



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO.11 OF 2008

ROSE GATHONI GITHINJI.....1ST APPLICANT

LUCY WANDIA MUTHONI.....2ND APPLICANT

-VERSUS-

JOHN WACHIRA GITHINJI.....ADMINISTRATOR/1ST RESPONDENT

PAULINE MUTHONI NDERITU.....2ND RESPONDENT

JUDGMENT

The 1st respondent petitioned for and was granted letters of administration for the estate of the late Githinji Kiguta who died on 30 April, 2000; prior to his death the deceased was domiciled in the Republic Kenya and his last known place of residence was Ruirie in Nyeri county.

The 1st respondent petitioned for grant of letters of administration in his capacity as the deceased's son and in the affidavit in support of the petition, he named the following other persons as having survived the deceased:

1. Mary Wambui Gichuki (daughter)
2. Wandia Ndiritu (daughter)
3. Gathoni Mwangi (daughter)

The grant was made to him on 26 August 2008 and a year later, more particularly on 24 July, 2009 the same is alleged to have been confirmed. According to the schedule to the certificate of confirmation of grant, the land known as Title No. Gatarakwa/Gatarakwa/Block 111/719 which is the only asset comprising the deceased's estate devolved upon the 1st respondent himself and the 2nd respondent.

By a summons for revocation of grant dated 18 May 2017, the applicants sought to have the grant revoked on the grounds that the proceedings to obtain the grant were defective in substance; that the grant was obtained fraudulently by the making of a false statement or by concealment from the court something material to the case; and, the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

The gist of the affidavit in support of the summons was that the 1st respondent isolated them from the succession cause and ultimately took the entire estate and shared it with the 2nd respondent who is not related to the deceased in any way.

Neither of the respondents filed any sort of response to summons and most importantly, the depositions in the applicants' affidavit were thus uncontroverted.

As matter of fact, when the summons came up for hearing, the 1st respondent admitted that the applicants were his sisters but he did not see their role in the succession proceedings since his late father had left the land in issue to him to the exclusion of the rest of his children; he vowed never to cede an inch of that land to any of his sisters.

Though he did not mention it in the affidavit in support of the petition, it was the 1st respondent's evidence that his late father had as many as twelve children out of whom he could only name eight. He could not remember the rest of names. Of the eight children he was able to name, four were said to be deceased.

He further admitted that he sold one acre of the land to cater for succession expenses. The purchaser turned out to be second respondent; she, on her part, confirmed in her evidence that she was not related to the deceased but that she bought from the 1st respondent an acre of the deceased's land at Kshs. 70,000/=; the transaction took place in 2008 and since then, she has settled on the land.

With the 1st respondent's admission that he deliberately omitted some of the deceased's children from the petition for grant of letters of administration, and in the absence of any evidence to controvert the applicants' assertion that they were not only ignored in the petition for grant of letters but also that their signatures purporting to signify their consent to the appointment of the 1st respondent as the administrator of the deceased's estate were forged, there is no much dispute that in terms of section 76 of the Law of Succession Act, the applicants have satisfied this honourable court that the grant was illegally obtained; that section reads:

76. Revocation or annulment of grant

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) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow;
or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.

Of all the grounds upon which a grant may either be revoked or annulled in the present circumstances, none is as clear as the grounds enumerated in subsections (b) and (c) of this provision of the law; any of them would have been sufficient to have the grant revoked but it is apparent from the uncontroverted facts that the grant was not only obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case but also that it was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant.

Even if the grant had been regularly obtained, I note that though the grant is said to have been confirmed on 24 July, 2009, there is no record of confirmation proceedings on that particular date. There is therefore some merit in the applicants' contention that they were not only ignored in the process leading to the making of the grant but also that they neither participated nor consented to the confirmation of grant.

Under the proviso to section 71(2) of the Law of Succession Act, in cases of intestacy, the grant of letters of administration can only be confirmed once the court is satisfied as to the respective identities and shares of all persons beneficially entitled. It is after the confirmation that the grant specifies all such persons and their respective shares.

Rule 41(1) of the Probate and Administration Rules further elaborate what the confirmation proceedings entail and the need for the beneficiaries to be present during such proceedings; it states as follows:

41. (1) At the hearing of the application for confirmation the court shall first read out in the language or respective languages in which they appear the application, the grant, the affidavits and any written protests which have been filed and shall then hear the applicant and each protester and any other person interested, whether such persons appear personally or by advocate or by a representative

There is no record that the 1st respondent's application for confirmation of grant was heard as envisaged in this rule.

Without proof of the confirmation proceedings, it is obvious that the court could not have satisfied itself of the respective identities and shares of all the persons beneficially entitled to the deceased's estate including the applicants. It is also obvious that neither the applicant nor the respondents were heard on any affidavits or protests. It is therefore apparent that the grant was confirmed in flagrant breach of section 71(2) of the Act and rule 41 of the Probate and Administration Rules. Accordingly, the certificate of confirmation of grant dated 24 July 2009 has no foundation in law and it is a nullity. In these circumstances, I allow the applicants' summons and revoke the grant.

In view of the age of this matter I direct that the parties agree on the administrators/administratrixes of the deceased's estate within fourteen days of today's date failure of which the court shall make the necessary appointment and issue such other directions as may be necessary for

expeditious conclusion of this cause. It is so ordered.

Signed dated and delivered in open court this 17th day of May, 2019

Ngaah Jairus

JUDGE