



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 295 OF 1996

IN THE MATTER OF THE ESTATE OF EPHANTUS GITAHU NGAYU(DECEASED)

CECILIA KARURU NGAYU.....APPLICANT

VERSUS

JERIOTH WAMBUI GITAHU.....RESPONDENT

RULING

Brief facts

1. This application dated 10th January 2017, brought under **Section 76 of the Law of Succession Act** seeking a revocation of the grant issued on 29th March 2006.
2. In opposition to the application, the respondent has filed a replying affidavit dated 17th February 2017.

The Applicant's case

3. The applicant states that she is the daughter in law of the deceased through her late husband, Cyrus Ngayu Gitahi who died on 21st January 2003. According to the applicant, the grant had been confirmed on 25th February 2000 and her husband was allocated 3 acres out of Land parcel No. TETU/KABAGE/437 but her husband died before transmission was effected. The applicant adds that in 2016 she sought to register the said parcel in her name but found out that the grant was amended on 29th March 2006 to the effect that her husband's share of the said parcel of land was taken over by the respondent.
4. The applicant contends that the respondent failed to disclose that Cyrus Ngayu had a wife and children despite being aware of her existence since she got married to the late Cyrus Ngayu in 1979 and lived and are still living on the same parcel of land. She adds that the respondent's non-disclosure was meant to disinherit her and her children of her late husband's share. She argues that her husband was the son of the deceased and was therefore a beneficiary in the estate.

The Respondent's Case

5. The respondent states that she is the wife of the deceased who is the father of the applicant's late husband. The record shows that the respondent had filed her replying affidavit before passing on in which she stated that grant herein was confirmed on 6th February 1997 but they realized that some properties of the deceased were left out of the list. The respondent further states that all her family members including the applicant agreed to her being the registered proprietor to Land Parcel No. TETU/KABAGE/437 to hold in trust for her, Thus during the confirmation of the rectified grant, all parties were present in court and they all consented to the respondent being registered to hold the whole of deceased's estate in trust for herself and her children.
6. Notably, the respondent contends that her son Cyrus Ngayu was the sole beneficiary of Land Parcel No. EUSO NYIRO SUGUROI BLOCK IV/189 which is currently owned by the applicant and now she is claiming a bigger share by demanding a portion of Land Parcel No. TETU/KABAGE/437 which means she seeks a bigger portion of inheritance than the respondent's children. The respondent further states that the applicant is aware of the amended certificate of confirmation of grant as the same emanated from an agreement by the whole family.
7. The respondent further contends that the applicant has interfered with the deceased's property in the past as she sold the kiosk no. 6430 situated at NYERI/NYAHURURU upper stage before the same was transferred to her.
8. The respondent contends that the applicant is selfish and in that regard her application ought to be dismissed with costs.

9. The applicant filed a Further Affidavit dated 10th March 2017 in which she states that she was not privy to the agreement that the respondent should hold the said suit property in trust for the family nor did she attend court to affirm the same. The applicant adds that she is only seeking what was left to her husband out of Land Parcel No. TETU/KABAGE/437 and not a bigger share.

10. Parties canvassed the application by way of written submissions. A summary of their rival submissions is as follows:-

The Applicant's Submissions

11. The applicant submits that the grant herein ought to be revoked because it was amended without the respondent disclosing her existence and that of her children to the court. She reiterates that she only claims for the 3 acres that was allocated to her deceased husband out of Land Parcel No. TETU/KABAGE/437.

12. The applicant states that pursuant to section 76 (e) of the Law of Succession Act, the court can revoke the grant herein because the administrator is deceased. The applicant adds that since the administrator died before transmission, the applicant ought to be appointed as the administrator.

Issues for determination

13. After careful analysis, I identify the main issue for determination as to whether the applicant has established a case for revocation of grant herein.

The Law

14. **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.**

Analysis & Determination.

15. The applicant claims that the grant ought to be revoked because the respondent concealed the fact that her late husband had a wife and children. On perusal of the record, particularly the petition for letters of administration, it is evident that the beneficiaries listed in form P&A 5 include Cyrus Ngayu Gitahi the applicant's husband who has been listed as married.

16. It is important to note that the applicant is not challenging the capacity of the respondent to be appointed the administrator of the estate as per the provisions of Section 66 of the Act. The said provisions put the respondent in priority in the estate over the applicant for the respondent is the deceased's widow. The respondent included the applicant's husband Cyrus Ngayu in Form P & A % in filing this succession case. As such the grant issued to the respondent was in order as far as the law is concerned.

17. The main contention of the applicant is that the share of her late husband ought to be given to her but the respondent was registered as he sole proprietor of the estate. The record shows that the applicant has ten(10) children including the applicant's husband. The respondent listed all the children of the deceased as beneficiaries. The husband of the applicant died on 21/01/2003 after the confirmation of the grant which was done on 25/02/2000.

18. Up to the stage of confirmation of the grant on 25/02/2000, the respondent had acted within the law. In the confirmed grant, all the

rightful beneficiaries were given their shares as follows:-

Jerioth Wambui Gitahi Nyandaura/Ndaragwa

block 1 kahutha/26 22 Acres

Peter Gathua Nyandarua/Ndaragwa

Block 1 Kahutha/26 20 Acres

Josphine Wangari Nyandarua/Ndaragwa

Block 1 Kahutha/26 3 Acres

Jedidah Muthoni Nyandarua/Ndaragwa

Block 1 Kahutha/26 2½ Acres

Elishpha Nyagwea Nyandaru/Ndaragwa

Block 1 Kahutha/26 2½ Acres

Shelmith Wanjiku Nyandarua/Ndaragwa

Block 1 Kahutha/26 2½ Acres

Susan Wanjugu Nyandarua/Ndaragwa

Block 1 Kahutha/26 2½ Acres

Agnes Wangui Nyandarua/Ndaragwa

Block 1 Kahutha/26 2½ Acres

Penina Murugi Nyandarua/Ndaragwa

Block 1 Kahutha/26 2½ Acres

Cyrus Ngayu Euaso Nyiro Suguroi Block iv/189 16.18ha

Cyrus Ngayu Tetu /Kabage/437 3 Acres

Peter Gathua Tetu/Kabage/437 2½ Acres

Mrs. Jerioth Wambui Tetu/Kabage/437 2½ Acres

The applicant's husband Cyrus Ng'ayu Gitahi was given L.R. Euaso Nyiro Surgoi Block IV 189 measuring 16.18ha solely. Out of L.R TETU KABAGE/431, Cyrus was given three(3) acres while Peter and Jerioth Wambui were bequeathed 2.5 acres each.

19. On 22/02/2006, the respondent filed an application for rectification of grant in which she sought to include some assets of the deceased which were left out and to redistribute L.R. No. TETU/KABAGE/437. The court granted the orders as sought on 29/03/2006 since there was no objection. The applicant was present in court. As for the beneficiaries, it was recorded "Beneficiaries present" without giving any names. The failure to record the names raises doubt as to whether the applicant was present. The respondent who was the Applicant and the team leader in the family may have informed the court that all the beneficiaries were present and the court may have proceeded to so record without confirming. I say this because the applicant herein says she was not present. Her husband having passed on, the applicant ought to have been brought on board as the beneficiary to represent her late husband. The respondent indeed did the rectification without the applicant's knowledge and surely took the share of the applicant's husband 3 acres out of L.R. TETU/KABAGE/431 to herself.

20. The act of the respondent in taking over the share of a deceased beneficiary knowing that the deceased was married with children, was fraudulent. And further the failure to inform the applicant of her intention by issuing summons to her as required by the law, was illegal. Further, Section 74 of the Act under which the rectification was done does not provide for taking away one beneficiary's share and giving it to another person or for the administrator taking away the share of another beneficiary unto herself. The non-disclosure of the marital status of the late Cyrus Ngayu Gitahi to the court was intended to defraud his family of their rightful inheritance. As such, I find that the set of actions in the rectification of the grant was fraudulent and tainted with illegality.

21. Any orders given thereof cannot be valid for illegalities and ought to be declared null and void.

22. Having found that the illegality herein was committed by the respondent after the confirmation of the grant, it is my considered view that the grant ought not to be revoked except in so far as LR. Tetu/Kabage/431 is concerned. It is noted that the orders for rectification violated the law as explained in the foregoing paragraphs. Further, the death of the respondent who was the sole administrator has rendered the grant inoperative under Section 76 of the Act. It is therefore necessary that the grant be revoked for that reason and other administrators appointed for the purpose of implementing the grant in regard to Tetu/Kabage/431 and in regard to any other asset that has not been bequeathed to the beneficiaries.

23. The applicant in her 2nd prayer urged the court to revoke the grant following the death of the administrator and appoint her the sole administrator. There being another beneficiary one Peter Gathua who was to take a share from Tetu/Kabage/431, it is in the interests of justice that the said Peter Gathua be appointed as a co-administrator to take care of his interest.

24. Consequently I make the following orders:-

a) That the Amended certificate of confirmation of grant arising from the orders issued on 29/3/2006 is hereby declared null and void.

b) That any transactions made under the said Amended grant are hereby declared null and void and any titles or ownership certificates issued therefrom are declared void *ab initio*.

c) That the grant issued to the late Jerioth Wamui Gitahi is hereby revoked and a fresh grant issued in the names of the Applicant Cecilia Karuru Ng'ayu and Peter Gathua in regard to distribution of L.R. Tetu/Kabage/431 and any other assets omitted from the grant confirmed on 25/02/2000.

d) That the co-administrators or any of them do file within 30 days an application for review of the grant to include the assets of the deceased omitted in this cause and in the grant confirmed on 25th February 2000.

25. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 22ND DAY of JULY, 2021.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 22nd day of July, 2021.