



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC. SUCCESSION NO. 8 OF 2018

IN THE MATTER OF THE ESTATE OF MAINA GITHINDI (DECEASED)

EUNICE WAMBUI MAINA.....1ST PETITIONER/APPLICANT

LUCY WANGUI MURIMI.....2ND PETITIONER/APPLICANT

-VERSUS-

JOSEPH MWANGI MAINA.....1ST RESPONDENT

EPHANTUS KINYUA MAINA.....2ND RESPONDENT

STEPHEN MUGWERU MAINA.....3RD RESPONDENT

JUSTUS MUTUGI MAINA.....4TH RESPONDENT

J U D G M E N T

Introduction

1. This cause relates to the estate of the late Maina Githindi (hereinafter referred to as the “deceased”). The deceased’s estate comprised of the land parcel no. KIINE/NGUGUINE/459 (hereinafter referred to as the “suit property”).
2. The deceased’s widow, Celiba Wanjiru Maina, filed *Kerugoya High Court Succession Cause No. 57 of 2011* and a grant of representation of the deceased estate was issued to her and later confirmed. She consequently subdivided the suit property into four portions (KIINE/KIBINGOTI/NGUNGUINE/3380-3383) and transferred it to herself, her two (2) daughters (the Applicants herein) and one Patrick Muthii Maina (the deceased’s grandson and son of Damaris Nyawira who is also a daughter to the deceased but disappeared).
3. The Respondents then learnt of the said succession cause and subsequent sub-division of the suit property. They filed for the revocation of the grant and cancellation of the title deeds that were as a result of the subdivision of the suit property, which application was allowed.
4. The 1st Respondent subsequently applied for confirmation of grant in respect to the subject estate and the same was confirmed on 11/07/2018. It was proposed that the suit property be shared equally among the following beneficiaries:
 - a. Joseph Mwangi Maina
 - b. Ephantus Kinyua Maina
 - c. Stephen Mugweru Maina
 - d. Justus Mutugi Maina
 - e. Patrick Muthii Maina
 - f. Eunice Wambui Maina
 - g. Jane Lucy Wangui Maina

5. Presently before this court is the Summons for Revocation of Grant dated 25/07/2018 and amended on 20/03/2019 in which the Applicants herein seek for the following orders:

a. Spent.

b. THAT this honourable court be pleased to revoke the grant confirmed by the lower court on 11/07/2018.

c. THAT the costs of this Application be provided for.

6. The application is supported by the affidavit sworn on 20/03/2019 by Lucy Wangui Murimi and premised on the grounds THAT:

a. The proceedings to obtain the grant were defective in substance.

b. The grant was obtained fraudulently by making a false statement or by concealment from the court something material to the cause.

c. The grant was obtained by means of untrue allegation of fact essential in a point of law to justify the grant.

7. The application was canvassed by way of viva voce evidence as well as written submissions. The Applicants filed their written submissions through their advocates on record on 29/01/2020 while the 1st Respondent filed his written submissions on 05/11/2020.

Applicants' Case

8. The 2nd Applicant testified as the only witness in support of the application. She is the deceased's daughter. She testified that the deceased left behind the suit property and that they obtained a grant in Kerugoya High Court Succession Cause No. 57 of 2011 but the same was revoked by the Respondents without informing them. She alleged that the suit property was to be distributed to the Applicants herein and one Patrick Muthii, who is a grandson to the deceased. She further alleged that the Respondents filed a succession cause in the estate of their grandfather without involving them or the deceased and that the estate (KIINE/NGUNGUINE/439) was distributed to them.

9. On cross examination by the 3rd Respondent, the 2nd Applicant admitted that they did not inform the Respondents when they filed the succession cause. The reason for this, according to the 2nd Applicant, is that the Respondents owned their late grandfather's land and that it was allegedly the deceased's wish that the suit property be distributed among his surviving daughters. It was therefore the Applicants' submission that the Respondents were not entitled to a share of the suit property.

Respondents' case

10. It is only the 1st Respondent who filed a Response to the application and testified in opposition of the same. The 1st Respondent is the first born of the deceased and therefore the brother to the Applicants. He alleged that the suit property was transferred to their mother through a succession cause that was filed and finalized without his knowledge. He further alleged that he informed the Applicants when he applied for the revocation of the grant. It was thus his submission that the present application should fail and that the confirmed grant dated 11/07/2018 should be upheld.

Issue for determination

11. The main issue for determination is whether the application dated 25/07/2018 and amended on 20/03/2019 is merited.

The applicants did not call for the lower court file and the court has not had a chance to peruse it. I will therefore rely on the annexed documents to determine the issue.

Analysis

12. The circumstances under which a grant of representation may be revoked by this court are provided for under **Section 76** of the **Law of Succession Act**. This provision was construed in the case of **Matheka and Another vs Matheka [2005] 2 KLR 455** where the Court of Appeal laid down the following guiding principles.

“i. A grant may be revoked either by application by an interested party or by the court on its own motion.

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.”

13. This being a probate court, it follows that its jurisdiction is limited to ascertaining what assets are available to the estate, who the beneficiaries are and the mode of distribution of the estate (See the holding of Mabeya J in the decision in the estate of Zakaria Nthiga Matumo (Deceased)). The preamble to the law of Succession Act (Cap 160 Laws of Kenya) provides that:

“ An Act of parliament to amend, define and consolidate the law relating to intestate and testamentary succession and administration of deceased persons; for purposes connected therewith and incidental thereto. This is buttressed under Section 2(1) of the Act. The duty of this court is to ascertain the estate of the deceased, beneficiaries and distribution

14. It is not in dispute that the deceased was survived by:

- a. Joseph Mwangi Maina - Son
- b. Ephantus Kinyua Maina - Son
- c. Stephen Mugweru Maina - Son
- d. Justus Mutugi Maina - Son
- e. Patrick Muthii Maina - Grandson
- f. Eunice Wambui Maina - Daughter
- g. Jane Lucy Wangui Maina – Daughter

15. It is therefore not in contention that the Applicants and the Respondents are all children of the deceased. There is also no dispute that the suit property forms part of the estate of the deceased. It is however the Applicants' contention that the Respondents should not inherit from the suit property as they were given land by the deceased's father, their late grandfather. The Respondents have not disputed that they were given land by their grandfather.

16. The issues pertaining to the estate of Wamwea Mbiri, the deceased's father, were canvassed in the **Kerugoya Principal Magistrate Succession Cause No. 98 of 2000**. According to the 1st Respondent, neither the deceased nor the Applicants objected to the Respondents being given land by the deceased's father. For purposes of these proceedings, it therefore follows that the estate of the deceased's father did not form part of the deceased's estate at the time of his death. In addition, it is trite that he who alleges must prove. The Applicant's allegation that the deceased left behind a written will was not substantiated by any proof. As such, the fact remains that the suit property is the only asset that the deceased left behind following his demise.

The grant issued in Kerugoya High Court Succession cause No. 57/2011 distributed the estates as follows:-

Kiine/Ngunguine/459

Celiba Wanjira Maina - whole share

The grant is dated 12/7/2011 annexure **JMM4** in the affidavit sworn by the 1st respondent Joseph Mwangi Maina which is undated but filed in court on 3/6/2019. The contention by the 1st respondent is that they were not notified when the succession cause was filed and they moved the court vide an application dated 20/3/2017 to have the grant revoked. This application was heard and determined and vide an order issued on 7/6/2018 the grant issued on 12/7/2011 was revoked and order was issued to the effect that the estate reverts back to Kiine/Ngunguine/459 and the resultant parcels from the grant i.e Kiine/Ngunguine/3389-3383 be cancelled. Thereafter according to the 1st respondent a summons for confirmation of grant was dated 8/6/2018 was filed and a mode of distribution to have the estate shared equally among all the sons and daughters was proposed. The grant was confirmed on 11/7/2018. The proposed mode of distribution was as follows:-

Land Parcel No. Kiine/Ngunguine/459 be shared equally among;

- 1. Joseph Mwangi Maina
- 2. Ephantus Kinyua Maina
- 3. Stephene Mugweru Maina
- 4. Justus Mutugi Maina
- 5. Eunice Wambui Maina
- 6. Jane Lucy Wangui Maina

To my mind this mode of distribution of the estate was in line with the **Law of Succession Act Cap 160 Section 29** thereof defines dependant as follows:

”29. Meaning of dependant;

For the purposes of this Part, "dependant" means-
(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

(c) Where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death."

The net estate is distributed to the dependants as provided under the Act. In this case, Section 35 of the Act is applicable in the distribution of the estate as it is the children and the widow of the deceased who survived him. **Section 35(1) (a) and (b)** of the **Law of Succession Act** provides as follows:-

"(1) Subject to the provisions of section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to- (a) the personal and household effects of the deceased absolutely; and

(b) a life interest in the whole residue of the net intestate estate: Provided that, if the surviving spouse is a widow, that interest shall determine upon her re-marriage to any person."

When it comes to distribution of the estate, it is only the free estate of the deceased which is available for distribution. Estate is defined as the free property of a deceased person. Free property connotes the property that the deceased could deal with freely and lawfully during his lifetime and which had no encumbrances or claims by 3rd parties. The Act defines free property to mean that it is the property which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death.

The estate of the Maina Githinji (deceased) is Land Parcel No. Kiine.Ngunguine/459 and is the only property which was available for distribution among his dependants. **Section 76(a), (b) (c) of the Law of Succession Act** provides as follows:-

" 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."

The law provides that he who alleges must prove. **Section 107 and 109 of the Evidence Act** provides;

107. Burden of proof;

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

109. Proof of particular fact
The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

The court will annul or revoke a grant if it is proved that the proceedings to obtain the grant were defective in substance, that the grant was obtained fraudulently by making of false statements or concealment from court something material to the case. It will also be revoked if it was obtained by means of untrue allegations of a fact essential in point of law to justify the grant. The applicant had the burden to prove that the proceedings were defective in substance, was obtained fraudulently and by means of untrue allegation as pleaded in summons for revocation of grant. Apart from listing these grounds, no evidence was tendered to prove the allegation. The grant related to the estate of the deceased which land parcel No. Kiine/Ngunguine/459 and all the beneficiaries were catered for. The contention by the applicant that the respondents had benefited from their grandfather which is a totally different estate is no bar for the respondents getting their rightful share from the estate of their father. Furthermore the estate of the said grandfather was litigated in **Succession Cause No.98/2000** and there can be no basis for litigating it in this cause. I find that the applicant has not established any of the grounds which would warrant this court to revoke the grant. She did not discharge the burden of proof of the allegations.

Conclusion

17. From the foregoing, it is my view that the suit property is the only asset available to the deceased's estate and that the beneficiaries named in the grant confirmed on 11/07/2018 are the only surviving beneficiaries of the deceased. In the circumstances, I opine that the application for revocation of grant dated 25/07/2018 and amended on 20/03/2019 lacks merits.

I order that-

- 1) The application is dismissed.
- 2) The prohibition order issued under prayer (a) of the application is set aside.
- 3) The estate shall be distributed as per the confirmed grant.
- 4) I make no orders as to costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 9TH DAY OF DECEMBER 2021.

L.W. GITARI

JUDGE