



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 288 OF 2013

FORMERLY RUNYENJES SUCCESSION CAUSE NO. 87 OF 2009

IN THE MATTER OF THE ESTATE OF NTHAKANIO M'NGUNGU (DECEASED)

MARY ROSE NAMU.....1ST APPLICANT

ELIZABETH CIUNGU.....2ND APPLICANT

VERSUS

KITHAKA NTHAKANIO.....PETITIONER/RESPONDENT

R U L I N G

A. Introduction

1. This is a ruling on summons for revocation of grant dated 19th November, 2017 on grounds that the proceedings were defective in substance and that the respondent/administrator has failed to proceed with administration of the estate diligently.
2. The application is supported by grounds contained in the affidavit of the 1st applicant Mary Rose Namu. It is deposed that the applicants are the daughters of the deceased by his first wife while the respondent is a son of the second wife. It was further stated that at the time of confirmation of grant the family had not agreed on the distribution of the estate.
3. At the time of the deceased's death, some beneficiaries had already occupied and developed their portions on LR. Kagaari/Weru/505. It was agreed in a family meeting that the beneficiaries were to inherit the portions each had developed. It was claimed that the respondent failed to involve the applicants of the confirmation date and he proceeded to have the confirmation in his favour.
4. The applicants further state that the grant was obtained by fraudulent means and concealment of facts material to the case. It is argued, that the distribution as it is in the grant will be prejudicial to the beneficiaries for they are likely to lose their developments on their respective portions to the respondent.
5. The respondent opposed the application on grounds in his replying affidavit. He admits the relationship between him and the applicants that they are brother and step-sisters. It is deposed that the family agreed on the mode of distribution and that the applicants were present in court during the confirmation of the grant but did not raise any objection.
6. It is denied that the beneficiaries had extensively developed their parcels before the grant was confirmed. That the respondent said that he sub-divided LR. Kagaari/Weru/505 into two portions of 17 and 11 acres respectively one for each house of the deceased. He further stated that the applicants have refused to meet the transmission charges for their respective parcels and that when the funds are availed the respondent is ready to execute the grant.
7. I have perused the evidence of the parties, their submissions and perused the court record.
8. In this cause, the deceased died intestate on 22/11/1971. The petitioner/respondent petitioned for letters of administration intestate which were issued to him on 29/10/2009 in Runyenjes Succession Cause No. 87 of 2009. The matter was later brought to the High Court on grounds that it was valued at |Kshs. 5,000,000/= which was way above the jurisdiction of the Magistrate's court. This move was initiated by three protesters who provided a valuation report of LR. Kagaari/Weru/505.
9. The grant was confirmed by this court on 28/02/2017 distributing the land among the beneficiaries as follows: -

LR. Kagaari/Weru/505

1. Elizabeth Ciungu - 3.75 Acres
2. Alexander Njue - 3.75 Acres
3. Peter Gakono - 3.75 Acres
4. Mary Rose Wanjiru - 3.75 Acres
5. Robert Thathi - 3.00 Acres
6. Paul Kithaka)
7. Mercy Rose Wanjuki)
8. Gatavi Jane) 12 Acres
9. Justina Marigu)

10. Preceding the confirmation of grant, the parties filed a consent dated 16th January, 2017 in which the distribution of the only asset of the deceased Kagaari/Weru/505 was agreed based on the two houses of the deceased and the number of children in each house.

11. The land was shared equally between the two houses with each house getting 15 acres which were distributed to the children in the same consent filed on 01/02/2017. This consent was signed by all the nine (9) beneficiaries and adopted as a court order on 21/02/2017. The respondent was represented by Messrs D. N. Gitonga & Co. Advocates while Messrs Morris Njage & Co. represented the three protesters. The two applicants were among the beneficiaries who signed the consent.

12. Bearing in mind that the parties entered into a consent for confirmation of grant which was signed by all the beneficiaries including the applicants, I find no legal or factual basis for the applicants to state that they were not informed of the date of confirmation or that they did not participate in the proceedings. The grant was confirmed on 21/02/2017 and this application was filed towards the same year which was about nine (9) months later.

13. The applicants complain of dissatisfaction that they were being denied their respective developments on parcels they say were in their possession and are extensively developed. The respondent told the court that the land had no developments and that the applicants were cultivating the whole parcel on their own. As such, they are unhappy with the sub-division.

14. I note that the applicants presented no evidence to this court of any developments made on the land. The deceased died in 1971 by which time the applicants claim to have taken possession of some portions and started developing. This information is not correct in that there is a valuation report of the land which states in part: -

The property is unoccupied but cultivated by one of the brothers.

15. "One of the brothers" means one of the sons of the deceased since it is Alexander J. Nyaga who instructed the valuer to conduct the valuation. The report is dated 1st July, 2010. At that time, it was one of the sons of the deceased who was cultivating the land since no daughter was mentioned in the report.

16. The applicants must have started cultivating after the valuation report was filed in court. I believe the respondent that except the mere cultivation of the land, there is no tangible development on the land as claimed. Even assuming there was development which has not been shown, the applicants knew that the land was still in the name of the deceased and was yet to be distributed. Any development before distribution and done many years after the death of the deceased, would have been done at the applicants' risk.

17. It is alleged that the applicants were not involved in the distribution of the land and that the respondent did it on his own and for his own benefit.

18. As I have said earlier, the distribution was done by consent of the beneficiaries and consent filed by their counsels who were in court. The distribution was done fairly to all the beneficiaries as shown by the grant.

19. I am of the considered opinion that the applicants have failed to demonstrate that they were not involved in the distribution and that the grant was obtained by means of fraud or by concealment of facts material to the case. The application does not pass the test of **Section 76 of the Succession Act**.

20. I find no merit in the application and I dismiss it with no order as to costs.

21. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF JANUARY, 2019.

F. MUCHEMI

JUDGE

in the presence of: -

Mr. Wachira for Muthoni for respondent/petitioner

Ms. Maroko for Migwi for the applicants