REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 390 OF 2010

(IN THE MATTER OF THE ESTATE OF MUCHANGI S/O NGOTHO)

LAWRENCE WACHIRA MUGO...APPLICANT

-VERSUS-

MICHAEL MUCHANGI NDUATI..............................1ST RESPONDENT

RACEAL WAMBUI MUCHANGI...............................2ND RESPONDENT

RULING

This ruling is delivered in rather unfamiliar and unprecedented circumstances. The entire world has been hit by a respiratory disease known as COVID-19 or corona virus. It is viral in nature spreading mainly through human contact although, lately, it has been suggested that it could be airborne as well. So far, it has no known cure but its spread can be contained if human contact or interactions can be restricted. Measures have been taken the world over towards this end in what is now popularly referred to as 'social distancing'. It is for this reason that this ruling is delivered via skype communication or video conferencing.

The deceased, Muchangi Ngotho also known as Muchangi son of Ngotho died intestate on 20 November 1998. He hailed from Iriaini location and was domiciled in the Republic of Kenya.

A grant of letters of administration intestate of the deceased's estate was confirmed on 29 July 2011 after a protracted dispute between three of his children, two of whom are named as the respondents herein. After hearing the protest against the summons for confirmation of the grant, this honorable court delivered its ruling on 29 July 2011. In its pertinent part, it stated as follows:

> **"The land in question stated to measure approximately 5.7 acres. I will dismiss the protest and confirm the grant as proposed by the applicant save that the protestor shall have life interest in 1.9 acres after which interest shall revert to his brother or their successors to share in equal measure. Each party to meet his or her costs."**

The protagonists then were the two respondents; at that time, the 1st respondent was the applicant in the summons for confirmation of grant while the 2nd respondent was the protestor.

In the summons, the 1st respondent had proposed to distribute the deceased's estate comprising Title No Iriaini/Kiaguthu/148 measuring approximately 5.7 acres as follows:

> **"Michael Ngotho Muchangi-3 acres**
>
> **Ephraim Ngatia Muchangi-2.7 acres**
>
> **Rachael Wambui Muchangi to have a life interest"**

Nothing was said of the deceased's other five children. Be that as it may, the grant was confirmed, more or less, in the terms proposed by the applicant except that Rachael Wambui Muchangi's share was defined as 1.9 acres subject to life interest.

By a summons for revocation of grant dated 9 November 2012, Ephraim Nduati Muchangi sought to have the grant revoked on the ground that it has become useless and inoperative through subsequent circumstances. It is this summons that is the subject of this ruling.

In the affidavit in support of the summons, Ephraim swore that it was impracticable to distribute the estate in terms proposed by the 1st respondent and endorsed by the court in the certificate of confirmation of grant dated 29 July 2011. To be precise, if Michael Ngotho Muchangi had been given 3 acres of the land comprising the estate while Ephraim was given the remaining 2.7 acres, there was nothing left for Rachael Wambui Muchangi; simply put, the 1.9 acres purportedly allocated to Rachael is non-existent.

Rachael herself swore a replying affidavit effectively supporting the summons; she insists that the estate should be shared equally between herself and her two brothers. As a daughter of the deceased, she urged that her share of the estate cannot be subject to life interest.

In response to the summons, the 1st respondent filed a replying in which he reiterated the events leading to the confirmation of the grant. He added that no appeal was preferred against the ruling of this court confirming the grant.

Both Ephraim and the 1st respondent eventually died before the present summons could be disposed; Ephraim was eventually substituted in the proceedings by the present applicant while the 1st respondent was substituted by Grace Wambui Ngotho.

In their submissions, both parties appear to have raised what I suppose are valid concerns; as far as the applicant is concerned, I agree that it is not practical to distribute the estate in terms of the confirmed grant; it appears, in my humble view, ambiguous. Secondly, those terms appear to run contra to section 38 of the Act which is categorical that:

> **Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.**

It follows that the children's share in a deceased's estate is absolute and cannot be subjected to any condition, not least, a life interest.

Thus, apart from the impracticability of executing the confirmation order, the proposed scheme of distribution of the estate and which, as noted, was confirmed by his court, does not find favour with the law.

The only problem with the applicant's summons is that, as much as he has brought it under section 76 of the Act which caters for nullification or revocation of grants, he is effectively asking this court to upset its own decision.

In my estimation, there is no problem, and none ought to arise from the making of the grant per se; the grant by itself has always been valid, ab initio. The problem arises from the confirmation order and in particular, the scheme for distribution of the deceased's estate which, as noted, is impracticable and is also contrary to the law, in any event.

The grant cannot be said to have become useless and inoperative through subsequent circumstances, in these circumstances; to the contrary, it is still useful and operative if the confirmation proceedings and the confirmation order could be put right.

I would conclude by reiterating that this court cannot exercise appellate jurisdiction over its own decisions and to this extent, I agree with the respondent's learned counsel that the appropriate course that the applicant ought to have taken is to appeal against the decision of this court delivered on 29 July 2011. He certainly cannot impeach it under the camouflage of a summons for revocation of grant.

The upshot is that the applicant's summons for revocation or nullification of grant dated 9 November 2012 is dismissed; I make no orders as to costs. It is so ordered.

Dated, signed and delivered on this 9th day of April,2020

Ngaah Jairus

JUDGE