



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 579 OF 2008

IN THE MATTER OF THE ESTATE OF M'IMUNYA ITUNGA NCORO (DECEASED)

MARIA NKIO M'IMUNYA.....PETITIONER

VERSUS

ROSE KANGAI.....APPLICANT/ OBJECTOR

RULING

1. Before me is a summons for revocation of grant dated 9/7/2014 and which is expressed to be brought pursuant to Section 68 of the land registration act. The application seeks for two significant orders, namely: -

- a. **Inhibition on L.R. NO. Tigania/Thananga/1531-1536 pending the hearing and determination of the cause; and**
- b. **Revocation of the grant confirmed on 9/12/2010.**

2. The application was based on the grounds on the face of it and in the supporting affidavit of Rose Kangai. The deponent claimed that the deceased herein was her husband and the petitioner her co-wife. the deceased was survived by the following dependants: -

1st house

Rose Kangai – Widow

Seberina Thirindi – daughter

Sabina Kalayu – daughter

2nd house

Maria Nkio – Widow

Moses Mwingirwa – Son

Jane Nkatha – Daughter

Josphine Nkirote – Daughter

Beatrice Ncekei – Daughter

Marion Kanario – Daughter

3. It was her assertion that she resides on land parcel No. Tigania/Thanaga/762 together with their children. According to the applicant following the death of the deceased herein she requested for a family meeting with the petitioner and their children so that they could agree on distribution of the estate. In 2009 she instituted Meru High Court Succession Cause No. 135 B of 2009 with a view of distributing the deceased's estate. She applied for confirmation of grant and when the matter came up for confirmation on 8/4/2014 the petitioners advocate

alluded to the existence of another succession cause in respect of the deceased's estate.

4. She later found out that the petitioner had secretly filed this suit and found that the petitioner had failed to disclose the existence of a 2nd house. Additionally she found out that the petitioner had since sub divided TIGANIA/THANANGA/762 into TIGANIAN/THANANGA/1531-1536.

5. The application was opposed by the replying affidavit of Maria Nkio M'Imunya who contended that she was the only wife of the deceased and that the applicant was previously the deceased wife because they divorced in the 1960's. The deceased was the owner of LR Tigania/Thananga/27 which was subdivided into Tigania/thanaga/760,761 and 762 which were transferred to Joseph Mutua M'Imunya, Moses Mwingiria and the deceased respectively.

Submissions

6. The matter was canvassed by way of written submissions where that applicant argued that the petitioner left out the objector from the list of beneficiaries and failed to disclose that the deceased had two houses. The petitioner misled the court into believing that the children of the deceased had consented to her proposed mode of distribution even though they did not get 'a share of the estate. In support they quoted **Francis Mutua M'Arimbi v. Cyprian Murori M'Arimi [2016] eKLR** where the petitioner forged the signatures of some beneficiaries. The court found that in such circumstances, the revocation of grant was merited under the provisions of section 76 (a) (b) & (c) of the Law of Succession Act.

7. It was the applicants submission that they were protected by the provisions of section 3 of the Law of succession Act that defines a wife to include a wife who is separated from her husband and the terms :husband' and 'spouse', 'widow' and 'widower' shall have corresponding meaning.

8. The applicant also submitted that the petitioner proceeded to acquire the shares in Barclays bank wholesomely and opined that the shares too should be shared equally between the petitioner and the objector.

9. The petitioner on the other hand submitted that the deceased divorced the objector in the 1960's. Thereafter the deceased and petitioner lived as husband and wife on LR No. Tigania/Thananga/762 until 13/7/2008 when the deceased passed away. The objector therefore ceased to be the deceased's wife. Consequently, by virtue of their marriage the petitioner is the only wife of the deceased and hers is the only household and therefore the estate should be distributed according 35 (1) of the Law of Succession Act.

Analysis and Determination

10. Having considered the application, affidavits, statements, submissions and the record in its entirety the issue for determination is: -

a. Whether or not to revoke and or annul the grant of letters of administration intestate issued to the petitioner on 9/12/2010 and

b. Whether I should issue an order of inhibition on Tigania/Thananga/1531-1536

11. **Section 76** of the **Law of Succession Act CAP 160** of the Laws of Kenya governs revocation or annulment of grants and it sets out circumstances in which a Grant can be revoked or annulled. Of significance in light of the arguments advance is whether:-

(a) The proceedings to obtain the grant were defective in substance; or

(b) 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; or

(c) 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.

12. In the case of **SAMUEL WAFULA WASIKE vs. HUDSON SIMIYU WAFULA CA NO.161 OF 1993** (Kwach, Omolo and Tunoi JJA):-

"A grant obtained on the strength of false claims, without obtaining the consent of persons who had prior right to the grant and on the basis of facts concealed from the court, is liable to revocation."

13. According to the petitioner the objector/applicant is not a dependent of the deceased because they were divorced in the 1960's. On this basis, she excluded the objector from the proceedings herein. Section 29 of the Law of Succession Act provides who the dependants of the estate of a deceased person are. The section states that:

"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.”

14. Whereas a former wife is listed as a dependant in law, however, the petitioner has stated that the objector and the deceased were divorced and the objector got married to another person. These allegations were not denied by the objector. In any event, such are important and substantial matters in applications such as this and should be taken into account. I also do note that the objector filed other proceedings when these proceedings were pending in court. Good faith should have reigned in the said proceedings. That is not all; I further do note that, contrary to the allegations by the objector, the petitioner listed the two daughters of the objector as beneficiaries of the estate. Therefore, she did not conceal the existence of the first house.

15. Accordingly, I find that the objector has not established that the grant herein was obtained fraudulently or through concealment of material facts. And, I also do note that the allegations of forgery were not proved to the required standard. Her request for revocation of grant therefore fails.

16. Be that as it may, I do note that the petitioner is to hold the estate in trust of all the beneficiaries of the estate. This was in accordance with her proposal in paragraph 4 of the affidavit in support of Summons for Confirmation of Grant. Of greater concern is that, eleven (11) beneficiaries of the estate were listed in paragraph 2 of the affidavit of the petitioner in support of Summons for Confirmation of grant. Accordingly, these are the beneficiaries for whom the petitioner holds the estate in trust. But, the petitioner sought to rectify the grant and identified only some of the beneficiaries to be the persons she intends to hold the property for. The amendment does not reflect the list of beneficiaries she provided in support of confirmation of grant. This move is contrary to the grant and smirks of mischief. These disclosures of beneficiaries have led the court to deny the application for revocation of grant. I do not understand how the petitioner can again try to take that back in making arguments that hers is the only house for purposes of distribution of the estate. Now therefore, whereas I rejected the quest for revocation of the grant herein, this court must always seek the path of justice; and I order the certificate of confirmation of the grant to be amended to reflect all the beneficiaries as listed in paragraph 2 of the affidavit in support of confirmation of the grant. Any amendment thereof shall have to be done with the consent of persons (or their representatives or guardians) named in the certificate including Seberina Thirindi and Sabina Kalayu. These orders are made in the interest of justice.

17. Given the observations I have made above, if, the properties herein, to wit, Land Parcel numbers Tigania/Thananga/1531-1536 are not registered in accordance with the grant herein, parties may apply for appropriate orders. As this is a family matter, I make no order as to costs.

Dated, signed and delivered at Meru this 12th day of October 2020

F. GIKONYO

JUDGE

Representation

M/s Nyaga for objector

Kiogora for petitioner – M/s Wanjohi holding brief.

F. GIKONYO

JUDGE