and intended to misguide the court. The said Remmy Kinyua M'Mugwika is a stranger and no one in his sister's family knows him.

11. The applicant reiterates that his sister was left out in the distribution of their father's estate and no one has represented her interests or those of her children. In support of his contention, the applicant annexed an affidavit sworn by one Paul Mwirigi, a son to his deceased sister.

12. The applicant contends that the court rendered a judgment on the will as pertaining this matter but did not make a ruling on the distribution of his father's estate.

13. The applicant further argues that he opposes the respondents' desire to distribute their father's estate without considering his sister's interest.

14. Parties canvassed the application by way of written submissions.

#### **The Applicant's Submissions**

15. The applicant submits that the estate of his late father was not fairly distributed to all the rightful and legal beneficiaries because they left out the applicant's deceased sister. The applicant relies on section 38 of the Law of Succession Act which provides for equal distribution of the net intestate estate to the surviving children of the deceased. He further relies on the case of **Re Estate of Francis Mwangi Mbaria (Deceased) [2018] eKLR** and **Article 27 of the Constitution of Kenya**, which guarantees equality and freedom from discrimination. Therefore, the act of disinheriting the deceased sister amounts to discrimination based on gender. The applicant relies on the cases of **Re Estate of Francis Mwangi (supra)**, **Peter Karumbi Keingati & 4 Others vs Dr. Ann Nyokabi Nguthi & 3 Others (2014) eKLR**, **In the Matter of the Estate of M'Ngarithi alias Paul M'Ngarithi M'Miriti (Deceased) [2017] eKLR**, **Stephen Gitonga M'Murithi vs Faith Ngiramurithi [2015] eKLR** and **Samson Kiogora Rukunga vs Zipporah Gaiti Rukunga [2011]eKLR**.

16. The applicant further submits that his deceased sister was neglected despite having five children who are entitled to benefit from their mother's share. He relies on the case of **Re Estate of M'Mboroki M'Rachi (Deceased) [2018] eKLR** which dealt with grandchildren entitled to their share of their grandparent's estate through their deceased parents.

17. The applicant further contends that the court was misguided and misinformed into occasioning a serious error. The list given to the court of the children surviving the deceased did not include the applicant's deceased sister or her children for that matter. On the other hand, the respondents contend that the interest of the deceased sister was represented by Remmy Kinyua M'Mugwika. This contention was supported by the affidavits of the applicant and that of Paul Mwirigi. Notably, the said Remmy Kinyua has not been included in the list of distribution of the assets of the deceased's estate. As such, the respondents intentionally and maliciously wanted to neglect the interests of their deceased sister. The applicant further adds that the fact that the respondents enlisted as a stranger and did not allocate him any share to hold for the children of his sister is an indication that the respondents admit that he is a stranger.

18. The applicant further submits that since the estate was not equally distributed, the confirmed grant ought to be revoked by virtue of **section 76 of the Law of Succession Act**. The applicant relied on the case of **Ibrahim vs Hassan & Charles Kimenyi Macharia, Interested Party [2019]eKLR**.

#### **The Respondents' submissions**

19. The respondents submitted that the applicant is seeking to appeal the judgment herein through the backdoor and his application is a fishing expedition which is frivolous, vexatious and an abuse of the court process.

20. Further there is an affidavit on record by Joseph Kimathi Antony, a son of the said Gladys Kinya sworn on 27/1/2020, whereby he explains in paragraph 3 that his family is not to benefit from the estate as they benefited from NANYUKI/MWAURA BLOCK 6/3605 NTURUKUMA which land belonged to the deceased herein and was a gift inter vivos.

21. The respondents further contend that the applicant has no locus to bring the application herein. This is so because the children of their deceased sister are not minors nor do they have any incapacity to bring their own cause. The children's interest are catered for by the involvement of Remmy Kinyua M'Mugwika. Additionally, Joseph Kimathi has sworn an affidavit that his family has no complaint with the distribution of the estate. In this regard, the applicant has no business challenging the grant which was obtained with his participation and yet he never raised the issue during the hearing.

22. The respondents further submit that Remmy Kinyua is a son of Gladys Kinya and not a stranger as alleged by the applicant. Remmy Kinyua is indicated as beneficiary No. 9 in form P &A5 and he subsequently appears in all the pleadings and consents, signed by all the beneficiaries including the applicant as a representative of his mother's estate. In his affidavit of protest sworn on 26/20/2015, Kinyua stated that the children of Gladys Kinya are not mentioned in the purported will. It is notable that the throughout the court proceedings, the applicant did not raise the issue that Gladys Kinya's family has being left out, either in his evidence or cross examination. This matter is therefore an afterthought motivated by selfish interests.

23. The respondents submit that all through the proceedings, Remmy Kinyua has been present in the proceedings. His brother Joseph Kimathi Antony, has deponed that they benefited from land parcel NANYUKI/MARURA BLOCK6/3605 NTURUKUMA and documents in support of this contention have been filed in court. Furthermore, none of the children of Gladys Kinya who are all adults were dissatisfied with the distribution therefore the matter should be allowed to rest.

24. The respondents submitted that the applicant's allegations are purely based on distribution. He is not alleging that the respondents are not heirs to the estate of the deceased, nor is he alleging that they are not suited to be administrators. As such, this cannot form a basis for revocation of the grant under the law.

#### **Issues for determination**

25. The main issue for determination is whether the applicant has presented sufficient evidence to warrant revocation or annulment of the grant.

#### **The Law**

26. **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.**

27. According to the applicant, his deceased sister was disinherited in her deceased father's estate and that she has children who are entitled to inherit her share. One Paul Mwirigi, a son to the applicant's deceased sister states in his affidavit that his mother was left out of his grandfather's estate and that he does not know the person referred to as Remmy Kinyua M'Mgwika who is alleged to be representing the interest of his mother.

28. On the other hand, the respondent states that Remmy Kinyua is not a stranger to the family but a brother to Joseph Kimathi Antony and that both are sons of Gladys Kinya. It is further stated that Joseph Kimathi Anthony holds land in trust for himself and on behalf of his siblings which the grandfather transferred to him during his lifetime. The respondents have also filed an affidavit by A copy of a search in respect to land parcel no. NANYUKI/MARURA BLK 8/3605(NTURUMUMA) SHOWS THAT Joseph Kimathi Anthony is one of the proprietors of the said land. Further, there is on record an affidavit by Joseph Kimathi Anthony who states that he is a son to Gladys Kinya. That he represents his mother's house in this matter and that his siblings and himself benefited from NANYUKI/MARURA BLOCK 6/3605 and as such were not to benefit from the estate subject of this cause.

29. Further on perusal of the court record, it is evident that Remmy Kinyua has been included in the succession cause and listed as no. 6 in the consent dated 4<sup>th</sup> September 2014 signed by all the beneficiaries. As one of the parties he gave consent to the petitioners/respondents herein to apply for the letters of grant of representation. Further in P & A 57 dated 4<sup>th</sup> September 2014, Remmy Kinyua has been listed as a beneficiary of the deceased. In the consent to confirmation of grant dated 3<sup>rd</sup> August 2015, Remmy Kinyua has been listed as no. 6 and he appended his signature. As such it is evident that Gladys Kinya's interest was in the hands of her sons, Joseph Kimathi Anthony and Remmy Kinyua.

30. The record shows that the applicant gave testimony on 23<sup>rd</sup> June, 2016, where he stated that his father had ten children but did not mention his deceased sister, Gladys Kinya. All through the proceedings, he never raised the issue of his deceased sister being disinherited.

31. From the onset, it is notable that the applicant has brought the case on behalf of his sister's children and yet they are all of age of majority capable of suing or being sued. Further the applicant has not shown any concealment of fact or fraud or untrue allegations or that

the proceedings were defective in obtaining the grant as provided for under Section 76 of the Act. In fact, the applicant participated in the proceedings of the grant including its confirmation. Two children of Gladys Kinya have sworn affidavits stating that they are not complaining about the mode of distribution as they had received a gift *inter vivos* from their grandfather. The applicant did not deny this fact. It is suspicious why the applicant would seek to institute a cause on behalf of his nephews and a niece, while they are content with the mode of distribution in the grant.

32. It is also worth noting that the applicant's main contention is on distribution of the estate. He is not alleging that the respondents are not qualified to be appointed administrators, or that they have no legal right to be the heirs of the estate of the deceased. The mode of distribution is not listed as one of the grounds one may rely on to revoke a grant.

33. The applicant having participated in the proceedings that resulted in the confirmation of the grant has not explained why he never raised the issue before the court and why he has chosen to bring this issue on board a bit late in the day.

### **Conclusion**

34. I have considered the evidence and the submissions of the parties as analysed herein. I am of the considered view that the applicant has failed to establish fraud or concealment of facts material to the case on part of the respondents to justify revocation of grant.

35. I find no merit in this application and dismiss it accordingly.

36. Each party to meet their own costs.

37. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 6<sup>TH</sup> DAY OF MAY, 2021.**

**F. MUCHEMI**

**JUDGE**

**Ruling delivered through video link this 6<sup>th</sup> day of May, 2021.**