



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

(FAMILY DIVISION)

SUCCESSION CAUSE NO 551 OF 2013

IN THE MATTER OF THE ESTATE OF WABARA GITAU Alias GITAU NJUGUNA (DECEASED)

PETER MBUGUA GITAU.....APPLICANT

JUDGMENT

1. From the death certificate forming part of the annexures in the pleadings the deceased herein **Gitau Wabara Gitau** died on the 19th of August 2012.

2. He was survived by George Njuguna, Stephen Kimani Gitau, Peter Gitau and Wanjiku Gitau.

3. On the 15th of March 2013 John Gachoka Njuguna and Lucy Njeri Njuguna siblings of the deceased filed a citation against the children of the deceased who had failed to take out grant of representation, the citors being persons claiming a beneficial interest in property **Ndumberi/Ndumberi/306** which they claim the deceased held in trust for them as the registered proprietor.

4. A response to the citation by way of a replying affidavit and a further affidavit were filed on 7th April and 30th June 2014.

5. The matter was heard and a ruling delivered on 30th January 2015. Musyoka J made 3 important observations which led to his ruling.

i. That citees did not show any willingness to petition for a grant.

ii. The case cited being HC Misc. Civil App. No. 92 of 2009 did not award the property to the deceased and there was nothing to show that the property was not held in trust.

iii. There was no reason to decline the orders sought.

6. In his ruling Musyoka J allowed the citors to petition the court for a grant herein. The ruling was delivered in the presence of counsel for both sides.

7. On 31st of August, 2015 pursuant to the ruling of Musyoka J the citors now Administrators petitioned the court and a grant was issued on the 27th of May, 2016.

8. The summons dated 29th March 2017 by the Respondents is a reaction to a pending application for confirmation of the grant by the Administrators filed on the 14th of December, 2016.

9. The application seeks for revocation of the grant on 3 grounds namely, the court erred in granting letters of administration to a brother and sister of the deceased yet he has children, the proceedings were defective as matter of ownership had been determined in another suit, and the grant was obtained fraudulently.

10. **Section 76** of the **Law of Succession Act** (the Act) gives instances when a grant may be revoked. It provides that;

“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;

11. In order to arrive at a decision herein I will consider the genesis of this matter from the time the Applicants were cited and they refused to indicate their willingness to take out or refuse to take out grant of representation. And where the court found the Administrators had a valid claim and gave them lee way to petition. The ruling was delivered on 30th January, 2015 which ruling remains binding as the same was never challenged.

12. In the said ruling referred above the respondent were allowed to petition for the grant, however they did not do so until 7 months later. In the 7 months nothing stopped the Applicants from acting, they had an opportunity to rise to the occasion as heirs of the deceased, they did not.

13. The mere fact that the applicants' father was a registered owner, that in itself does not stop the respondents from claiming a beneficial interest. Their claim is that the deceased held the property in trust.

14. For the reasons enumerated above, I do not see merit in the allegations that the court erred, if it did, an appeal ought to have been preferred or a review sought. Secondly, there was no concealment of any material facts as the respondents petitioned the court pursuant to a court process where the Applicants participated and where they had failed to convince the court to issue orders in their favour. Thirdly, this court cannot sit on appeal of an order of a Judge of concurrent jurisdiction.

15. In any event the Applicants can still have another bite at the cherry by filing a protest to the proposed application for confirmation of grant, the proposed distribution and place their case before court.

16. Application is therefore dismissed with costs.

Dated and Delivered in Nairobi on this 7TH day of NOVEMBER 2019.

.....

ALI-ARONI

JUDGE