



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

SUCCESSION CASE NO. 68 OF 2017

IN THE MATTER OF THE ESTATE OF GITAU WAIME GITHU (DECEASED)

NJENGA GITAU.....APPLICANT

VERSUS

LUCIA WANGUI GITAU.....RESPONDENT

RULING

1. For determination is the Summons for Revocation of Grant filed on 23rd June, 2014 and expressed to be brought under Section 76 of the Law of Succession Act and Rule 44(1) of the Probate and Administration Rules. The Applicant seeks that the grant made to **LUCIA WANGUI GITAU** on 20th January 1998 in Kiambu Chief Magistrate's Court Succession Cause No. 373 of 1997 be revoked.

2. The summons is based on grounds that the proceedings to obtain the grant were defective and that the grant was obtained fraudulently by means of untrue allegations. The application is supported by the affidavit of **NJENGA GITAU**, the Applicant herein. He deposed that he was not served with the Petition for grant to enable him respond and only became aware of the matter when he was evicted from Land Parcel No. KIAMBU/NGOLIBA 'A' /90 in 2011 which parcel formed part of the estate of the deceased herein who was his father. He deposed that the Respondent failed to disclose the existence of other beneficiaries who are entitled to share in the distribution of the estate

3. **LUCIA WANGUI GITAU** the Respondent herein and the deceased's second wife filed a replying affidavit in opposition to the application. She deposed that she filed Succession Cause No. 373 of 1997 at the CM's Court Kiambu with the consent of all the beneficiaries including the Applicant herein and that the estate was shared as envisaged by the confirmed grant. She contended that she has since sold her share to third parties and that the other beneficiaries including the Applicant herein also disposed of their respective shares. She urged the court to dismiss the summons for revocation of grant.

4. A further affidavit was filed by **STEPHEN KAHONGE GAKI** (Kahonge) on 30th September, 2014. He deposed that on or about 20th February, 2007 he entered into sale agreement with the Applicant herein for the sale of 1 acre from the suit land for Kshs. 145,000/= which sale agreement was signed by the Applicant herein and all the other beneficiaries thereby consenting to the said sale. He deposed that he subsequently made two more purchases from the beneficiaries of the deceased's estate and he obtained title deeds and has developed the purchased assets. He contended that the Applicant's claim is fraudulent and should be dismissed. He annexed to his affidavit copies of title deeds in proof of his assertions.

5. The court directed that the Summons be heard by way of viva voce evidence based on affidavits by parties. Testifying as **PW1** the Applicant adopted his affidavit as his evidence -in -chief. During cross-examination he stated that he learned about the succession cause from the Respondent. He contended that he distributed his house's 2 3/4 acres amongst his siblings. He further claimed that he never sold his portion of the land to Kahonge and denied entering into a sale agreement with any person.

6. **LUCIA WANGUI (RW1)** also adopted her affidavit material and stated in cross examination that she filed and prosecuted the succession cause with the consent and participation of all beneficiaries. She stated that the deceased had already distributed the suit property equally between his two houses prior to death and that the Applicants and his siblings later sold their portion to Kahonge. She claimed that she sold her parcel of land and moved away due to harassment at the hands of the Applicant.

7. **STEPHEN KAHONGE GAKI (RW2)** also relied on his further affidavit. He stated under cross-examination that he purchased the parcels of land stated in his affidavit from the Applicant and his brothers and obtained consent from the Land Control Board. Subsequently, parties were directed to file their written submissions but none of the parties found it necessary to file. The parties did not file any submissions.

8. The court has considered the application to revoke grant and the evidence of the respective parties. There is no dispute that the deceased

herein died possessed of one asset, namely, land parcel LR NO. KIAMBU/NGOLIBA A/90 measuring 2.02 hectares (suit property). A perusal of the record of the cause in the lower court reveals the following.

9. The deceased was a polygamous man and had two wives in his lifetime the youngest being Lucia Wangui Gitau (hereafter Lucia) who survived him. The deceased was also survived by children of his first wife Hannah Mwhiki who had predeceased him. These were Njenga Gitau (the Applicant), Fredrick Ndichu Githu (or Gitau), Samuel Kinyanjui Gitau and Samson Chege Gitau. The surviving widow Lucia had no children. These beneficiaries were listed in the Petition for grant filed by Lucia on 3rd November 1997. On 22nd December, 1997 after the publication of the requisite notice in the Kenya Gazette, Lucia filed an application seeking that the grant of letters of administration be issued to her as the other beneficiaries had refused to sign the necessary consents. According to an affidavit of service filed into court on 15th January 1998, the application was served in person on the Applicant herein and his brother Samuel Kinyanjui, and upon their brother Samson Chege Gitau through them (acknowledged through endorsements on the rear of the process) and upon Fredrick Ndichu Gitau, another brother through his son named as Ndichu.

10. Thus, when the matter came up before **Muchemi SPM** (as she then was) on 20.1.98, the grant was issued to the Applicant as the application had not been opposed. The record of the day's proceedings shows that neither the Applicant nor his siblings attended the court. Three days later however, on 23.1.98 Samuel Kinyanjui Gitau filed a caveat. Thus, when the application to confirm the grant, filed on 21st July 1998 was set down for hearing on 25th August 1998, a notice was sent to him by post at his stated postal address.

11. On 22.9.1998 the court adjourned the summons to confirm grant observing that, "*All the heirs (are) not in court*". The court directed that all the beneficiaries be present at the next hearing. There is no evidence on record that the summons to confirm grant or hearing notice was subsequently served on the beneficiaries and neither does the record of proceedings on 7th October 1998 indicate the appearance of the beneficiaries as earlier ordered. The grant was however confirmed on terms that the sole land asset be shared equally between Lucia on the one hand and the four sons of the deceased on the other. A certificate of confirmation of grant issued on the same date.

12. The summons for revocation brought by the Applicant herein came some 16 years later. He claims to have been unaware of the succession cause until his eviction from the suit property in January 2011. Lucia asserts that all the beneficiaries participated in the cause. Section 76 of the Law of Succession Act provides 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) ..."

13. According to the affidavit of the Applicant, Lucia failed to disclose all the beneficiaries to the estate or to involve them in the Petition. Three female beneficiaries namely Gathoni Gitau, Njoki Gitau and Wanjiru Gitau, presumably daughters of the deceased's widow Hannah Mwhiki are named by the Applicant among beneficiaries not disclosed. None of them participated in the summons. Nor is there any evidence to link them with the deceased as the chief's letter, dated 3rd January 1997 (filed with the Petition on November 1992) listed only four sons and Lucia as surviving the deceased.

14. The assertions by Lucia in her affidavit and oral evidence to the effect that all the survivors or beneficiaries were involved in the Petition for grant are rebutted by the record herein. The filing the application of 22.12.97 was necessitated by the stated fact that other beneficiaries including the Applicant and his brothers had refused to sign requisite consents. True, the application was served on the four sons of the deceased but only one filed a caveat. The others including the Applicant took no steps. During cross-examination **PW1** stated that;

"Succession cause was brought by my stepmother. Yes, I was told about succession cause. I want my stepmother to get her portion – 2¾ acres as per my father's wishes. Our family (Hannah Mwhiki's) was to receive 2¾ acres. That is the correct mode of distribution. I distributed the land as follows:

Ndichu,

Kinyanjui,

Chege,

Myself,

We did it informally and did not involve surveyor."

15. The Applicant stridently denied having sold his share of the suit land to Kahonge and it appeared that the Applicant's key motivation in bringing the summons was the desire to reverse the apparent sale of the parcels of land inherited from his father by himself and his brothers to Kahonge, an in-law having married the Applicant's niece. So that from the Applicant's own evidence, the mode of distribution adopted by the court in confirming the grant is consistent with his father's wishes and he does not contest it. The fact that neither the Applicant nor his brothers attended court on the date of the hearing of the application to confirm the grant, or that they did not consent therefor appears to lose any significance in the circumstances.

16. Reviewing the entire proceedings in light of the evidence tendered by the parties, the court is of the view that even though the succession proceedings in the lower were not perfect, the Applicant and his brothers had notice thereof and did not take steps to protect their interests, and that in any event, the final outcome is endorsed by the Applicant himself. As observed, it seems that the application herein was prompted by the eviction of the Applicant from the suit property pursuant to the alleged sale by the Applicant and his siblings of their shares of the asset, to Kahonge. This cause is not the proper forum in which to challenge the title held by Kahonge in that regard. As it turns out, Lucia has already allegedly sold her undisputed share of the property. Nothing would be achieved by revoking the grant to Lucia at this late stage. The application filed on 23rd June 2014 is therefore without merit and will be dismissed with costs.

SIGNED AND DELIVERED ELECTRONICALLY ON THIS 16TH DAY OF JULY, 2020.

C. MEOLI

JUDGE