



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

SUCCESSION CAUSE NO. 1380 OF 2002

IN THE MATTER OF THE ESTATE OF M'NYONDO RUGETA (DECEASED)

JANE RUNJI NYAGA.....APPLICANT

VERSUS

SIMON MWANIKI NYAGA.....RESPONDENT/PETITIONER

RULING

A. Introduction

1. This ruling pertains to the summons for revocation of grant dated 22nd November 2017 on the grounds that the grant confirmed on the 7/11/2003 to the respondent were defective as the same was obtained fraudulently as the respondent was not a son of the deceased but a cousin of the applicant and further that he failed to inform the applicant of the probate proceedings.
2. The application was heard by way of *viva voce* evidence.
3. It is the applicant's case that the estate of the deceased comprises Land Parcel No Gaturi/Nembure/783 which is registered in her name and the same should be distributed to herself and the widows and children of her deceased brothers and sisters as suggested in her witness statement dated 26th November 2018.
4. The applicant further testified that the respondent was a son of the deceased's brother and that he had failed to produce evidence that he was a dependant on the deceased.
5. In rejoinder, the respondent opposes the application for revocation on the ground that the deceased's wife gave her authority to apply for letters of grant and further that there was no objection lodged against his petition for grant. Further, it is the respondent's case that at the time of the petition for letters the applicant was married and away from home and stated her disinterest in having a share of the estate. In cross examination, the respondent recanted this statement.
6. Following their testimonies before the court, the parties filed submissions to support their arguments of the matter.

B. Applicant's Submissions

7. It was submitted that the respondent was not entitled to inherit from the deceased's estate as he failed to prove dependency and further as he ranks low in the area of consanguinity and affinity. Further, it was submitted that the applicant being a daughter of the deceased ranked higher than the respondent. Reliance was placed on the case of **Nyeri Succession Cause No. 46 of 2015, In the Matter of the Estate of Hillary Wambugu, Deceased.**

C. Analysis & Determination

8. The issue for determination is whether the Applicant meets the threshold for the revocation of a grant within the meaning of **Section 76** of the **Law of Succession Act**. That Section states;

“Section 76: 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 has ordered or allowed; 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.”

9. It is the Applicant's case that she was excluded from probate proceedings leading up to the issuing of the grant confirmed on the 7/11/2003 to the respondent. Further, the applicant states that the respondent was not entitled to inherit from the deceased's estate as he failed to prove dependency and further as he ranks low in the area of consanguinity and affinity in comparison to her.

10. It is important to note the contents of Form P&A.5 as to whether the applicant was included in the probate proceedings leading to the issuance of the grant to the respondent. In the affidavit in support of the petition, the respondent deposes that the deceased died intestate and was survived by;

a) Lucia Njoki Njue – wife

b) Mwaniki Njue – son

c) Ndwiga Njue – son

d) Mary Wawira Ileri

e) Simon Mwaniki Nyaga - son

11. Despite there being no rebuttal of the fact that the Applicant, Jane Runji Nyaga is a daughter to the deceased, I note she is not included as a survivor of the deceased. I also note that the applicant has listed himself as a son of the deceased which is not true.

12. By failing to include the name of the applicant as a survivor of the deceased, it is my considered opinion that the Respondent obtained the grant fraudulently by making a false statement of fact and by concealing from the Court of something material to the case.

13. Indeed, the proceedings to obtain the grant were defective in substance as **Section 51(2)** of the **Law of Succession Act** requires that an application for grant shall include information as to;

“(g) In cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers, sisters of the deceased and of the children of any child of his or hers then deceased.”

14. It is also notable in this regard that the law prioritizes the persons who may be appointed administrators of a deceased's estate, and as between the applicant and respondents, the applicant who is the only surviving daughter and child of the deceased, ranks in priority to the respondent as to who should be appointed administrator of the estate of the deceased. Section 66 of the Law of Succession Act provides a general guide as to those who will be preferred to administer the estate of a deceased as follows: -

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors;

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”

15. The question is whether the respondent knew that Jane Runji Nyaga was a daughter to the deceased why did he conceal that fact from court when the provisions of **Section 51 (i)(g)** of the **Law of Succession Act** placed an obligation on him to reveal the names of all surviving children of the deceased? It is my considered opinion that even from that fact of concealment alone; the applicant has made out a good ground for revocation of grant herein.

16. Further I am persuaded that the petition for letters of administration were defective in substance because of non compliance of **rule 26(1)** of **Probation and Administration Rules**. The respondent was required to notify all persons entitled in the same degree or in priority to the respondent when applying for letters of administration. All the beneficiaries were required to give consent in Form 38 to the respondent in Form 38, no such consent was obtained.

17. The upshot is that the Applicant has achieved the threshold for revocation of the grant herein and as such his application must succeed.

18. Consequently, I allow the Application and revoke the certificate of confirmation of grant dated 7th November 2003.

19. The applicant shall file an application for confirmation within forty-five (45) days.

20. Each party to bear its own costs.

21. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF NOVEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muriuki for Ithiga for Applicant

Petitioner/Applicant present