



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT CHUKA**

**MISC SUCCESSION NO. 21 OF 2018**

**AND**

**IN THE MATTER OF THE ESTATE OF LATE PELILA NGIGE NJERU alias BERIRA NJERU (DECEASED)**

**VIOLET CIAMBAKA SABARI.....APPLICANT**

**VERSUS**

**PHARES GITARI NJERU.....1<sup>ST</sup> RESPONDENT**

**CHARLES MUTEGI NJERU.....2<sup>ND</sup> RESPONDENT**

**ROBERT NJOKA NJERU.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. This is an application dated 16<sup>th</sup> July 2018 seeking for revocation of grant issued on 28<sup>th</sup> September 2009 and confirmed on 15<sup>th</sup> September 2010 vide **Chuka Principal Magistrate's Court Succ. Cause No.139 of 2008.** That cause related to the estate of the Late **PELILA NGIGE NJERU** who died intestate on 10<sup>th</sup> September 2005 resident at Thuita Meru South.

2. The grant was issued to **PHARES GITARI NJERU**, the Petitioner/Respondent herein who listed the dependants surviving the deceased as follows:-

- i) Charles Mutegi Njeru
- ii) Robert Njoka Njeru and
- iii) Phares Gitari Njeru

4. The asset comprising the estate listed is that property known as L.R Magumoni/Thuita/738 which was distributed among the 3 named beneficiaries above.

5. The applicant herein Violet Ciambaka vide Summons for Revocation of Grant dated 16<sup>th</sup> July 2018 has sought substantively for revocation of the said grant on the following grounds namely:-

***a) That the 1<sup>st</sup> Respondent/Petitioner filed PMCC Succession Cause No.139 of 2008 secretly and obtained the grants fraudulently by making of a false statement and/or by the concealment from the court the fact that the Applicant being a sister in law and a dependant resided on 0.75 acres of estate and ought to have been included as a beneficiary in the distribution of the deceased estate.***

***b) That the Applicant has buried her late husband Erastus Njagi Njeru on the said portion measuring 0.75 acres or thereabout in the estate.***

***c) That Chuka Principal Magistrate's Court did not have pecuniary jurisdiction to entertain the cause as the estate's value was over 2 million then.***

***d) That the Respondents misrepresented to the area Chief that they were the only beneficiaries to the estate.***

***e) That the foregoing demonstrates clearly that the grant should be revoked and the cause be determined by a court with competent jurisdiction.***

5. The Applicant has supported her application with an affidavit sworn on 16<sup>th</sup> July 2018 where she has reiterated the above grounds adding that the deceased herein died on 10<sup>th</sup> September 2005 and the allegation that the appointed administrator was dishonest in his petition for letters of administration.
6. In her further affidavit sworn on 20<sup>th</sup> September 2018 the Applicant has further deposed that she is the legal wife of Erastus Njagi Mwalimu whom she claims was one of the sons to the deceased herein. She further claims that the deceased also had a daughter named Dorothy Ciacukuru.
7. She avers that her late husband was buried at the estate and that the Respondents took part in the burial ceremony. She also claims that she also buried a child she lost in the same property forming the estate herein.
8. She claims that when her husband died the Respondents unlawfully removed her from the estate and demolished her house and that the matter was reported to the police who are still investigating the issue.
9. The Applicant states that the 1<sup>st</sup> Respondent did not seek her consent or that of her sister in law prior to petitioning for letters of administration.
10. She adds the Principal Magistrate's Court did not have jurisdiction to entertain an estate worth **Kshs.300,000** as indicated.
11. In her oral evidence in court, the Applicant told this court that the Respondent used to claim that her late husband was not a child to the deceased herein. She was at difficulty as to whether her deceased husband was a 2<sup>nd</sup> born or a 4<sup>th</sup> born. She was however sure that her husband was born in 1960 and died in 2003 at 43 years old. She also could not tell why her husband used a different sir name unlike the Respondent herein.
12. Rose Mukari M'Ringata (PW2) testified on behalf of the Applicant and told this court that she knew the Applicant's husband as a son to the deceased. She further claimed that the deceased had subdivided her estate among his 4 sons with the Applicant's husband inclusive. She however conceded that she lived far from where the deceased resided.
13. Fredrick Gitonga (PW3) also testified and supported the Applicant's claim that she buried her child within the estate in this cause when the child passed on. He further stated that the Respondent participated in the burial ceremony.
14. The Applicant in her written submissions has contended that the destruction of her house through arson was a well calculated move to disinherit her.
15. She has faulted the affidavits filed by Eustace Njeru and Dorothy Murangiri contending that they were not properly stamped or filed.
16. She has termed the Respondent opposition to her application as mere denials and termed the evidence tendered by the Area Chief as biased. She insists that the lower court lacked the monetary jurisdiction to entertain the matter.
17. On the other hand the Respondents have opposed this application. According to the Petitioner/Administrator the deceased left behind three sons only. He has further deposed that their mother, the deceased herein, was a single mother and that the Applicant is a total stranger to the deceased.
18. The 1<sup>st</sup> Respondent has conceded that Dorothy Ciacukuru Murangiri is a daughter to the deceased and their eldest sister. He has alleged that the Applicant is a stranger who had sued the deceased via Magumoni Land Disputes Tribunal and that the deceased denied categorically the Applicant's claim on her land.
19. The Respondents aver that the Applicant has not proved that she was married to the late Erastus and that all the sons of the deceased have the sir name Njeru unlike Erastus who used a different name. They claim that the said Erastus worked for the deceased as a herds boy in 1970s for five years and thereafter left. They claim that the said Erastus used to visit once in a while for casual work and that when he lost a child he requested for a place to bury his child which request was allowed by the deceased.
20. The Petitioner/Respondent (DW1) in his evidence told this court that they did not know where Erastus Mwalimu came from. He stated that he knew the late Erastus as a casual worker employed by her late mother (deceased) to herd livestock in the 1970s. He conceded that the photo exhibited by the Applicant as evidence of burial of her child was taken from their home which is within the only property forming the estate herein.
21. Dorothy Ciacukuru (DW2) testified and told this court that she was the eldest child to the deceased. She stated that they took the name Njeru from their maternal grandfather. She added she was married in 1964 and that she used to visit her late mother the deceased herein from time to time and that during one of the visits she met one Erastus and that her mother informed her that she had hired him as a herds boy. She denied the Applicant's claim that Erastus was buried in the estate.
22. Eustace Kigumba Njeru (DW3) a brother to the deceased testified and disowned the Applicant's claim that Erastus was a son to the deceased. He claimed that as brother to the deceased he knew her children well and that he does not know the said Erastus nor the Applicant herein.

23. Henry Ngai Rungaka, the Area Chief summoned by this court to shed light on the Appellant claims testified and confirmed being the author of the introductory letter dated 26<sup>th</sup> September 2008 herein. He denied knowledge of Erastus Mwalimu as a son of the deceased. He told this court that he only knew four children, being three sons he named and a daughter he omitted in his introductory letter claiming that the daughter of the deceased expressed no interest in the estate.

24. In their written submissions the Respondent's have pointed out that the Applicant failed to call any clan member to prove her claims. They assert that the late Erastus Mwalimu did not use the name '*Njeru*' which is used by all the sons of the deceased pointing out that the name Njeru was taken from their grandfather.

25. They argue that if the late Erastus Mwalimu died on 19<sup>th</sup> November 2003 aged 43 years he was born in 1960 which is the year Robert Njoka Njeru was born and that the two were not twins which according to them shows that Erastus is not a son to the deceased. The Respondents further contend that the Applicant has not established that she was married to the late Erastus Mwalimu and that she should not be allowed to take advantage of the good nature of the deceased herein who allowed her to bury her child in the estate. They contend that there is no evidence presented showing that the Applicant ever resided on the estate.

26. This court has considered this application and the evidence presented. I have considered the response made and the evidence in rebuttal by the Respondents.

27. The Applicant has invoked the provisions of **Section 76 Law of Succession Act** in this application and **Section 76** outlines clearly grounds upon which this court can either be moved to revoke a grant or move on its own motion to do the same. The law provides as follows:

*" A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either or 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 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....."*

30. The main ground relied by the Applicant is that the Respondents concealed a material fact which in her view is the fact that the late Erastus Mwalimu was a son to the deceased and since she was married to him she should have been considered as a dependant and notified of the petition for letters of administration.

31. It is trite that whoever alleges has the burden of proof. The burden of proof in this application lay with the applicant and she had the burden to prove on a balance of probabilities that she is a dependant or a beneficiary of the deceased which would have obligated the petition to involve her pursuant to the legal requirements under **Section 51 (g) Law of Succession Act** and **Rule 26(2) Probate and Administration Rules** that requires a petitioner to involve all the dependants when petitioning for letters of administration.

32. The Applicant asserts that she was a wife of one Erastus Mwalimu. She has however not tendered any evidence to that effect. The only document she has exhibited in this application in relation to a death certificate with the name "*Erastus Njagi Mwakimu*". The Applicant in her affidavit in support of her application sworn on 16<sup>th</sup> July 2018 that her late husband was known as "*Erastus Njagi Njeru*" pegging the question whether her late husband was also known as 'Erastus Njagi Njeru' or 'Erastus Njagi Mwalimu' or 'Erastuas Njagi Mwakimu' as reflected on the death certificate. The Applicant did not clarify whether her late husband also had alias names. She also failed to show that she had the legal capacity to sue or claim on behalf of her late husband.

33. The Applicant claims to have buried her husband in the estate or within the estate of the deceased herein but there was no burial permit tendered to establish or prove that fact. The picture exhibited as evidence of the site her husband was buried in my view is not sufficient to prove that fact. In any event evidence of burial perse without any other evidence proving dependency is not sufficient to establish dependency under **Section 29 of Law of Succession Act**. A party claiming dependency must either prove paternity/maternity or show that the deceased immediately prior to his/her demise looked after him/her.

34. In this matter evidence that the Applicant was related to the deceased by virtue of marriage to a son of the deceased is negated by the Respondents' claim that the applicant had sued the deceased during her life time in Land Disputes Tribunal claiming ownership of the estate. This clearly shows that the deceased herself disapproved her and her claims that is why she took the action against her. Although the Respondent did not inform the court the outcome of the dispute at the Land Disputes Tribunal, what is apparent is that the Applicant had issues related to claims over land with the deceased during her lifetime which issues are better canvassed in a court seized with the requisite jurisdiction which is Environment and Land Court rather than this court.

35. The Applicant has claimed that the deceased allowed her to bury her child in the estate which fact the Respondent claim was an act of Charity. This court finds that the fact that the deceased may have allowed the Applicant to bury her child in the land forming the estate does not amount to prove of dependency. The evidence tendered before this court in respect to Erastus Njagi '*Mwalimu*' or Mwakimu points to one and only conclusion. The late Erastus Mwalimu was certainly not a son of the deceased. The fact that the sons of the

deceased took the name "**Njeru**" which name was taken from the maternal grandfather because the deceased was unmarried shows that the Applicant probably was not a brother to the Respondents herein. I am also persuaded by the Respondent's argument regarding the fact that the deceased from the death certificate appears to have been born in 1960 the same year, the 3<sup>rd</sup> Respondent Robert Njoka Njeru was born as demonstrated by his Identity Card exhibited in affidavit sworn on 1<sup>st</sup> October 2018 by the 1<sup>st</sup> Respondent. The Applicant has not claimed that her husband was a twin brother to the 3<sup>rd</sup> Respondent. In the foregoing I find that the Applicant has failed to prove that the said Erastus Njagi Mwalimu was a son of the deceased or even the fact that he was a dependant. She has failed to prove that she was married to Erastus Mwalimu

37. The Applicant claim that the lower court lacked monetary jurisdiction to entertain the cause given that the estate was beyond the monetary jurisdiction of that court. This fact has not been controverted by the Respondents perhaps because in the Petitioner's own account or declaration the estate was estimated at **Kshs.300,000** when the petition was lodged in the lower court on 22<sup>nd</sup> October 2008. Under the provision of **Section 49 of Law of Succession Act** (now repealed) the monetary jurisdiction of the lower court was capped at Kshs.100,000/-. It is clear therefore that the grant was issued in that court due to some inadvertence. The cause should have been filed in the High Court. That is the sole ground that this court is bound even on its own motion under **Section 76 Law of Succession Act** to revoke the grant. The revocation of grant however does not mean this court finds that the Applicant's claim of dependency has been proved. It has not. The grant issued on 28<sup>th</sup> September 2009 and confirmed that it was issued by a court bereft of jurisdiction. The same is hereby revoked.

I will exercise my discretion under **Section 55 of Law of Succession Act** and appoint **PHARES GITARI NJERU** to be the administrator of the estate of the late **PELILA NGIGE NJERU**. He is hereby granted leave to apply for confirmation of grant before expiry of the Statutory period of six months due to the age of the cause.

**Dated, signed and delivered at Chuka this 13<sup>th</sup> day of February 2020.**

**R. K. LIMO**

**JUDGE**

**13/2/2020**

Ruling dated, signed and delivered in the open court in the presence of Kirimi for Applicant and Kariuki holding brief for Kijaru for the Respondent.

**R.K. LIMO**

**JUDGE**

**13/2/2020**