



REPUBLIC OF KENYA

IN THE HIGH COURT

AT EMBU

SUCCESSION CAUSE NO. 343 OF 2008

IN THE MATTER OF THE ESTATE OF GATUMU MUTUGI (DECEASED)

EMILY WAWIRA GATUMU.....1ST APPLICANT

CATHERINE WANJIRU GATIMU.....2ND APPLICANT

VERSUS

MARY WANJIRA GATUMU.....PETITIONER/1ST RESPONDENT

JOTHAM MWANIKI GAKUNJU.....2ND RESPONDENT

FLORENCE WAKARII JOTHAM.....3RD RESPONDENT

AND

JULIUS KARIUKI NDAMBIRI.....1ST INTERESTED PARTY

RICHARD CHOMBA NJAGIGU.....2ND INTERESTED PARTY

RULING

A. Introduction

1. This ruling pertains to the summons for revocation of grant dated 8th September 2016. The applicants, who purport to be children of the deceased, seek to revoke the grant issued and confirmed in favour of the petitioner/1st respondent and one Samuel Njagi Gatimu (now deceased) on the 4th day of March 2010.
2. It is the applicants' case that the respondents proceeded to file the succession proceedings secretly without involving them and other beneficiaries. Neither did the respondents obtain the applicants' consent or that of other beneficiaries. The applicants also state the respondents may have forged signatures of the beneficiaries.
3. The applicants further state the certificate of confirmation of grant issued to the 1st respondent was obtained by making false statement or by concealment of material facts to the court and that the 2nd and 3rd respondent who are mere purchasers intend to dispossess the lawful beneficiaries of the deceased's estate and unjustly enrich themselves.
4. In rejoinder, the 1st respondent is the widow of the deceased and mother to the beneficiaries herein admitted the applicants' claim but denied forging their signatures. She further deposed that the 2nd and 3rd respondents should await the outcome of the succession case and not benefit more than her own children.
5. The petitioner also stated that the share of the deceased's estate intended for the now deceased Samuel Njagi Gatimu, should go to his two children. She further stated that the grant issued to her was not fraudulently obtained but that she was misinformed and as such that it is only right that this court proceeds to allow the succession process to commence afresh.
6. The 1st and 2nd respondents opposed the summons for revocation on the grounds that all beneficiaries of the deceased were present during

confirmation of the grant and as such there was no consent required from them. They also stated that subsequently the deceased's estate was sub divided as per the confirmed grant and the applicants did not object to the mode of subdivision but the petitioner refused to sign the requisite transfer forms.

7. On his part, the interested party deposed that he bought ¼ acre of the deceased's estate on the strength of the certificate of confirmation of grant confirmed on the 4th March 2010 which indicated that Joseph Mugo Gatimu was a beneficiary of 2.25 acres and that he has since been in occupation and use of the aforementioned piece of land without interference by any person. As such the interested party is opposed to the application for revocation of grant.

8. The parties disposed of the summons for revocation by way of written submissions.

B. Applicants' Submissions

9. It is submitted that respondents failed to fully disclose material facts whilst filing the instant succession proceedings and further that they presented forgeries of the applicants' signatures before court. Reliance is placed on the case of **In re Estate of Julius Ndubi Javan (deceased)** where it was held inter alia that "*non-disclosure of material facts undermines justice and as such must be subjected to serious reverse osmosis.*"

10. It was further submitted that the respondents, Jotham Mwaniki Gakunju and Florence Wakarii Jotham have proceeded to transact over the deceased's estate whereas the succession proceedings are not completed.

C. 1st & 2nd Respondents' Submissions

11. It was submitted that the applicants were present during confirmation of the grant and none of them raised any objection or protest against both the issuance of the grant or mode of distribution. It is further submitted that the applicants have failed to supply the court with evidence that their signatures were forged and as such their allegations were not substantiated and further that no other beneficiary raised the issue of a forged signature.

12. It is also submitted that the 1st and 2nd respondents were creditors' to the deceased's estate and thus entitled to a share therein.

D. Interested Party's Submissions

13. It is submitted that following the issuance of the certificate of confirmation of grant on the 4th March 2010, the interested party entered into a sale agreement with one Joseph Mugo Gatimu, a son of the deceased and subsequently purchased ¼ acre out of land parcel number Ngariama/Merichi/466 and duly paid the consideration. It was further submitted that vide an order issued Gichugu PMCC No. 30 of 2016, he was registered in the green card for land parcel number Ngariama/Merichi/466.

14. It is submitted that submissions cannot be treated as evidence or take the place of evidence and as such the applicants submission that they are ready to attend court and give evidence over their allegations should be dismissed. Reliance is placed on the case of **Daniel Torotich Arap Moi & Another v Mwangi Stephen Muriithi & Another [2014] eKLR** where it was held that "*submissions cannot take the place of evidence. The respondent had failed to prove his claim by evidence what appeared in submissions could not come to his aid.*"

E. Analysis & Determination

15. 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.

16. It is the applicants' case that the respondents proceeded to file the succession proceedings secretly without involving them and other beneficiaries neither did they obtain the applicants' consent or the beneficiaries permission. The applicants also state the respondents may have forged signatures of the beneficiaries. The petitioner denies forging the applicants' signatures but supports the application in everything else.

17. The 1st and 2nd respondents oppose the application and state that the applicants were aware of the proceedings and subsequent dealings in the deceased's estate after confirmation of grant and have been quiet for all those years.

18. The interested party also opposes the application and states that he acquired ¼ acre from land parcel number Ngariama/Merichi/ 466 after the confirmation of grant and that the grounds relied upon by the applicants herein have not been proven to warrant revocation of grant.

19. My perusal of the record reveals that the applicants herein were listed as survivors of the deceased, in compliance with **Section 51(2)** of the **Law of Succession Act** that 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.”

20. Further, I do note that their consent was sought and granted by their affixing of their signatures in Form 38. The net effect of all the above is that the applicants herein were considered for shares during distribution. Their names are on the grant rectified on 9/03/2015 and certificate dated 21st April 2015 getting 3.25 acres out of the deceased's estate jointly, with their mother the petitioner and other daughters of the deceased.

21. The record also reveals that on 4/03/2010 when the grant was confirmed, the petitioner and all the listed beneficiaries were present and did not raise any objection to the confirmation. The fact of the applicants' presence is evidence of their dishonesty in alleging that these proceedings were filed and proceeded secretly.

22. It is also noted that since the confirmation of grant in 2010, the applicants filed this application only in 2016 which was over six (6) years later. This confirms the averments of the interested parties that the intention of the applicants in this summons for revocation is to remove the purchaser from their land which they purchased from the beneficiaries after the grant was confirmed.

23. The applicants' have alleged that their signatures on Form 38 were forged. Despite supporting the summons for revocation, the petitioner denies forging the applicants' signature. The applicants' have not provided any substantial evidence in support of this claim. It remained a mere allegation.

24. Section 107 of the Evidence Act Cap 80 Laws of Kenya provides that;

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

25. Its trite law that he that alleges must prove and the applicants in my considered view have failed to prove their claim of forgery.

26. The daughters of the deceased together with their mother the petitioner were provided for fairly in the grant given the size of the only asset of the deceased Ngariama/Merichi/466.

27. I reach a conclusion that the applicants have failed to establish any of the grounds set out in Section 76 of the Act.

28. I find no merit in this application and it is hereby dismissed with costs to the respondents and the interested parties.

29. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 11TH DAY OF DECEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muriuki for Nyenyire for Applicants/Objectors

Mr. Njiru for Respondents

