



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

SUCCESSION CAUSE NO. 262 OF 2012

IN THE MATTER OF THE ESTATE OF KIMANI MUNGAI (DECEASED)

TAMAR WANJIKU KARIKU.....APPLICANT

VERSUS

WINNIE WANJIRU KIMANI.....1ST RESPONDENT

MWATHI MUNGAI.....2ND RESPONDENT

RULING

1. The deceased in respect of whose estate these proceedings relate died intestate on 4th July 2010 leaving behind a widow by the name of Winnie Wanjiru Kimani. Among his survivors as listed in Form P & A 5 are; Mary Wanjiru Wanganga (sister), Ndungu Wanjiku Mungai (sister), John Mwathi Mungai (brother), Peter Mungai Mwathi (a nephew) and Tamar Wanjiku Kariku (sister-in-law).

2. Listed as assets comprising the estate are:

(a) Ngenda/Kahugu-ini/526

(b) IR No. Ngenda/Kahugu-ini 1/T.139

(c) Parcel No. Ngenda /Kimunyu/894

3. On 9th February 2012, Winnie Wanjiru Kimani and John Mwathi moved the court for a grant of representation. Filed together with the petition was a consent form for making a grant which had all beneficiaries append their signatures except for Tamar and Peris. Consequently, a limited grant of letters of administration intestate was made and issued to the petitioners/applicants on 20th July 2015.

4. On 11th March 2016, the applicants filed summons for confirmation of grant pursuant to rule 40 of the Probate and Administration rules. Attached to the application was a consent form signed by all beneficiaries except for Tamar Wanjiku. The grant was subsequently confirmed on 12th July 2016 and the estate shared out as follows:

(1) Ngenda/Kahuguini/526 to be shared amongst:

(a) Ndungu Mungai Mwathi – ¼ acre

(b) Peter Mungai Mwathi – 1/8 acre

(c) Tamar Wanjiku Kariku – 1/8 acre

(2) Ngenda/Kahuguini/T.139 to be shared equally amongst

(a) Mary Wanjiru Waiganjo

(b) Ndungu Mungai

(c) John Mwathi

(d) Peter Mungai Mwathi and Tamar Wanjiku Kariku to share their share jointly

(3) Ngenda/Kimunyu/894 to be shared equally between:

(a) Winnie Wanjiru Kimani

(b) Mary Wanjiru Waiganjo

(c) John Mwathi Mungai

5. Dissatisfied with the manner in which the estate was distributed, Tamar moved the court vide a notice of motion dated 3rd February 2017 pursuant to Section 47, and 76 (a) of the Law of Succession Cap 160 Laws of Kenya Cap 160, rules 17(1) (2), 26(1), 44 and 73 of the Probate and Administration rules seeking orders as hereunder:

(a) Spent.

(b) Spent.

(c) That pending hearing of this application an order be issued restraining, stopping, preventing the respondent, their representatives, assigns, employees, servants, agents and anyone else acting on their behalf from entering into, alienating and taking possession of any portion/part of, and or whatsoever interfering with the applicant and her family's peaceful, quiet and actual possession, user and enjoyment of land title No. Ngenda/Kihuguini/T.139.

(d) That the certificate of confirmation of grant dated 12th July 2016 issued to Winnie Wanjiru Kimani and Mwathi Mungai be revoked and the applicant be allowed to put in her proposed mode of distribution of the estate of the deceased.

6. The application is premised upon grounds set out on the face of it and an affidavit sworn on 3rd February 2017 by the applicant. By a ruling dated 24th March 2017 prayer (c) was allowed pending hearing and determination of the revocation application which basically sought to have the grant revoked.

7. It is the applicant's case that, she was not served with the application for confirmation nor was her consent sought hence irregular confirmation of the grant in her absence. She further deponed that, the manner in which the estate was distributed was unjust and unfair considering that her step son Peter Mungai Mwathi who was listed together with her in property IR No. Ngenda/Kahuguini1/T.139 would benefit twice given that he has been listed together with other beneficiaries in another property.

8. She further stated that the estate was supposed to have been shared out as per the trust arising from a court order issued on 28th of November 1980 in HCCC No. 1275/76. She averred that her objection to the making of a grant of representation to the applicants was merely stayed by the court hence the same is still pending.

9. The applicant urged the court to find that property known as Ngenda/ Kahuguini/T.139 having been listed in the estate of Stanley Mwangi Mungai in succession cause No. 2371/10 cannot be included and distributed again in this estate. That Kimani Mungai the deceased herein was only holding the properties listed herein in trust of his siblings and the division had been done by their mother Wambui Mungai as per the signed trust.

10. She further averred that, L.R. Ngenda/Kahuguini/T.139 should be given to her as the bonafide administrator to her late husband's estate. She therefore proposed for the estate to be distributed as follows:

(1) LR No. Ngenda/Kahuguini/526 – 0.64 Ha

(a) Ndungu Mungai – 0.32 acres

(b) Winnie Wanjiru Kimani – 0.32 acres

(2) LR Ngenda Kahuguini/T.139

(a) Tamari Wanjiku – absolutely

(3) Parcel Ngenda/Kimunyu/894

(a) John Mwathi Mungai – 0.32 acres

(b) Mary Wanjiru Nanganya – 1 acre

(c) Ndungu Mungai, Winnie Wanjiru Kimani and John Mwathi Mungai to share 0.56 acres equally.

11. In response, John Mwangi Mungai (2nd respondent) with authority from Winnie Wanjiru (1st respondent) swore an affidavit on 16th March 2017 and filed the same on 20th March 2017. It was the respondents' case that the applicant was duly served with the application for confirmation and invited to consent but she refused to take part. Regarding the trust order made in HCC No. 1275/1976, he averred that the same merely placed the deceased's property in the hands of Kimani the deceased herein to hold in trust for his siblings and not to distribute.

12. It was further claimed that the applicant was hell bent to disinherit Peter Mwangi her step son the only son left by Stanley's first wife who died after delivery. He contended that, Peter Mwangi and the step mother (applicant) should equally share the share entitled to Stanley Mwangi Mungai father to Peter and husband to the applicant.

13. It was further alleged that the filing of succession cause No. 2371/10 in respect of the estate of Stanley Mwangi Mungai listing properties which were never registered in the name of Stanley was irregular as the same properties are comprising the estate in this case. He also asserted that LR Ngenda/ Kahuguini/T.139 was family land where they were born and raised and that their mother was buried there hence the applicant who was married as a second wife to her brother cannot claim absolute ownership. That the house the applicant is currently occupying is a temporary house made of mabati which was originally built for the first wife (deceased) mother to Peter Mwangi.

14. According to the deponent, Plot No. T.139 should be shared amongst 5 beneficiaries among them their late brother Stanley whose share should be shared equally between Peter Mwangi representing his mother's house and the applicant as Stanley's second house.

hearing

15. During the hearing, the applicant basically adopted the averments contained in the affidavit in support of the summons for revocation which is replicated in her witness statement dated 8th May 2018 and filed on 11th May 2018 and a further witness statement signed on 30th October 2018. It was her testimony that, she got married to Stanley in 1985 and together had 8 children. That during their stay together, they stayed with her mother-in-law in the same compound (in Plot T.139). She claimed that her sisters and brothers in law have conspired to evict her from her matrimonial home with the intention of selling the property thus exposing her to destitution.

16. On cross examination, she admitted that Plot No. T.139 was registered in the name of Kimani the deceased herein and not her husband Stanley. She further confirmed that she has been given ½ share of her husband's entitlement in L.R. Ngenda/Kahuguini/526 with her step son getting similar size (1/8 acre). She further confirmed that she had no problem with the manner in which the respondents had shared out L.R. 526. In re-examination, she insisted that, she wanted the property shared as per her mother-in-law's desire in the trust agreement which she had signed and that she had built houses on T.139 which includes one room built of stones (shop) and one room made of timber.

17. On his part, the 2nd respondent (DW1) also adopted the contents contained in his written statement dated 25th October 2018 which is a replica of the averments contained in his replying affidavit

18. According to DW1, the property was held by the deceased in trust for his siblings and has been shared out as agreed by the family. He stated that, T.139 should be shared out equally amongst the siblings and the share to Stanley be shared out equally between his two houses i.e. Peter Mungai and Tamar the applicant herein. He stated that his mother has 4 sons and 2 daughters. That T.139 should be shared out equally between five children exclusive of Peris who was taken care of elsewhere. He denied that their mother's trust had shared out the property. DW2 Mary Wangari Waiganjo, basically supported DW1. DW3 Peter Mungai a step son to the applicant also corroborated the testimony of DW1 and DW2. He urged the court to equally share with the applicant his father's share out of the estate herein.

Submissions

19. The applicant filed her submissions on 25th April 2019 through the firm of Sang Chambers and Partners. Learned counsel broke down issues for determination into four as follows:

(a) Whether the applicant is a beneficiary in the estate of the deceased.

(b) Whether the applicant has a life interest in the estate of the deceased Stanley Mwangi.

(c) Whether the grant issued to the respondent ought to be revoked and the applicant allowed to put in her proposed mode of distribution of the estate.

(d) Who is to bear costs of this suit.

20. It was counsel's submission that the respondents did not seek consent of all beneficiaries hence a ground for revocation of the grant. To support this position counsel referred the court to the decision in the case of **Samuel Wafula Wasike vs Hudson Simiyu Wafula Case No. 161 of 1993** where the court held that:

“A grant obtained on the strength of false claims, without obtaining the consent of persons who held prior right to the grant and on the basis of facts concealed from the court is liable to revocation”.

The court was further referred to the decision in the case of the estate of **STM (2017) eKLR** where a grant was revoked for lack of consent from some beneficiaries.

21. Turning on the issue of life interest, reliance was placed on Section 35 (1) of the Succession Act which refers to a situation where a person has died intestate leaving one surviving child or children. In such a scenario the spouse shall be entitled to personal effects and

household goods and life interest on the whole residue of the net intestate estate.

22. To bolster the above argument, the court was further referred to the case of Bob **Njoroge Ngarama v Mary Wanjiru Ngarama and another (2014) eKLR.**

23. According to the applicant, there was concealment of material facts to the extent that the property shared out in this case had allegedly been distributed in the estate of Stanley Mungai vide succession case No. 2371/2010 which grant was confirmed on 13th February 2012.

24. Lastly, counsel submitted that, the applicant having lived in Plot T.139 for over 35 years she has established matrimonial home to which she cannot be removed until her death.

Respondent's submissions

25. Mr. Mbichire appearing for the respondent literally adopted the averments contained in the replying affidavit. Counsel submitted that there was no evidence to show that a trust left by the applicant's mother-in-law ever shared out the estate. That the inclusion of the subject property in Stanley Mungai's estate in succession cause No. 2371/10 was irregular as Stanley never owned those properties in the first place.

26. Learned counsel submitted that the applicant had not met the threshold for revocation of the grant as envisioned under Section 76 of the Law of Succession.

Analysis and Determination

27. I have considered the application herein, supporting affidavits and responses thereto. I have also considered the testimonies from both sides and their respective submissions. Issues that arise for determination are:

(1) Whether the applicant has met the threshold for revocation of the grant.

(2) Whether the applicant is entitled to life interest in respect of the estate of Stanley Mungai.

(3) Whether the late Stanley Mungai was entitled to a share of the estate equal to his siblings.

(4) Whether Stanley Mungai's share should be shared equally between his two houses as represented by Peter Mwachai Mungai for the first house and the applicant for the 2nd house.

28. The law governing revocation of a grant is underpinned under Section 76 of the Law of succession. Revocation or annulment of a grant in respect to an intestate or testate estate can issue either on application of an interested party or by the court's own motion upon proof of the following-

(a) That the proceedings to obtain the grant were defective in substance.

(b) That the grant was obtained fraudulently by making 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) ...

(e) That the grant has become useless and inoperative through subsequent circumstances.

29. This court is seized of wide discretion to revoke a grant if any of the grounds stated above is established. Therefore, the burden of proof that the grounds stated under section 76 have been met lies with the applicant.

30. According to the applicant, she was not notified of the filing of the application for confirmation of the grant and that the respondent did not disclose that the assets comprising the estate herein had been dealt with in the succession cause involving the estate of one Stanley Mungai.

31. It is not in dispute that the deceased herein Kimani Mungai had a land dispute with his mother Wambui Mungai and sister Wanjiru Mungai vide HCC No. 1275/1976 in which the three properties the subject of the estate herein then registered in the name of Kimani Mungai were declared as land held by Kimani Mungai in trust for the rest of the family members. That Wambui Mungai was to draw the trust.

32. By a court judgment dated 28th November 1980, the court ordered as follows:

(1) That the defendant (Kimani Mungai) holds title numbers Ngenda/Kahuguini/526, Ngenda/Kahuguini/T.139 , Ngenda/Kimunyu/894 and Ngenda/Mutomo/T.151 upon trust for the plaintiff (Wambui Mungai and Wanjiru Mungai).

(2) That it is not necessary that the trust should be declared but it may well be that the first plaintiff (Wambui Mungai) should draw up the trust for the future.

(3) That the second plaintiff Wanjiru Mungai has a right to one sixth of Ngenda/Kahuguini/526 having paid ten goats out of sixty goats.

(4) That the defendant, Kimani Mungai will remain the registered owner but having declared the trust, the other members of the family are quite safe and they can safeguard themselves further by the first plaintiff, Wambui Mungai writing down exactly the interest of each person because she is the founder of the trust. The cautions should remain in the title to preserve their interests.

(5) That the defendant to pay the plaintiff's costs of this suit to be taxed and certified by the taxing master of this court.

33. Subsequently, Wambui Mungai did prepare a trust as per the court's directions in which she made proposal on how the property was to be shared as follows:

(1) Wambui Mungai – (i) the whole of Title No. Ngenda/Kahuguini/T.139

(ii) Naught decimal five six (0.56) of an acre of title No. Ngenda/Kimunyu/894

(2) Wanjiru Mungai (daughter)

(i) The whole of title No. Ngenda/Mutomo/T.151

(ii) One (1) acre of title No. Ngenda/Mutomo/T.151

(3) Kimani Mungai (1st son) – naught decimal three two (0.32) of an acre of Title No. Ngenda/Kahuguini/526

(4) Ndungu Mungai – naught decimal two (0.32) acres out of title No. Ngenda/Kahuguini/526

(5) Mwathi Mungai (3rd son) naught decimal three two (0.32) of an acre out of Ngenda/Kimunyu/894

34. However, when Mwangi Mungai also known as Stanley Mwangi died on 10th September 2008, his wife Tamar the objector herein filed succession cause No. 2371/2016 on 26th November 2010 thereby listing IR Ngenda/ Kimunyu/894 and LR Ngenda/Kahuguini/T.139 as part of the assets comprising the estate to her husband.

35. Unfortunately, the two properties were still in the names of Kimani Mungai the original registered owner who is also the deceased in these proceedings having died on 4th July 2010. By the time Tamar was filing a succession cause in respect of her husband Stanley Mwangi Mungai, her brother in law Kimani Mungai had died three months ago. In other words, the applicant's husband had no registrable interest in the two properties listed in succession cause NO. 2371/2010 by the time he died.

36. For all purposes and intents, Tamar the applicant herein had no business listing the two properties as assets of her late husband's properties knowing very well that she could not inherit what her husband did not own in the first place. It is my finding that the properties known as Ngenda/ Kahuguini/T.139 and Ngenda/Kimunyu/894 were wrongly listed in succession cause No. 2371/2010 as the deceased Stanley Mwangi Mungai did not own them.

37. Accordingly, the grant in succession file No. 2371/10 ought to be amended to remove the two properties from the list of assets. For those reasons, the two properties were listed as assets properly belonging to the deceased herein one Kimani Mungai under this file although holding in trust for the other family members.

38. To that extent, the respondent did not conceal any material information by not disclosing that the two properties had already been shared out because that distribution under file No. 2371/10 was illegal and irregular. Therefore, disclosure or non-disclosure was not of any consequence.

39. Whether the respondent had notified the applicant of the pending application for confirmation, the applicant having obtained a grant in respect of the estate of her husband Stanley Mwangi a beneficiary in the estate of Kimani the deceased herein, had an interest and was entitled to be notified. The respondent claimed that he notified the applicant who refused to participate.

40. It is trite law that, where a beneficiary to an estate is not notified of the confirmation proceedings and consent obtained, such a grant will be revoked or nullified. This position was dealt with in the case of In Re estate of Japhet Rutere Kajara (2019) where the court held that **“a grant obtained in the strength of false claims, without obtaining consent of persons who had prior right to the grant and on the basis of facts concealed from the court, is liable to revocation”**.

41. In the absence of any proof that the applicant was notified and her consent having not been sought, the grant was confirmed without the requisite consent from all persons interested in the estate having been obtained. Failure to seek consent of any interested party as a beneficiary is ground to revoke the confirmed certificate of grant.

42. Was the applicant entitled to life interest of the estate? The estate herein is not the applicant's husband's estate. She was not a wife to the deceased herein one Kimani. In the circumstances, Section 35 of the Succession Act which refers to the spouse of the deceased person is not applicable. The submission by counsel for the applicant that Section 35 of the Succession Act is applicable is misplaced.

43. As to whether the applicant was entitled to a share equal to her step son, one would have to trace the history of the land in question. The applicant is not opposed to the mode of distribution of the rest of the estate. She is only opposed to the mode of distribution of one plot namely; Ngenda/Kahuguini/ T.139. This property was as per the said trust supposed to be Wambui Mungai's property.

44. However, after Wambui's demise, her children five in number decided to share the same in equal share. That after sharing the estate amongst the deceased's children, the heirs to Stanley Mwangi one of the children, are entitled to share Stanley's share equally. To the contrary, the applicant is opposed to the sharing in equal share with her step son being a son the only survivor from the first house.

45. According to the applicant, she has developed the property and she would like to take the property absolutely. She however does not justify the reason why she wants to take the entire plot belonging to her mother in law to the exclusion of the rest of the children (in-laws).

46. Since her husband Stanley had two wives, in my view, it is fair that each house takes half share of his entitlement in the estate. Her step son is entitled to half share as the sole survivor representing the first house (first wife) and the applicant to take half share of her husband's entitlement. Since they have taken equal share in Ngenda/Kahuguini/526, there is no reason why they should not share Stanley's share equally.

47. I am therefore satisfied that the distribution proposed was fair in the circumstances. The trust arrangement which was proposed by M/s Wambui was not executed during her lifetime. The same was not a Will capable of execution. It is my conviction that the applicant was properly taken care of and lack of her consent notwithstanding, her interest was appropriately catered for. Regarding her matrimonial home, the structures are temporary which upon subdivision she can be compensated for development done. In the event they encroach to other beneficiaries share, the temporary structures can be removed. In the alternative, the property can be sold after valuing the applicant's developments and the proceeds shared out equally less the value of the developments done. In the event of sale, the applicant be given priority to buy the property.

48. Cognizant of the fact that the applicant was not consulted although entitled to give her consent, and further considering that her interest was taken care of, revocation on that ground will not be of any effect. I do not find it reasonable in the circumstances of this case and interest of justice to revoke the confirmed grant. There is no need to engage on an academic exercise when distribution will not change. For those reasons and in line with the discretionary powers bestowed upon me under section 76 of the Law of Succession, I am inclined not to revoke the confirmed grant. Accordingly, I do direct that the estate be distributed as per the confirmed grant in place.

49. The upshot of it all is that, the application is hereby dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5th DAY OF NOVEMBER, 2019.

J.N. ONYIEGO

JUDGE