



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO 1420 OF 2012

(IN THE MATTER OF THE ESTATE OF PETER GICHOHI GITHAIGA (DECEASED))

1. JEDIDAH WAMBUI GICHOHI

2. MARY WATETU GICHOHI.....APPLICANTS

-VERSUS-

MOSES MWANGI GICHOHI.....PROTESTOR

RULING

This cause was scheduled to come for judgment today the 20th day of September 2019 but for reasons which will become apparent in due course, it is imperative that I have to give further directions before the final resolution of the dispute between the parties.

The background of this cause is this. The deceased Peter Gichohi Githaiga died on 11 August 2011; he was then domiciled in Kenya and his last known place of residence was Thunguri sub-location, Iriaini South location in Nyeri County.

His wife having predeceased him, he was survived only by his five children three of whom are the applicants and the protestor respectively. The rest have been identified as Eunice Mumbi Gichohi and Grace Wambui Gichohi.

On 7 March 2012, the applicants petitioned for grant of letters of administration of the deceased's intestate estate in Nyeri High Court Succession Cause No. 144 of 2012. The grant was subsequently made to them on 18 July 2012. The protestor was dissatisfied with this development and so on 29 November 2012, he filed a summons of the even date for annulment or revocation of the grant.

There is nothing on record to show that the applicants responded to the protestor's summons; they, instead, filed a summons for confirmation of the grant made in their favour. The summons is dated 23 April 2013 and was filed the following day.

On his part, the protestor contested the summons for confirmation of grant and filed an affidavit of protest in that regard; in that affidavit, he deposed, *inter alia*, that the summons for confirmation was premature and mischievous because, as I understand him, it could not be filed when his summons for revocation or annulment of grant was still pending for disposal. He, nonetheless, filed a supplementary affidavit in which he made his own proposal on how their father's estate should be distributed. This affidavit was filed in court on 22 May 2013.

All these things happened in Succession Cause No. 144 of 2012. The last entry in that cause was the direction by the court (Wakiaga, J) that the protest be heard by way of oral evidence and parties exchange their written statements and any documents they would be relying upon. Meanwhile, so the court ordered, the status quo was to be maintained.

While all this was happening and, apparently unbeknown to the applicants, the protestor had earlier on instituted a petition for grant of letters of administration for the same estate in the High Court at Embu where it had been registered as High Court Succession Cause No. 498 of 2011. He obtained the grant of letters of administration intestate in that cause on 28 March 2012.

All his four sisters moved to have the grant revoked or annulled by a summons dated 8 May 2012; it is not clear on the face of the summons when it was filed but I should suppose it was on or around the date of the summons.

By its ruling dated and delivered on 22 November 2012, the court (Ong'udi, J) agreed with the applicants and revoked the grant. In that ruling the court acknowledged that there was a similar cause (Succession Cause No. 144 of 2012) pending in the High Court at Nyeri and the two causes could not run concurrently. The court acknowledged further that while most of the deceased's estate was in Embu, within the jurisdiction of the High Court at Embu, the deceased hailed from Othaya in the jurisdiction of the High Court at Nyeri. For this reason, the learned judge transferred the cause to the High Court at Nyeri.

Following the learned judge's order Embu High Court Succession Cause No. 498 of 2011 was transferred to the High Court sitting at Nyeri where it was registered as High Court Succession Cause No. 1420 of 2012.

When parties appeared before me for the first time on 12 December 2014, Mr. Muchiri wa Gathoni, the learned counsel for the applicants, informed the court that what was scheduled for hearing on that date was the protest; the protestor himself, appearing in person, informed the court that he was ready to proceed and so the hearing began in earnest and dragged for the next four years partly because it was suspended midway when parties made fruitless attempts to settle the matter out of court. Eventually, in the absence of any settlement, the hearing picked up and was concluded in the fullness of time.

Ideally, after hearing the parties and their witnesses (where they were called), this honourable court ought to have delivered a judgment on the dispute, more particularly on the protestor's protest. However, from the chronology of events which I have set forth, it is clear that this cause has had a somewhat chequered history that cannot just be swept under the rug; it is a history that cannot be ignored because it certainly would have a negative impact on the final decision of this honourable court unless the cause itself is first put in its proper perspective. I am convinced that irrespective of its adequacy in every other respect, a judgment that would overlook this cause's past is unlikely to stand the test of time.

My point is simply this. The protest was filed in High Court Succession Cause No. 144 of 2012 in which, as noted, the applicants were appointed administratrixes of the deceased's estate. It is also obvious that at the time that cause was filed, there was already in existence another succession cause in respect of the same estate at the High Court at Embu, being Succession Cause No. 498 of 2011 and which was eventually admitted in this court as Cause No. 1420 of 2012; for all practical purposes, it is the cause that is actively before court.

As Ong'udi, J. rightly put it, the two causes cannot run side by side; to this I must add that once the protestor filed the present cause, no other cause in respect of the same estate could possibly be filed. The net result is that the applicant's petition which is later in time is, for all intents and purposes, a nullity and no valid proceedings can or could be taken in that cause.

There is evidence that the earlier petition was duly published in the Kenya Gazette as Gazette Notice No. 1415 dated 17 January 2012; it could be that the applicants were ignorant of this gazette notice at the time they filed their own version of petition for grant of letters of administration. However, their ignorance of this notice cannot, by itself, validate what is otherwise an invalid petition and by extension, invalid proceedings.

In short, under section 76(a) of the Law of Succession Act, the proceedings to obtain the grant in High Court Succession Cause No. 144 of 2012 were defective in substance or, the statement by the applicants in their petition that no other person having equal or prior right to the grant of representation had applied for the grant was not true in fact and for that reason, according to section 76(c) of the Act, the grant was obtained by untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance of the existence of the earlier petition by the protestor.

That said, I am minded that the grant made in the present petition was annulled or revoked for reasons stated in the ruling by the High Court in Embu; but that is the farthest the court could and in fact did go. It annulled or revoked the grant only; it did not nullify or invalidate the proceedings in which the grant was obtained. The petition remained alive and I suppose it is for this reason that my learned sister transferred it to this Court, sitting at Nyeri, for disposal. If the entire petition had been nullified, there would have been nothing left to transfer.

If I am right, it follows that if the applicants' petition is a nullity, the grant which they purportedly obtained in that petition is equally void and of no legal consequence. In the absence of a grant capable of confirmation, the protestor's protest is superfluous; the summons for confirmation against which it is lodged has no foundation in law.

For these reasons, and for completeness of record, the only cause open to Court is to annul the grant made to the applicants on 18 July 2012 in High Succession Cause No. 144 of 2012. It so annulled.

Where does this leave the administration of the deceased's estate?

In exercise of the powers with which this honourable court is clothed under section 47 of the Act on its jurisdiction to pronounce such decrees and make such orders as may be expedient; section 66 on its discretion as to the person or persons to whom a grant of letters of administration should be made; and Rule 73 of the Probate and Administration Rules on the court's inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court, I hereby appoint the protestor and the applicants as joint administrator or administratrixes of the estate of the late Peter Gichohi Githaiga. A fresh grant shall be issued in their joint names forthwith.

Owing to the age of this matter in court, and the need to have it disposed of at the earliest opportunity possible, I further make the following directions:

1. The joint administratrixes/ administrator or either of them shall file and serve on the rest of the deceased's children a fresh summons for confirmation of the grant I have made within 14 days of the date of its issue notwithstanding that six months have not elapsed.
2. This cause shall be mentioned before me on 16 October 2019 for directions on the hearing of the summons for confirmation of grant or for such other directions as may be necessary and expedient for disposal of any protest that may have been filed or is intended to be filed against the summons.
3. Parties will bear their respective costs.

It is so ordered.

Dated, signed and delivered in open court this 20th day of September 2019

Ngaah Jairus

JUDGE