



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**SUCCESSION CAUSE NO. 201 OF 2015**

**IN THE MATTER OF THE ESTATE OF THE LATE MWANGI**

**S/O GICHIRI alias MWANGA GICHIRI (DECEASED)**

**MARY WANJIRU MACHARIA**

**JOYCE WAMUYU MIRICHO**

**JANE MUTHONI MWANGI.....APPLICANTS**

**VERSUS**

**MARY WANGARI KAGONDU.....RESPONDENT**

**RULING**

1. The estate relates to the late **Mwangi s/o Gichiri (Deceased)** who died on the 3<sup>rd</sup> May, 1966;
2. A Grant of Letters of Administration was issued to one **Mary Wangari Kagondu ('Mary')** on the 23/06/2015 and the same was confirmed on the 21/September, 2016;
3. The applicants filed the application on the 23/07/2018 under the provisions of Section 76(a) (b) and (c) of the Law of Succession Act and all enabling provisions of the law; and they sought the following orders:
  - (i) That the Grant was obtained fraudulently by the making of a false statement and concealment of something material to the case in that the respondent/administrator failed to disclose the existence of the applicants who are grandchildren to the deceased;
  - (ii) That the Grant was obtained by means of an untrue allegation in that the petitioner failed to disclose to the court that the deceased had two (2) sons **John Kagondu (deceased)** the husband to the respondent and **Mbuthia Mwangi (deceased)** who was the father of the applicants, both had equal priority to petition for the letters and their consent was not sought;
  - (iii) That the respondent concealed the fact that the applicants had an interest in their deceased's grandfather's estate;
4. The application was premised on the grounds on the face of the application and to support their claim the applicants relied on the supporting affidavit dated the 20/06/2018 and made by ; the respondent **Mary Wangari Kagondu ('Mary')** filed her response opposing the application on the 11/12/2018;
5. Directions were taken on the 23/07/2018 that the cause be heard by way of '**viva voce**' evidence; despite having been duly served with the hearing notice the respondent failed to be in attendance on the date that was fixed for hearing and the cause proceeded in her absence; hereunder is a summary of the applicants claim;

**APPLICANT'S CASE**

6. The applicant's evidence was that the deceased herein was their grandfather and he passed on the 3/05/1966 and a death certificate was issued; that the deceased had two sons namely Mbuthia Mwangi and John Kagondu; both sons are deceased;
7. Mbuthia Mwangi was the father of the applicants and they survived him; the other son was John Kagondu (deceased) was the

respondent's husband and he was survived by the respondent and her children;

8. The respondent proceeded to petition for letters of administration without informing the applicants; the respondent never cited the applicants nor did she seek for their consent; the petition only discloses the respondent and her children who are also the grandchildren of the deceased;

9. By failing to disclose the interest of the applicants the respondent concealed to the court something material to the case; the applicants prayed that the Grant obtained on 21/09/2016 which they submit was obtained by untrue allegations of fact and concealment be revoked; and the costs be provided for;

### **ISSUES FOR DETERMINATION**

10. This court reiterates that the case proceeded in the absence of the respondent who despite having been duly served with the requisite hearing notice was not in attendance; after hearing the applicants they were directed to file written submissions; and upon hearing taking evidence of the applicants, perusing the court record and reading the written submissions this court has framed only one issue for determination which is;

(i) Whether to revoke the Grant dated the 21/09/2016;

### **ANALYSIS**

#### **Whether to revoke the Confirmed Grant;**

11. The provisions of Section 76 of the Law of Succession Act give this court the power to revoke a grant whether confirmed or not; and the section reads as follows;

#### ***“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 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.”***

12. Upon perusal of the court record this court had the occasion to read the affidavit made by the respondent in which she sought leave to be allowed to dispense with the Letter from the Chief when pursuing the letters of administration; she deposed as follows;

***“12. THAT I have several visits to the office of our area Chief to obtain the letter from the Chief but the Chief has been adamant and has insisted that I should go with all the family members whom I cannot trace***

***THAT I make and swear this affidavit in support of my application that the Honourable court may be pleased to allow me to file succession proceedings for the estate of the deceased without production of the Chief's letter.”***

13. The respondent then proceeded to petition for the letters of administration and wherein she only listed herself and her children as being the only survivors of the deceased; this was contrary to the information deposed in the affidavit she made when seeking leave of the court to dispense with the Chief's letter; she averred that she knew there were grandsons and granddaughters of the deceased but her contention was she did not know their whereabouts;

14. From this averment the respondent has conceded that she was aware that there were other family members whom she knew had a beneficial interest in the deceased's estate; and although she knew these material facts were within her knowledge she simply proceeded to apply for the letters of administration and did not disclose to the court nor list the other beneficiaries therein;

15. The record indeed demonstrates that the respondent failed to list them in the petition; the record also shows that no Citation was issued to these other beneficiaries, inclusive of the applicants, as required by the provisions set out under Rule 22(1) of the Probate and Administration Rules;

16. This court's considered view that not knowing the whereabouts of the other beneficiaries cannot be a good reason to be taken in her favour; the respondent ought to have commenced the succession proceedings by taking out a Citation and she ought to have sought leave from the court for substituted service upon them;

17. As admitted by the respondent that despite her numerous visits to the Chief he had been adamant that the other beneficiaries be present; from this statement the reason why the Chief was reluctant to issue the letter can be discerned; in that he may have been aware of her intentions to exclude the other beneficiaries; the Chief eventually issued a letter dated the 27/01/2016 to the applicants and all the beneficiaries are named therein inclusive of the respondents and her family;

18. This court reiterates that the respondent was absent at the hearing therefore the evidence of the applicants was unchallenged and uncontroverted; there is also an admission by the respondent of knowledge of the existence of the other beneficiaries;

19. Rule 26(1) of the Probate and Administration Rules provides as follows;

20. It is trite law that the respondent knowing that the applicants had an interest either as survivors, dependants or beneficiaries ought to have notified or involved them applicants at all stages and obtained their written consents or in default the respondent ought to have cited them;

21. There is absolutely no evidence on record that demonstrates that the respondent duly notified the applicants before filing the petition; neither is there any evidence that the respondent sought and failed to obtain the applicants consents; and it goes without stating the obvious that the respondent did not comply with the provisions of Rule 26 aforesaid and that the Grant was obtained by concealment from the court of material and pertinent facts relating to the applicants;

22. This court is satisfied that the applicants have demonstrated that the application satisfies the requirements as set out in Section 76 (a) and (b) of the Law of Succession Act in that the Grant was obtained in a manner that renders it defective;

#### **FINDINGS & DETERMINATION**

23. In the light of the forgoing this court makes the following findings and determinations;

- (i) The application dated the 13/09/2017 for Revocation of the Grant is found to be meritorious and it is hereby allowed;
- (ii) The Grant is hereby revoked; a fresh Grant be issued in the joint names of Mary Wangari Kagondu and Mary Wanjiru Macharia; the title parcel no Githi/muthambi/29 to revert back to the estate of the deceased;
- (iii) Either party at liberty to file summons general for the confirmation of the Grant;
- (iv) This being a family matter each party shall bear their own costs.

It is so ordered accordingly.

**Dated, Signed and Delivered at Nyeri this 13<sup>th</sup> day of June, 2019.**

**HON. A. MSHILA**

**JUDGE**