



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 649 OF 2013

IN THE MATTER OF THE ESTATE ON NJERU THIKA KARISHO (DECEASED)

EPHANTUS KARIUKI.....APPLICANT

VERSUS

FAITH WANDIRI NTHIGA.....1ST RESPONDENT/ADMINISTRATOR

MOSES GICOVI NYAGA.....2ND RESPONDENT

RULING

1. Before this court is an undated amended summons for revocation of grant filed by the applicant wherein he seeks for orders that:

i. Spent.

ii. The certificate of confirmation of grant issued to Faith Wandiri Nthiga on the 14.12.2016 be revoked or annulled.

iii. That the Honourable court do hereby include the applicant herein Ephantus Kariuki Thika as a beneficiary in the estate of Njeru Thika Karisho (deceased) and the mode of distribution be changed to include the applicant.

iv. That all the titles issued pursuant to the grant issued to Faith Wandiri Nthiga be cancelled pending the hearing of the summons.

v. That this Honourable court do issue orders restraining the respondents, their agents, servants, family members or anyone claiming through him from disposing or transferring or interfering with the plaintiff's use, utilization of land parcel No. Ngandori/Kirigi/13724 or status quo be maintained pending the hearing and determination of this application inter partes.

vi. That this Honourable court do issue an injunction restraining the respondents, their agents, servants, family members or anyone claiming through them from disposing, or transferring or interfering with the plaintiff's use, utilization of land parcel number Ngandori/Kirigi/13724 or status quo be maintained pending the hearing and determination of this suit.

2. The application is premised on the grounds on its face and further supported by an affidavit sworn by the applicant. The applicant's case is that the 1st respondent obtained grant fraudulently by making a false statement or by concealing from the court something material in this matter and further that he was neither notified nor included in the whole process despite him being listed as one of the beneficiaries of the estate.

3. It was the applicant's case that the 1st respondent did not disclose to the court that the deceased had other beneficiaries who were equally entitled to the estate of the deceased.

4. The application is opposed vide a relying affidavit sworn on 19.10.2020 whereupon the 2nd respondent deponed that he is the registered owner and absolute proprietor of Land Parcel Ngandori/Kirigi/13724. That, he bought the land on 03.12.2019 from Phyllis Muthoni Chabari, a beneficiary of the estate of the deceased herein, at an amount Kshs. 1,700,000/= which amount he paid in full to the said Phyllis Muthoni Chabari. That after the confirmation of grant, the 1st respondent subdivided the original land parcel of the estate of the deceased into three portions as per the certificate of the confirmed grant.

5. It was further deponed that, Phyllis Muthoni Chabari informed him that the applicant herein was farming on the land together with his siblings as the original owner of the land, the deceased herein, did not have children. That he informed the applicant who was cultivating the land that the ownership of the land had changed and that he was the new owner. He proceeded to submit that he had an agreement with the applicant herein to vacate his land amicably and that it was not true that he is harassing the applicant.

6. The parties took directions to have the matter proceed by way of *viva voce* evidence and the court directed the parties to file witness statements.
7. PW1, Ephantus Kariuki testified that the administrator is his sister while the deceased herein was his uncle. He further adopted his statement and his sworn affidavit as filed. It was his case that his sister had sold a land that had been given to him by his uncle and that the land in reference is Ngandori/Kirigi/7167. That the deceased never had children of his own and so he bequeathed them his estate which was to be shared equally amongst the beneficiaries.
8. That the administrator awarded herself 2 acres, applicant (1 acre), John (1 acre), Charles Njururi (1 acre); that upon being in possession of the one acre, he started farming on the land. He further informed the court that the administrator, Charles Njururi and Kiura John filed the succession cause secretly without informing him. That, the other beneficiaries changed the ownership of the land and then proceeded to sell it to the 2nd respondent who has since been harassing him. Upon cross examination, he informed the court that they are six siblings and the deceased's land was given to only three siblings. That as per the wishes of his father and equally his uncle, the land parcel Ngandori/Kirigi/7167 was to be inherited by sons.
9. DW1, Faith Wandiri testified that they sat down as a family and agreed to file Succession Causes No. 649 of 2013 and 317 of 2006 which were heard together since they were related. That they agreed that the estate of Josiah Nthiga Thika (Succession No. 317 of 2006) be shared amongst Charles Njururi, Elizabeth Kiine and Elias Njeru (on behalf of Ephantus Kariuki Nthiga) while in 649 of 2013 (in the estate of the deceased herein) be shared amongst Faith Wandiri, Phyllis Muthoni Chabari and Alex Ndwiwa Kiura on behalf of his late father John Kiura Nthiga. That the applicant decided that his portion be given to his son called Elias Njeru Nthiga.
10. That she got 0.4 acres and not 2 acres and that during the confirmation of grant in this cause, all parties were present and the court record can confirm that. Upon cross examination, she confirmed that there were two Succession Causes although she is not aware if they were consolidated but all the parties appeared before the judge save for one Phyllis Muthoni Chabari. That they further sat down as a family and agreed that after the distribution, each person was given one year's notice to occupy their rightful places.
11. DW2, Charles Ruagua Nthiga adopted his statement and further relied on his sworn affidavit and further upon cross examination, he stated that there were two Succession Causes of two parcels; one in Kirigi and the other one in Gatoori. That the two land parcels were a subject of one Succession.
12. DW3, Phyllis Muthoni Chabari adopted her statement and further relied on her sworn affidavit as her evidence in chief. Upon cross examination, she testified that there were two succession causes; one of their father and the other for their uncle. That she sold her portion to the second respondent at Kshs.1.7million and even went on to process ownership documents.
13. DW4, Moses Gicovi Nyaga, testified that he is a businessman and that he bought land parcel Ngandori/Kirigi/13724 (excised from Ngandori/Kirigi/7167) from Phyllis Muthoni and further, he holds the title deed of the said portion of land. Upon cross examination, he confirmed that he is the rightful owner of land parcel Ngandori/Kirigi/13724 after having bought the same from Phyllis Muthoni.
14. The parties took directions to file their submissions whereupon the applicant submitted that he was never involved in the process of acquiring and confirmation of grant despite him being named as one of the beneficiaries in the chief's letter. That the Succession Cause was filed without his knowledge and further that he was not in court when the application for confirmation of the grant came up in court.
15. On the other hand, the respondent submitted that it came out clearly that the 2nd respondent bought his Land Parcel No. Ngandori/Kirigi/13724 from a beneficiary of the estate at an agreed amount of Kshs.1.7 million and that the process of transfer was above board in that, at the very time when the transfer was done, all the succession process was already completed. They submitted that this application is an afterthought since the applicant had previously moved the ELC Embu court vide ELC Case No. 11 of 2020 claiming adverse possession but the learned judge ruled that the applicant was never in occupation of the said land and so his case was dismissed.
16. I have considered the amended application filed herein, the responses thereto and further, the oral evidence tendered in court; I have further considered the rival submissions filed herein. As I have already noted, the applicant herein seeks for revocation of the confirmed grant made to the 1st respondent herein.
17. The application is brought under section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules. Section 76 (a) - (d) provides for revocation of grant and the circumstances under which a grant of representation may be revoked. In the instant case, the applicant's case is that the certificate of confirmation of grant was obtained by the 1st respondent fraudulently and by concealment of material facts.
18. Section 76 provides the circumstances under which a grant of representation may be revoked. However, from the analysis above, it appears that the relevant provision is section 76 (a) and (c) as the application before this court related to the process of obtaining of the grant.
19. Under the said provision, *a grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on an application by an interested party or of its own motion on the grounds either that the proceedings to obtain the grant were defective in substance; that the grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case; or that 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. These grounds ought to be proved with evidence as the power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. (See Albert Imbuga Kisigwa v Recho Kawai Kisigwa, Succession Cause No.158 of 2000). Even when revocation is by the court upon its own motion, there must be evidence to satisfy the grounds for revocation of grant (See Matheka and Another v Matheka [2005] 2 KLR 455).*
20. **It is clear, therefore, that the grounds upon which a grant may be revoked or annulled are statutory and it is incumbent upon any party**

making an application for revocation or annulment of a grant to demonstrate the existence of any, some or all the above grounds. The applicant has the duty to demonstrate the ground(s) which he relies on, in challenging the grant.

21. As I have already noted, the grounds in support of the applicant's application are that the succession cause was filed without involving him and that he only came to realize it when the 2nd respondent visited the suit land alleging that the ownership had changed. Further, that, the 1st respondent misrepresented to the court that they were the only beneficiaries whereas he was equally a beneficiary of the estate herein. These averments were strongly opposed by the respondents who deposed and further submitted that the applicant was involved in the proceedings herein and was even present in the court when the grant was confirmed.

22. It is not in dispute that the deceased herein had neither a wife nor a child of his own and so he bequeathed his property to his nieces and nephews (the parties herein).

23. The court has perused the said file Succession Cause No. 317 of 2006 in relation to the estate of Josiah Nthiga Thika and confirmed that the listed beneficiaries were as follows: Elizabeth Kini, Ephantus Kariuki, Phyllis Marigu, Johnson Kiura, Charles Rwanjagua and Faith Wandiri. Equally, from the court record, I found out that the parties willingly changed the administrator from Ephantus Kariuki to Faith Wandiri and that the two Succession causes were done at the same time and that all the parties were in court and the court did note on its record as follows :

“All beneficiaries are present and agreeable to the mode of distribution except Phyllis Muthoni who had been provided for in file Succession No. 649 of 2013 and is also agreeable.”

24. And the grant was confirmed on 05.12.2016 in the following manner:

i. Charles Rwanjagua Nthiga – 0.4 Ha.

ii. Elizabeth Kiini Nthiga – 0.4 Ha.

iii. Elias Njeru Nthiga – 0.40 Ha.

25. In the current case, the beneficiaries were listed as: Ephantus Kariuki, Elizabeth Kini, Phyllis Marigu, Alex Ndwiga, Charles Rwanjagua and Faith Wandiri; and the grant was equally confirmed on 05.12.2016 in the following manner:

i. Faith Wandiri Nthiga – 0.4 Ha.

ii. Alex Nwiga Kiura – 0.4 Ha.

iii. Phyllis Muthoni Chambari – 0.4 Ha.

26. The applicant is crying foul over being kept in the dark in regards to the confirmation of the grant issued unto the 1st respondent and yet from the court record, on 05.12.2016 (in both files), the grants were confirmed in the presence of all the beneficiaries whereupon all were agreeable to the mode of distribution employed.

27. The court in the case of **In the Estate of Stephen Kurgat Kimwei (Deceased) [2017] eKLR** dismissed an application to revoke grant where the applicants were present in court during the confirmation process.

28. I am inclined to believe the respondent's case that prior to filing the two succession causes, the parties herein sat and agreed on the mode which they would employ to realize smooth transmission of the estates (for Josiah Nthiga Thika and equally for Njeru Thika Karisho), only that the applicant evidently wished for a double benefit.

29. Having considered the totality of the material before me, I am unable to find any merit in the application. The applicant has not demonstrated that the grant in this matter was obtained in a manner that rendered the grant defective in substance, or fraudulently by making of a false statement, or concealed from the court something material to the case, or made an untrue allegation of a fact essential in point of fact to the case.

30. Having considered the application herein, the applicant did not make out a case for revocation of the grant issued to the 1st respondent. In view of the above I find that :

i. The application before me is unmerited and I hereby dismiss the same.

ii. Costs to the respondents.

31. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 1ST DAY OF DECEMBER, 2021.

L. NJUGUNA

JUDGE

.....for the Respondents

.....for the Applicant