



**REPUBLIC OF KENYA**

**IN THE HIGHCOURT OF KENYA AT NYAHURURU**

**SUCCESSION CAUSE NO. 15 OF 2019**

**(Formerly Nakuru Succession Cause No: 813 of 2015)**

**IN THE MATTER OF THE ESTATE OF JOSHUA GITHIARI KIBUI alias JOSHUA GITHIARI (DECEASED)**

**KENNETH NJAU GITHIARI.....1<sup>ST</sup> APPLICANT**

**VIRGINIA WANJIRU GITHIARI.....2<sup>ND</sup> APPLICANT**

**-VS-**

**GRACE NDUTA GITHIARI.....RESPONDENT**

**RULING**

**FACTS**

1. The matter before Court is an application by the Applicants through Chamber Summons dated 26/9/2018 seeking to annul and/or revoke the Grant of Letters of Administration made to Grace Nduta Githiari on the 29/2/2016 and confirmed on the 20/9/2018. The Grant is in respect to the estate of Joshua Githiari alias Joshua Githiari Kibui-deceased herein who died on 19/2/2009.
2. Kenneth Njau Githiari, the Protestor herein, premised his application for revocation and/or annulment of the Grant on allegations:-
3. That the proceedings to obtain the Grant were defective in substance.
4. That the Grant was obtained by concealment from the court of something material to the case.
5. 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.
6. That the Grant was confirmed in terms of a forged consent to confirmation of Grant.
7. That it is in the best interest of justice that the prayers sought be Granted.

**APPLICANT/PROTESTOR'S CASE**

8. The Protestor submitted that although the beneficiaries signed the consent to issuance of the Grant to the Respondent, he discovered that she had left out LR No Nyandarua/Leshau Mbuyu BLK 2 Karai/1016 that was in the name of their deceased father in her affidavit in support of her petition of Letters of Administration. He averred that LR No Karai Trading Centre/96 was leased jointly as tenants' in common in equal shares to the deceased and one Karanja Kibui Njau (also deceased) and that the family of the latter conducted succession where ½ of the said parcel of land was ordered to devolve to his beneficiaries and therefore the whole of the said plot was and is not available for the beneficiaries of their deceased father's estate. The Protestor made efforts to raise the issues through a letter dated 4/4/2018 but the said issues were neither addressed nor corrected and that when the matter came up for confirmation of Grant the Protestor through his current advocate sought to find out whether the said changes had been effected however he found out that the Grant had already been confirmed in terms of a consent that neither of the beneficiaries signed.
9. Furthermore, he maintained that the Respondent caused the fraudulent transfer of LR Nyandarua/Leshau Mbuyu BLK 2/Karai/1015 and LR Nyandarua/Leshau Mbuyu BLK 2/Karai/1019 to Peter Mugi Githiari and Elizabeth Wairimu Wairegi respectively on 23/6/2014 and 7/1/2015 respectively.

## **RESPONDENT'S CASE**

10. The Respondent purported that on the passing of the deceased, a succession process was initiated by the beneficiaries as listed by the Chief in his letter dated 26/10/2015. The application was made with all necessary documents executed by the beneficiaries in which they gave their respective consent for her to apply for Letters of Administration of the deceased's estate. On 30/10/2017 an application for confirmation of Grant and the summons or the confirmation were made and served to all the interested parties as required including the Protestor. The High Court at Nakuru set the date for the application on 20/9/2018 and proceeded to confirm the Grant. The Respondent averred that after the confirmation of Grant and before the same was released to her as the administrator, the Protestor moved the court on 26/9/2018 for the revocation and/or annulment of the Grant.

11. The Respondent stated that LR No Nyandarua/Lashau Mbuyu Block 2 Karai/1016 was not deliberately left out and that all the beneficiaries save for the Protestor were aware and that the discrepancy was discovered after presentation of the application to court. Additionally, LR No Nyandarua Karai Trading Center/96 was jointly owned between the deceased and another was leased to Safaricom and is subject to a civil suit Chief Magistrates Court Case no 308/2017 and that she is not sure how the said property affects the Grant to the extent of revocation. She alleges that the transfer of L.R Nyandarua/Leshau Mbuyu BLK 2/Karai/1015 and LR Nyandarua/Leshau/Mbuyu BLK 2 Karai/1019 transferred to Peter Mugi Githiari and Elizabeth Wairimu Wairegi respectively was effected before she was appointed as the administrator.

12. Lastly, the Respondent asserted that the Protestor had all the time to protest or oppose the application when it was gazzeted and notice given calling for objections. The issues raised by the Protestor could be cured through rectification/ amendment of the Grant and that there is no beneficiary who has come on record that has been denied or defrauded a benefit as they had been distributed initially.

## **ISSUES FOR ANALYSIS AND DETERMINATION**

13. Whether the Grant of Letters of Administration made to Grace Nduta Githiari on 29/2/2016 and confirmed on 20/9/2018 should be revoked and/or annulled?

14. Whether the proceedings to obtain the Grant were defective in substance?

15. Whether the Grant was obtained by the making of false statement and by concealment from the court of some facts material to the case?

16. Whether the Grant was obtained by means of untrue allegation of a fact essential in point of law to justify the Grant notwithstanding that the allegation was made in ignorance or inadvertently?

17. Whether the Grant was confirmed in terms of a forged consent to confirmation of Grant?

## **ANALYSIS OF THE ISSUES**

18. For avoidance of doubt, **Section 76 of the Law of Succession Act** states as follows:

**a. "76. Revocation or annulment of Grant**

**b. 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—**

19. 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

**(a) (ii) to proceed diligently with the Administration of the estate; or**

**(b) (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**

**b. (e) that the Grant has become useless and inoperative through subsequent circumstances."**

20. Further, ***In the Matter of the Estate of L A K – (Deceased) [2014] eKLR*** the court held that;

***(a) Revocation of grants in governed by Section 76 of the Law of Succession Act. The relevant portions of Section 76 are paragraphs (a), (b) and (c) since the issues raised relate to the process of the making of a grant. A grant may be revoked where the proceedings leading up to its making were defective, or were attended by fraud and concealment of important matter, or was obtained by an untrue allegation of a fact essential to the point.***

21. It is the Protestor(s) obligation to prove that the grounds of revocation have been satisfied in order to obtain the orders sought.
22. Predominantly, the Protestor herein raises a number of issues that buttress his application for revocation and/or annulment of the Grant including:-
23. The deliberate omission by the Respondent of parcel no. LR No Nyandarua/Leshau Mbuyu BLK 2 Karai/1016 that was in the name of their deceased father in her affidavit in support of her petition of Letters of Administration.
24. The inclusion of LR No Nyandarua Karai Trading Center/96 as a whole and yet it was leased jointly as tenants' in common in equal shares to the deceased and one Karanja Kibui Njau (also deceased)
25. And that the family of the latter conducted succession where ½ of the said parcel of land was ordered to devolve to his beneficiaries and therefore the Respondent failed to disclose that the whole of the said plot was and is not available for the beneficiaries of their deceased father's estate.
26. The fraudulent transfer of LR Nyandarua/Leshau Mbuyu BLK 2/Karai/1015 and LR Nyandarua/Leshau Mbuyu BLK 2/Karai/1019 to Peter Mugi Githiari and Elizabeth Wairimu Wairegi respectively on 23/6/2014 and 7/1/2015 respectively which he alleges was caused by the Respondent.
27. It is pivotal to address the issue of the transfer of LR Nyandarua/Leshau Mbuyu BLK 2/Karai/1015 and LR Nyandarua/Leshau Mbuyu BLK 2/ Karai /1019 to Peter Mugi Githiari and Elizabeth Wairimu Wairegi respectively on 23/6/2014 and 7/1/2015 which the Protestor alleged was fraudulently done by the Respondent. In her replying affidavit, the Respondent alleged that the transfer of the aforementioned parcels were effected before she was appointed as the administrator through the grant dated 29/2/2016. She further alleged that no evidence was tendered of the property having been given to those who were not the bona fide beneficiaries. Save for the respective certificates of official searches produced by the Protestor marked KNG 6 and 7, I find that that the Protestor has not proven his case on a balance of probabilities as to the alleged fraudulent transfer of the aforementioned properties.

**a. Whether there was material non-disclosure of facts?**

28. The Protestor submitted through his affidavit dated 4/4/2018 that the Respondent did not disclose in p & a 5 the entire estate of the deceased by leaving out LR No. Nyandarua /Leshau Mbuyu BLK 2 Karai/1016.
29. He further averred that the Respondent did not disclose in p & a 5 that LR No. Karai Trading Centre/96 is jointly registered between the deceased and the deceased's brother pursuant to which succession proceeding for half share had already been concluded by the latter's beneficiaries.
30. Furthermore, he submitted that despite raising all these issues to the Respondent through her counsels and even requesting for a meeting the same was not addressed. It is his assertion that the non-disclosure of material facts coupled with the inordinate delay by the Respondent in filing the summons for confirmation of grant and/or convening a meeting with the other dependants of the deceased estate to agree on a mode of distribution of the estate are grave transgressions. Consequently, the trustee-beneficiary relationship between the Respondent and beneficiaries had been broken down beyond salvage.
31. In rebuttal, the Respondent stated that LR No Nyandarua/Leshau Mbuyu Block 2 Karai/1016 was not deliberately left out and that all the beneficiaries save for the Protestor were aware and that the discrepancy was discovered after presentation of the application to court. Additionally, LR No Nyandarua Karai Trading Center/96 was jointly owned between the deceased and another was leased to Safaricom and is subject to a civil suit Chief Magistrates Court Case no 308/2017 and that she is not sure how the said property affects the Grant to the extent of revocation.
32. The court in the case of ***Jamleck Maina Njoroge v Mary Wanjiru Mwangi (2015) eKLR*** at paragraph 11 of its ruling in revoking a grant reiterated the grounds upon which a grant can be revoked. It stated as follows:-

***a. "11. The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. For a grant to be revoked either on the Application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law."***

33. In the case of ***Matheka and Another vs Matheka [2005] 2KLR 455*** the Court of Appeal laid down the following guiding principles as to revocation of grants.

***(a) "i. A grant may be revoked either by application by an interested party or by the court on its own motion.***

***(b) ii. Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of***

*something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.”*

34. Applying the test of law in Section 76 of the Law of Succession Act, I find it compelling that despite the fact that the Grant of Letters of Administration were issued to the Respondent on 29/2/2016, the Protestor through his advocates then in a letter dated 12/1/2018 to the Respondent raised the aforementioned material issues but they were not addressed. Moreover, the Respondent pursued the confirmation of the grant as it were as evidenced by the summons for confirmation of grant dated 30/10/2018 despite her knowledge of the need to rectify and/or vary the same.

35. There is no dispute that LR No Nyandarua Karai Trading Center/96 was jointly owned as evidenced by a copy of lease and certificate of lease annexed and marked as “KNG3” and thus should have been indicated in P & A 5 as so indicating the deliberate failure by the Respondent to do so. On material non-disclosure, of essence is the failure by the Petitioner/Respondent to acknowledge that the land known as LR No. Karai Trading Centre/96 was not entirely owned by the deceased and that LR No. Nyandarua /Leshau Mbuyu BLK 2 Karai/1016 was left out as part of the deceased’ estate. The fact that the parcel of land is subject to a civil suit Chief Magistrates Court Case no 308/2017 does not mitigate this fact. Such material facts should be disclosed to the court during confirmation of the grant so as to enable the court make an informed decision on distribution of the estate.

#### **CONCLUSION**

36. **Considering all the circumstances of this case, I am satisfied that the Protestor has made a sufficient case of the revocation and/or annulment of grant pursuant to Section 76 of the Law of Succession Act.**

**DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 13TH DAY OF MAY, 2021.**

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**CHARLES KARIUKI**

**JUDGE**