



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

SUCCESSION CAUSE NO. 75 OF 2016

IN THE MATTER OF THE ESTATE OF WAINAINA MUKIRI (DECEASED)

DOMINIC MBUGUA WAINAINA.....APPLICANT

VERSUS

SAMUEL MBERE WAINAINA

GILBERT MUKIRI WAINAINA

PETER MUNGAI WAINAINA

BOSCO MUNGAI WAINAINARESPONDENTS

RULING

1. For determination is the Amended Summons for Revocation of Grant brought under Section 76 of the Law of Succession Act and Rule 44(1) of the Probate and Administration Rules, filed on 8th October, 2018. Seeking that the Grant of Letters of Administration intestate issued in the Kiambu SPM's Court Succession Cause No. 529 of 1996, to SAMUEL MBERE WAINAINA, GILBERT MUKIRI WAINAINA, PETER MUNGAI WAINAINA and BOSCO MUNGAI WAINAINA on the 8th January, 1997 and confirmed on 4th August 2004, be revoked and a fresh Grant of Letters of Administration be issued to JACKSON KINYANJUI WAINAINA.

2. The application is premised on the ground that the impugned grant was obtained fraudulently by concealment of material facts concerning the list of persons beneficially entitled and extent of the deceased's estate.

3. DOMINIC MBUGUA WAINAINA swore the affidavit in support of the Summons. He deposed that he became aware of the succession proceedings in the year 2015 when he conducted an official search on the deceased's immovable asset and discovered that some of the dependents including himself had been left out in the distribution of the estate of the deceased. It was his contention that not all beneficiaries were involved, or their consent obtained regarding the filing of the petition for grant in the lower Court and in the circumstances the grant, was obtained fraudulently. He contended that the deceased had distributed his parcels of land to his various houses in his lifetime and the said beneficiaries who have developed and heavily invested in their respective portions.

4. SAMUEL MBERE WAINAINA one of the Administrators and Respondent herein opposed the Summons. He filed an affidavit in reply contending that the proposed mode of distribution proposed by the Applicant is similar to the one adopted by the lower court hence the instant application was merely a demurrer. He asserted that each of the deceased's four households appointed their representative in the succession proceedings and that the Applicant's house was represented by Gilbert Mukiri, an administrator; that the Applicant benefitted from shares in estate land parcels **LR. Nos. Gatamaiyu/Kamburu/1756** and **Gatamaiyu/Kamburu/T.305** the latter portion which the Applicant had sold to his brother. The Applicant was accused of impeding the process of distribution.

5. The Summons was heard by way of oral evidence based on the affidavits and statements filed by the parties.

6. The Applicant testified as **PW1** and adopting his affidavit asserted that his wish is that the deceased's estate be distributed according to the wishes of the deceased. SAMUEL MBERE WAINAINA (**RW1**) similarly adopted his affidavit and statement. The gist of his evidence was that there was an agreement that each house of the deceased be represented in the succession by a nominee administrator and hence not all beneficiaries signed consents and/or were present when the grant was confirmed.

7. Parties subsequently filed their written submissions. The Applicant's submissions are to the following effect. That even though each house had nominated an administrator, it was the said administrator's duty to ensure that the requisite consents were obtained from all the deceased's children which did not happen; that though the deceased had distributed his estate prior to his death his wishes were not reflected in the summons leading to the confirmed grant; and further that the Administrators have not taken any steps to complete the administration

more than fifteen years since the grant was confirmed. In the Applicant's view, no prejudice will be occasioned to the dependents if the grant is revoked as distribution has not taken place. Besides, he claimed that strangers had been allocated shares in the deceased's assets thereby disinheriting some of the dependents. The court was urged allow the application to pave way for the proper administration of the deceased's estate.

8. The court has now considered the material canvassed in respect of the amended summons for revocation of grant, dated 5th October 2018. In addition, the court has perused the original record in Kiambu SPM's Succession cause no. 529 of 1996 in which the impugned grant was issued and confirmed. Evidently, some of the material filed with the petition are missing, and in particular, the letter of the Chief in whose jurisdiction the deceased lived, to introduce his family is missing from the record. There is no dispute that the deceased during his lifetime married four wives and sired several children, including the four petitioners from four houses. These petitioners were selected to represent the four houses, and are Samuel Mbere Wainaina, Gilbert Mukiri Wainaina, Peter Mungai Wainaina and Bosco Mungai Wainaina. These were listed in the petition filed on 25th November, 1996, together with six others as persons who survived the deceased.

9. The six named beneficiaries are:

- i. David Ngure Wainaina (son)
- ii. Waithira Wainaina (wife)
- iii. Naomi Wangui Wainaina (wife)
- iv. Hannah Njeri Wainaina (wife)
- v. Patricia Wanjiru (daughter)
- vi. Mary Wambui (daughter)

10. On record are consents to the making of a grant to the petitioners executed by the deceased's widows Waithira Wainaina, Naomi Wangui Wainaina, Hannah Njeri Wainaina and children David Ngure Wainaina, Patricia Wanjiru and Mary Wambui. A grant was issued in favor of the petitioners on 25th November, 1996, and confirmed on 4th August, 2004. It appears that by that date, the widow Naomi Wangui and a child Patricia Wanjiru were deceased (see record of proceedings on 7/07/2004). All was silent until 15th August, 2011 when an application was made to rectify the grant so that the names of beneficiaries Charles Karanja Wainaina, Peter Njoroge Kamau and Mumbi Keinama who had benefitted from portions of land parcel LR No. Gatamaiyu/Kamburu/1756 were removed, leaving Mary Wambui Njari, Waithira Wainaina, Jackson Kinyanjui Wainaina, David Ngure Wainaina and Dominic Mbugua Wainaina as the persons to benefit from the said parcel. It appears that the summons was abandoned. Evidently what the summons was irregularly seeking was a redistribution of the stated asset.

11. The land parcel no. Gatamaiyu/Kamburu/1756 was one of five subdivisions out of the mother title LR No. Gatamaiyu/Kamburu/707 owned by the deceased prior to 1994, together with land parcel No. Gatamaiyu/Kamburu/305. During his lifetime, the deceased subdivided the former parcel into five portions. The resultant subdivisions were nos. 1756, 1757, 1758, 1759 and 1760. The deceased retained the former subdivision in his name and transferred the remaining portions to his four wives, namely, Hannah Njeri, Grace Waithera, Naomi Wangui and Tabitha Wanjiku, respectively. Thus, on his death, the deceased was possessed of subdivision 1756 and LR no. Gatamaiyu/Kamburu/305 measuring 3.16 ha. and 2.22 acres, respectively. These are listed in the petition form P & A 5 together with the plot 1 Nyamuthanga and account No. 0635-01-720 Kamahia farmers as comprising the deceased's estate.

12. The latter two assets appear to have been excluded from the confirmation proceedings. The petition does not appear to contain any evidence that the excluded assets belonged to the deceased. However, the Applicant has annexed to his supplementary affidavit filed on 19th September, 2016 a copy of a letter of allocation of plot no. 1 Nyamuthanga market to Ms. Nyamuthanga General Shop by the County Council of Kiambu on 7th December, 2012 and a copy of an invoice in respect of rent for plot 1 Lari Kijabe owed to the Kiambu County Government by Nyamuthanga General Shop. It may well be that the deceased owned the plot through his business name, Nyamuthanga General Shop.

13. The summons for revocation is brought primarily under section 76 of the Law of Succession Act. The grounds on the face of the summons and urged by the Applicant through its affidavit and oral evidence are that: -

- a. The grant was obtained fraudulently through failure by the petitioners to give notice thereof to all the dependants and children of the deceased and to list all the beneficiaries instead including strangers;
- b. The Applicant and other beneficiaries were not involved in the succession proceedings nor was their consent sought;
- c. Despite confirmation of the grant in 1997, the administrators have failed/neglected to complete the administration of the estate; and
- d. The grant has become useless and inoperative as "the deceased had already distributed his land parcel no. Gatamaiyu/Kamburu/1756 to his "dependants who have developed and heavily invested in *their respective portions, and he had given his wishes on the subdivision of Gatamaiyu/Kiambu/T305*" (sic)

14. The summons seeks therefore that the grant be revoked, and a fresh grant be issued to Jackson Kinyanjui Wainaina, a son of the deceased. The court must determine whether the Applicant has established grounds to justify the revocation of the grant.

15. Ground (d) above is easy to dispose of. The Applicant asserted by his affidavit and oral evidence that the deceased had already distributed parcel No. Gatamaiyu/Kamburu/1756 to Mary Wambui Njari (deceased), James Kihanya Wainaina, David Ngure Wainaina (deceased), Dominic Ngure Wainaina (Applicant), Charles Karanja Wainaina and Jackson Kinyanjui Wainaina some 14 years prior to his demise. And further made his wishes known regarding the division of the asset LR No. Gatamaiyu/Kamburu/T305. The deceased herein died intestate, and no credible evidence was led by the Applicant to prove the deposition at paragraph 15 of the Applicant's affidavit in support of his revocation application. If indeed the deceased had made his wishes known or distributed his assets during his lifetime, some memoranda, or witnesses to the same ought to have been produced by the Applicant.

16. At any rate, on the record of the original proceedings is an affidavit of service filed on 30th June, 2004 by one Peter Mwichigi Njoroge a process server, indicating that the summons for confirmation filed on 9th June, 2004 and due for hearing on 7th July, 2004 had on 15th June, 2004 been served on the following persons:

- a. Dominic Mbugua Wainaina (Applicant)
- b. Charles Karanja Wainaina
- c. David Ngure Wainaina
- d. Gilbert Mukiri Wainaina
- e. Susan Nyokabi Wainaina
- f. Jackson Kinyanjui Wainaina
- g. Peter Mungai Wainaina (through wife Hannah Wangui Mungai)
- h. Hannah Njeri Wainaina
- i. Mary Wambui Njari
- j. Waithira Wainaina

17. Bosco Mungai Wainaina was served on 22nd June 2004 through his wife, Wanjiru Bosco. Indeed, on 7/07/2004 when the summons for confirmation came up for hearing, the petitioners Samuel Mbere and Gilbert Mukiri, as well as Bosco Mungai, Waithira Wainaina, Hannah Njeri and Mary Wambui were all in attendance, the court noting that David Ngure and Peter Mungai had been served, as per the affidavit of the process server. The Applicant did not attend that hearing and the subsequent one on 4/08/2004 to which the matter was adjourned. Having been served with summons, the Applicant ought to have filed a protest thereto and/or attended the court session to indicate to the court the alleged wishes of the deceased now being canvassed. I will return to this issue in a moment.

18. For now, however, the court is not persuaded that ground (d) has any merit in fact and in law. Pursuant to section 76 (e) of the Law of Succession Act, a grant is rendered useless and inoperative through subsequent circumstances which have not been demonstrated in this case.

19. Concerning ground (a) and (b) it is apparent from the P & A 5 form in the original record that only ten beneficiaries are listed as having survived the deceased. There is no dispute that the Applicant herein was a son of the deceased. He ought to have been included in the list of persons beneficially entitled. As stated earlier, the chief's letter which normally introduces the family surviving a deceased intestate for succession purposes is missing from the original record and neither the Applicant nor the administrator Samuel Mbere Wainaina thought it useful to obtain a replacement. Thus, as matters stand, it is difficult to establish the identities of all the children who survived the deceased. What is however evident from the record is that at the time of confirming the grant, other undisputed children of the deceased not listed in the Petition for grant namely; Jackson Kinyanjui Wainaina, Dominic Mbugua Wainaina, (Applicant) and Charles Karanja Wainaina were included as beneficiaries and apportioned shares in the estate. Also included were Susan Nyokabi Wainaina, Peter Mburu Waring'u, Peter Njoroge Kamau and Mumbi Keinama.

20. The record of proceedings in the lower court of 7/07/2004 indicate that the court was informed that Mumbi Keinama was a daughter of the deceased's daughter while Peter Njoroge Kamau was recorded in proceedings on 4/08/2004 as the son of Patricia Wanjiru another daughter of the deceased. This was also confirmed by Samuel Mbere in his evidence, that Peter Njoroge Karuau was the son of Patricia Wanjiru (daughter of deceased), and that Mumbi Keinama was the daughter of Mary Wambui (daughter of deceased).

21. As for Peter Ndungu Waring'u he is alleged to be a purchaser of an estate share from Gilbert Mukiri Wainaina and one John Wainaina. It is not clear whose child Susan Nyokabi Wainaina was and why she was listed as a beneficiary. The Applicant herein asserted that he had brought his application on his own behalf and on behalf of other beneficiaries excluded from the succession cause in the lower court. These persons did not file any affidavits or appear in court to testify. Nor was any authority to plead on their behalf furnished by the Applicant. The court is unable on the material available to establish comprehensively and with certainty the identities and exact number of persons beneficially entitled and those excluded from the succession cause or distribution therein.

22. These other persons allegedly represented by the Applicant have not brought any complaint before the court and the court is unwilling to entertain any claims of exclusion made on their behalf by the Applicant. Be that as it may, concerning the Applicant himself, it is undisputed that he was not listed in the petition as a child surviving the deceased. Nonetheless, he was included as a beneficiary in the summons to confirm the grant which was served on him on 15th June, 2004. He did not attend the court or file a protest. The factual foundation of his application for revocation is therefore false. He was aware of the succession proceedings at least, by June, 2004. He is also

a beneficiary of the estate of the deceased, having admittedly received a portion measuring 0.44ha of the land parcel No. Gatamaiyu/Kamburu/1756.

23. Regarding the initial petition for grant, it appears from material on record that the three surviving widows and other children of the deceased consented to have the four petitioners (all sons of the deceased) file for a grant. Under section 66 of the Law of Succession Act, a surviving spouse of an intestate ranks higher in priority than a child. The widows of the deceased herein did not require the Applicant's consent to renounce their priority right to apply for grant in favour of the four petitioners. In their capacity as sons, the petitioners ranked equally with the Applicant, whose consent ought to have been obtained.

24. However, in the circumstances of this case, the failure to obtain the Applicant's consent does not vitiate the grant as the Applicant was demonstrably served with process in respect of the proceedings albeit much later. He did not take any step in that regard. Besides, the Applicant did confirm that he was aware that soon after his father's death, the four houses appointed representatives for the purpose of succession. Is it therefore unbelievable that the Applicant only learned about the succession proceedings in 2015 as he asserts in his affidavit? I do not believe so. Indeed, one of the administrators was the Applicant's brother and no explanation is given for failure to make enquires with him. Having admittedly obtained a benefit through the confirmation of grant, the Applicant has waited over twelve years to bring the revocation application, at a time when most of his siblings are deceased.

25. The court finds that even though section 51(2) (g) of the Law of Succession Act, and Rule 26(2) of the Probate and Administration Rules may not have been strictly complied with regard to the Applicant, during the confirmation stage, his share was identified and he was served with the application to confirm the grant, which satisfies the requirement in the proviso to section 71 of the Law of Succession Act and Rules 26 and 40 of the Probate and Administration Rules. It is too late in the day for the Applicant, having enjoyed a benefit from the estate to protest the mode of distribution in the summons to confirm the grant as appears to be his intention.

26. It appeared during the hearing that the Applicant was unhappy that he did not obtain a share of the land parcel LR No. Gatamaiyu/Kamburu/T305, hence his plea that the wishes of the deceased regarding the devolution of his properties be upheld as the various beneficiaries have occupied and "*heavily invested*" in their respective portions. It was clear from the Applicant's evidence in chief and answers during cross examination that his desire was to turn back the clock, thus denying that he had already sold his share of land Parcel LR Gatamaiyu/Kamburu/T305 to his brother David Ngure Wainaina (now deceased) soon after his father assigned him the said portion.

27. On his part he has emphasized the alleged sale by the administrators of certain portions of Gatamaiyu/Kamburu/1756 due to Peter Njoroge Kamau and Mumbi Keinama to Naomi Wanjiru Mirii and Tabitha Wanjiru Njuguna in 2010. The said beneficiaries to the affected have not come forward to complain and if indeed the sale was intended to defraud them, the agreement would have omitted any reference to them. Be that as it may, this transaction and the lengthy delay by the administrations to complete the administration of the estate are cause for concern. By his replying affidavit and oral evidence, the administrator Samuel Mbere Wainaina has detailed by way of explanation the various handicaps faced by the administrators including frosty relations between beneficiaries, lack of funds, death of some of the beneficiaries, a restriction placed in the suit property, non-cooperation by the Applicant and others.

28. Already, in 1999, the petitioners in the lower court had been compelled to file an application to restrain their stepbrothers James Kihanya Wainaina and Albert Mukiri Wainaina who were allegedly interfering with parcel No. Gatamaiyu/Kamburu/1756 and had allegedly threatened the petitioners with death when they sought to intervene. The deceased was polygamous and left a large and fractured family. Matters can only get worse if the administrators fail to complete the administration of the estate. Therefore, the Applicant's complaint as captured in ground (c) concerning this delay have merit. However, given the scenario obtaining and the age of this matter, it would be imprudent to revoke the grant held by the administrators at this point in time.

29. All in all, therefore, the court is not persuaded that the application of revocation of grant ought to be granted. Moreover, the prayer that the court appoints **Jackson Kinyanjui Wainaina** in place of the present administrators cannot be considered as the said party has not participated in the proceedings or sought such appointment. This court therefore dismisses the amended summons dated 5th October, 2018, and directs that:

- a. Pursuant to their duties under section 83 Law of succession Act, the administrators herein do proceed with alacrity and take all the necessary steps to complete the administration of the estate within 7 (seven) months of today's date;
- b. The administrators will thereafter file a full and accurate account of the completed administration in terms of section 83(i) of the Law of Succession Act;
- c. For purposes of confirming compliance, this cause be listed before the Judge on 24th November, 2021; and
- d. The administrator Samuel Mbere Wainaina to serve a copy of this ruling upon his three co-administrators within 21 days of the date of delivery.

30. The parties will bear own costs in view of the nature of the dispute.

Delivered and signed electronically on this 13TH Day of May 2021.

C.MEOLI

JUDGE

In the Presence of:

For Applicant : Ms Luchemo.

For Administrator Samuel Mbere Wainaina: Mr. Ng'ang'a

Court Assistant .Kevin Ndege.