



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 225 OF 2004

IN THE MATTER OF THE ESTATE OF THE GATONYE GITIRU (DECEASED)

MARY WAMBUI GATONYE.....1ST APPLICANT

STEPHEN NJAMBU NJOROGE.....2ND APPLICANT

VERSUS

ALICE WAIRIMU GATONYE.....1ST RESPONDENT

NJERI GATONYE.....2ND RESPONDENT

RULING

1. By way of Summons for Revocation of Grant, dated 2nd August, 2017, the Applicants seek revocation of the Grant of Letters of Administration issued in respect of the Estate of Gatonye Gituri (deceased) granted to Alice Wairimu Gatonye and Njeri Gatonye and confirmed on 23rd May, 2005.
2. The application is premised on the grounds that, the grant was fraudulently obtained by the administrators through concealment from Court of material facts that the 1st Applicant was a daughter to the deceased and secondly, that the deceased had sold a half acre parcel of land excised from title number MUGUGA MUGUGA/720 to the 2nd Applicant. Further, that this has denied the applicants their entitlements in the estate of the deceased.
3. The 1st Applicant swore an affidavit dated 2nd August in support of the summons for revocation of grant. She deposed that Gatonye Gaturi, the deceased herein died on 26th March, 2001 and a grant of letters of administration was issued to the Respondents herein. She stated that the deceased had three wives namely; Hannah Njambi Gatonye, Njeri Gatonye and Alice Wairimu Gatonye. She claimed to be the child of the first wife Hannah Njambi Gatonye. She asserted that Njeri Gatonye had no children while Alice Wairimu Gatonye had six children one of whom is deceased.
4. It was her position that the Respondents had applied for letters of administration intestate to her deceased father's estate without her knowledge involvement or consent. She asserted that the Respondents did not inform her of the proceeding before the Succession Court. She stated that after perusal of the Court records, she learnt that she had not been provided for as a beneficiary of the estate. She contended that the 1st Respondent had deceived her to believe that she had been provided for under the name Wambui Gatonye and yet Wambui Gatonye was her youngest daughter and not herself. She also claimed that the Respondents had failed to disclose to the Court that the deceased had sold a half acre portion of his parcel to the 2nd Applicant but the sale was never registered as the deceased died before registration.
5. It was the 1st Applicant's averment that the Respondents had also concealed the fact that the deceased owned another parcel of land at Gatuanya Thika measuring 5 acres registered under the 2nd Respondent's name where the deceased was living at the time of his death with her and three of the 1st Respondent's children. It was her deposition that the grant should be revoked.
6. The 2nd Applicant also swore an affidavit dated 2nd August, 2017 and a further affidavit dated 19th February, 2019 in support of the summons for revocation of grant. He deposed that the deceased sold him a half acre of land from title number MUGUGA/MUGUGA/720. He stated that upon application, he was issued with a consent from the Land Control Board on 2nd September, 1999. However, the deceased succumbed to illness before he could transfer the property to him.
7. The 2nd Applicant asserted that he had family ties with the deceased. He stated that it was for this reason that the 1st respondent wrote to

him a letter requesting him to allow her use of the parcel of land for some time to educate her children. He claimed that he granted her permission to use the parcel of land only to later on learn that she had intended to distribute the entire parcel without his involvement.

8. In response to the summons for revocation of grant, the 1st Respondent filed a replying affidavit dated 18th January, 2018. She opposed allegations by the 1st Applicant that she had been excluded as a beneficiary, noting that her name was on the confirmed grant as a beneficiary. She asserted that at the time, the Administrators did not know the 1st Applicant's full names thus using only her second and third names. She was certain that the name Wambui Gatonye in the schedule of distribution of the confirmed grant referred to the 1st Applicant and not her minor daughter whose shares were held in trust and who was referred to as LWG. She denied that she had any issue sharing the estate with the 1st Applicant although they only came to learn that she was the deceased's child after the deceased's death.

9. On whether the Petition was filed without the 1st Applicant's knowledge or consent, the 1st Respondent opposed this claim stating that the 1st Applicant was well aware of the progress of the Petition as she attended meetings where the filing was discussed. She pointed out that the 1st Applicant did not raise any objection to the proceedings before the Court on the issuance and/or distribution of the estate. She denied the existence of any fraud or concealment of material facts in obtaining the grant. She also denied that the deceased sold a half acre portion to the 2nd Respondent as alleged.

10. On the allegation that the deceased owned another parcel, she emphasized that the mentioned parcel belonged to the 2nd Respondent's mother although the deceased lived and was buried there. The 1st Respondent's children and the 2nd Respondent also lived on the said parcel of land.

11. In response to the 2nd Applicant's affidavit, the 1st Respondent stated that the claims that he purchased property from the deceased were unfounded, baseless and untrue. She asserted that mere allegations without evidence of the purported sale, consent or the letter written to him to confirm purchase lacked any evidential value. She averred that the application was an afterthought and was malicious with an intention to delay and obstruct the distribution of the estate. She urged the court to dismiss the application with costs.

12. The matter proceeded by way of viva voce evidence. During the hearing, the 1st Applicant conceded that since the Respondents had admitted her claim as a child of the deceased, she would not pursue the case any further on her own behalf but would testify for the 2nd Applicant. The Court ordered that the grant be rectified to include the specific names of the 1st Applicant, Mary Wambui Gatonye as a beneficiary.

13. Stephen Njambu Njoroge, the 2nd Applicant herein testified that he filed this claim because he had purchased two parcels of land each measuring a half acre from the deceased. A title deed had already been processed in his name for L.R No. Muguga/Muguga/721. He stated that his claim was to for a half acre excised from L.R No. Muguga/Muguga/720 which he bought at Kshs. 130,000/= in 1998. It was his testimony that he applied for and received consent from the Land Control Board. A copy thereof dated 02.09.1999 was marked for identification in Court. He asserted that the payment of Kshs. 130,000/= was made to the deceased in the presence of Makwia Gitau and Gatonye Githui, a step mother to his uncle both of whom have since passed on. He averred that the sale agreement executed by the parties was stolen when his house was vandalized.

14. It was the 2nd Applicant's testimony that on 3rd February 1998, the 1st Administrator had written to him acknowledging the purchase of a half acre portion to be excised from L.R No. Muguga/Muguga/720 from the deceased, while also requesting use of the land. He asserted that the letter was hand delivered by the 1st Respondent in the presence of his mother and sister. He stated that he allowed her to use the parcel which she has been in possession of to date and when the deceased passed on, he requested the Respondents herein to apply for letters of Administration, but they insisted that they needed time to heal. He maintained that it was not until 2016 when a boundary dispute with a neighbor arose that he discovered that the Letters of Administration intestate had already been issued to the Administrators.

15. Margaret Karugu Njoroge a sister to the 2nd Applicant also testified in support of the application. It was her testimony that she was present when the 1st Respondent brought a letter to the 2nd Applicant but was unaware of the contents of the said letter. She also stated that she was present when the parcel of land was being sold to the 2nd Applicant but she did not know the purchase price.

16. In support of their case, the 1st Respondent testified that the land in issue was wholly owned by the deceased. She admitted that upon his demise, they applied for letters of administration intestate and never informed the 2nd Applicant as they did not recognise any interest he had over the parcel of land. She was adamant that the 2nd Applicant only bought L.R No. MUGUGA/MUGUGA/721. In her testimony, she denied ever writing or causing a letter to be written on her behalf to the 2nd Applicant requesting to use the parcel of land. She also stated that that there were no boundary marks for the 2nd parcel of land being L.R No. MUGUGA/MUGUGA/721.

17. In their written submissions, the 2nd Applicant submitted that he genuinely purchased a ½ acre of land from the deceased in 1998 and which was to be excised from parcel Number MUGUGA/MUGUGA/720 and the transaction was witnessed by individuals who are now deceased. He further submitted that the sale transaction was procedurally done and he should be entitled to the half acre portion of land. That for that reason the grant should be revoked as it was obtained contrary to the provisions of **Section 51(2) (g) of the Law of Succession Act.**

18. It was submitted for the Respondents that the 2nd Applicant has not proven that he had bought ½ acre from the deceased since he did not call the persons who witnessed the transaction to testify and further that the purported sale agreement entered into was never produced in court. It was also submitted that the purported consent in evidence was for the entire parcel of land and not ½ acre as alleged. There was therefore no proof that the deceased had sold or intended to sale a portion of L.R No. MUGUGA/MUGUGA/721 to the 2nd Applicant as alleged.

19. I have read and carefully considered the pleadings, the testimonies and the submissions from the parties to this matter. The issue for consideration is whether the application before me passes muster on the threshold set by **Section 76 of the Law of Succession Act**. The issue it raises for determination is:

- i. Whether the grant was fraudulently obtained by the administrators through concealment from court of material facts.

The Court has power to revoke a grant in the circumstances set out in section 76 of the Law of Succession Act, as follows:

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.”

20. In this case, it is disputed that the deceased sold a ½ acre excised from MUGUGA/MUGUGA/720 property owned by the deceased. It was the 2nd Applicant's case that he purchased the property from the deceased in 1998 but the sale agreement executed by the parties to the sale was stolen when his house was vandalized.

21. The Court appreciates that in this case there was no evidence that the 2nd Applicant took possession of the land in question leave alone develop it. It is further appreciated that the fact of the sale is also disputed. However, it is the 2nd Applicant's case that the sale transaction was in the advanced stages of completion and would have been successfully completed were it not for the death of the Deceased. Therefore, if proved that the Deceased actually entered into sale agreement with the 2nd Applicant and the purchase price was paid and steps were taken towards the transfer of a half acre portion, the Court would be under an obligation to uphold his interests in the distribution of the estate of the Deceased.

22. According to the 1st Respondent and the evidence in support of her position, there was no evidence that the 2nd Applicant and the deceased entered into an agreement or paid the purchase price for the sale. Secondly, at the time of the alleged transaction, it was not explained why the deceased did not complete the transfer and yet two years had lapsed before his demise in 2001. However, the 2nd applicant claimed that the deceased fell ill making it impossible to complete the transfer to him.

23. An acknowledgement letter purportedly written by the 1st Respondent to the 2nd Applicant acknowledging that he was indeed the owner of the parcel of land was presented. The document was said to be a request for access to use the parcel of land. These allegations were vehemently denied by the 1st Respondent who denied writing the letter or requesting to use the parcel of land.

24. It is an elementary principle that he who alleges must prove it. This is a principle firmly embedded in the **Section 107 of the Evidence Act** which provides that:

“(1) whoever desires any court to give judgment as to legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

25. It is noted that the letter in question is written in kikuyu language. The use of language and participation in culture today is provided for under **Article 44** of the Constitution of Kenya. The official languages of the Republic of Kenya according to **Article 7** are Kiswahili and English. Documents used in the proceedings in the High Court must be translated into English. It is noteworthy to point out that a Certificate of Translation was not presented together with the said letter. The Court could therefore not consider the letter as a document on record for purposes of this proceedings.

26. The evidence presented shows that indeed the 2nd Applicant had purchased property from the deceased being MUGUGA/MUGUGA/721 and the property was subsequently transferred to him. This is not in dispute. The allegation that he purchased another half acre excised from L.R. No. MUGUGA/MUGUGA/720 has not been supported by any documentary evidence. **Section 3(3) the Law of Contract Act** requires

that for any suit to be brought upon a contract for the disposition of an interest in land the said contract must be in writing, signed by all the parties thereto and attested by witnesses who are present when the contract was signed by the parties.

27. The sale agreement or a copy thereof was not presented to court. Individuals who were present and witnessed the sale were never called to testify nor did they swear an affidavit in support of his claim. The 2nd Applicant did not present any evidence to show that a consideration for the purchase of the property was paid to the deceased.

28. In my view there is nothing on record showing that the Deceased sold ½ acre portion of MUGUGA/MUGUGA/720 to the 2nd Applicant. Further, the record does not disclose any defects in the proceedings or any concealment of facts or indeed any fraud. The application for revocation of the grant therefore has no merit and is dismissed with costs to the Respondents.

SIGNED DATED AND DELIVERED IN OPEN COURT THIS 16TH DAY OF SEPTEMBER, 2019.

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L. A. ACHODE

HIGH COURT JUDGE

In the presence of.....Advocate for the 1st Applicant

In the presence of.....Advocate for the 2nd Applicant

In the presence ofAdvocate for the 1st Respondent

In the presence of.....Advocate for the 2nd Respondent