



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NO. 263 OF 2007

IN THE MATTER OF THE ESTATE OF THE LATE NJAU KARIUKI (DECEASED)

NANCY WAMUYU NJAU.....APPLICANT

VERSUS

MARY WANGARI NJAU.....1st RESPONDENT

WALLACE MWANGI NJAU.....2nd RESPONDENT

RULING

1. The estate relates to the late **NJAU KARIUKI (DECEASED)** who died on the 5th September, 1995;
2. The Grant in dispute was issued on the 13/10/2008 to the respondents herein one Wallace Mwangi Njau (**'Wallace'**) and Mary Wangari Njau (**'Mary'**) as joint administrators; and the same was confirmed on the 15th October, 2009;
3. The applicant filed the application on the 17/11/2015 under the provisions of Section 76(a) (b) and (c) of the Law of Succession Act and Rule 73 of the Succession Rules stating that she was a widow to a son of the deceased; that the 1st respondent was her late husband's step-mother and the 2nd respondent was the brother of her late husband; in the application she claims that the respondents had obtained the Grant to the deceased's estate without informing her; and she sought the following orders;
 - (a) Spent
 - (b) Spent
 - (c) That this court do order that the half share of L.R.MUHITO/THIHA/13 be removed from the list of assets of the deceased herein NJAU KARIUKI and the said half share do revert to the estate of LAWRENCE KARIUKI NJAU who died on 19th October, 2007;
 - (d) That the Grant of Letters of Administration to the estate of the deceased herein NJAU KARIUKI made herein to MARY WANGARI NJAU and WALLACE MWANGI NJAU and confirmed on the 15th October, 2009 be revoked or annulled.
4. The application was based on the grounds on the face of the application which are inter alia;
 - (i) The Grant and Confirmation of Grant was obtained fraudulently by the making of false statements that all the beneficiaries to the deceased's estate had consented to the appointment of MARY WANGARI NJAU and WALLACE MWANGI NJAU as the administrators to the estate of the deceased;
 - (ii) That the grant was obtained by the concealment from the court that the deceased herein was also survived by one LAWRENCE KARIUKI NJAU (the husband of the applicant herein) who died on the 19th October, 2007 and the administrators concealed the death of LAWRENCE KARIUKI NJAU from the court in a calculated scheme to disinherit the widow and children of the said LAWRENCE KARIUKI NJAU from their lawful entitlement to the estate of NJAU KARIUKI.
 - (iii) That the confirmation of grant was obtained through concealment of the fact that the half share of land parcel number MUHITO/THIHA/13 belonged to the said LAWRENCE KARIUKI NJAU and did not form part of the estate of NJAU KARIUKI and the same was not available for distribution in this succession cause.

(iv) That the proceedings to appoint MARY WANGARI NJAU and WALLACE MWANGI NJAU were defective in substance in that neither LAWRENCE KARIUKI NJAU nor the widow or children of LAWRENCE KARIUKI NJAU were served or notified with any proposal to appoint the two administrators.

5. To support her claim the applicant also relied on her supporting affidavit made on the 3/06/2007; the respondents MARY WANGARI NJAU (**Mary**) and WALLACE MWANGI NJAU (**Wallace**) filed their responses to the application on the 3rd December, 2015 and on the 17/11/2015 respectively ; directions were taken on the 28/09/2012 that the matter proceed for hearing by way of '**viva voce**' evidence; all the parties gave oral evidence and hereunder is a summary of the applicant's case and the petitioners response;

APPLICANT'S CASE

6. The applicant's evidence was that she was the wife of LAWRENCE KARIUKI NJAU (**Lawrence**) who died on the 19th October, 2007; she annexed the death certificate (**PExh.1**) and a letter from the chief (**PExh.2**); Lawrence was the first born of the deceased herein who was her father-in-law and that he had two (2) wives namely Susan Nyakio who was now deceased and the other was Mary; her late husband was Susan's son;

7. That her late husband and the deceased herein were the joint registered owners of the parcel of land known as **Muhito/Thiha/13** with each owning half share of the land; and produced the copy of the Title Deed (**PExh.3**) and copy of the Green Card (**PExh.4**)

8. On the 20/04/1999 her late husband sold 2.6 acres to one BENERD WERU KAGONDU for the sum of Kshs.500,000/-; the Sale Agreement produced as an exhibit (**PExh.5**) and the remaining acreage of one (1) acre was sold to BETH WANJIRU MARIGA for a sum of Kshs.200,000/-; a copy of the Sale Agreement was produced (**PExh.6**); the two (2) purchasers took occupation of their respective portions and have been there since 1999 and had erected permanent houses thereon; the other half share was taken by Wallace who lives on it but Mary does not live on this land;

9. Her contention was that the confirmation of the grant was obtained through the concealment of fact that the half share of the land did not form part of the estate of the deceased herein; that her late husband's half share was not available for distribution in this cause;

10. That she only became aware of the succession cause on the 13/11/2015 when Wallace showed her an application served upon him on the 1/09/2015; no letter was brought for her to sign and annex her consent;

11. That her father in law owned another parcel of land **Githi/Muthambi/501** and she was entitled to three (3) acres of this land as she has lived on it since 1980; that Mary has never lived on either of the parcels of land;

12. The applicant called **PW2** as a witness; her evidence was that she bought one (1) acre from Lawrence in 1989 for the sum of Kshs.220,000/- but although she had no Title to the land she resided thereon and had built a permanent house; and to date no one had asked her to leave the land;

13. The evidence of **PW3** was that he bought 2.6 acres from Lawrence for Kshs.500,000/-; that he too had built a house on the land and had resided thereon for the last 16 years; and he had uninterrupted use of the land since then; and resided thereon; together with **PW2** they occupy 3.6 acres and Wallace lives on the other portion of 3.6 acres; he confirmed that he too had no title to his portion of land and also confirmed that the applicant did not reside on this parcel of land;

14. The applicant's prayer was that the Grant be revoked so that she may be included on behalf of her late husband;

PETITIONERS/RESPONDENTS CASE

15. Wallace (**DW1**) made and filed his Replying Affidavit on the 17/11/2015 which he adopted as his evidence; that his father the deceased herein had two wives and Mary was the second wife of the deceased; that Lawrence, himself and their sister Isabella were children of the first wife;

16. That he filed a Succession Cause jointly with Lawrence in Karatina in 2004 and obtained Letters of Administration; that he never knew of the Revocation of Grant herein and only got to know about it in August 2015 when the applicant, the Chief and personnel from the Survey Office arrived to survey the land and he refused to give them the go ahead;

17. There was also a Revocation of Grant filed in Karatina by his step-mother which he was aware of; Mary had filed it because he had failed to include together with her children; he later agreed to enjoin Mary as a joint administrator;

18. The deceased had two (2) parcels of land namely **Muhito/Thiha/13** and **Githi/Muthambi/50**; the parcel **Muhito/Thiha/13** was jointly owned by his late brother Lawrence and the deceased; in the Karatina Cause the mode of distribution of **Muhito/Thiha/13** was as between Lawrence and himself; this was because he lived on half of this portion and the other portion had been sold by Lawrence when he was alive to **PW2** and **PW3** who had been on the land since 1999;

19. The other parcel owned by the deceased was **Githi/Muthambi/501**; that the applicant had lived on this parcel ever since she got married to Lawrence in 1979 and should be given this parcel of land; that his co-administrator was not entitled to this land as she had been given her portion of land;

20. That the applicant or had rant was issued to the petitioner on the 25/02/2013 and she thereafter filed Summons for Confirmation on the

24/09/2013 and therein proposed the mode of distribution for the three properties that constituted the estate of the deceased; she had proposed that the properties be divided in equal proportions between herself

ISSUES FOR DETERMINATION

21. After hearing the evidence of the parties and upon reading their respective written submissions this court has framed the following issues for determination;

- (i) Whether the applicant has the capacity to initiate this action;
- (ii) Whether the half portion of the parcel known as Muhito/Thiha/13 comprises the estate of the deceased;
- (iii) Whether to revoke the confirmed Grant;

ANALYSIS

22. This cause has a long history that needs to be broken down before this court embarks on the addressing the issues; initially the 1st respondent petitioned for the Letters of Administration for the estate of his late father; and he did this all by himself at the Karatina Law Court vide Succession Cause No.76 of 2003 and he was issued with a grant on the 8/02/2005; the 2nd respondent who is the 1st respondents step-mother got wind of the Cause and found out that the 2nd house had not been included by 1st respondent who is her step-son; she proceeded to file an Objection together with a Protest; she successfully moved the court to revoke the Grant that had been issued to the 1st respondent; the two respondents later brokered an agreement in which they agreed that a fresh Grant be obtained in their joint names; the Grant was issued on the 13/10/2008 in the joint names of the 1st respondent who represented the interest of the 1st house and 2nd respondent representing the interest of the 2nd house; the matter was also transferred to the Nyeri High Court where the 2nd respondent moved the court and had the Grant confirmed as proposed;

23. It is this confirmed Grant that the applicant herein now seeks to have revoked;

Whether the applicant has capacity to initiate the action;

24. The first issue for determination is whether the applicant is an interested party and has the right or capacity to bring this action; her interest is pegged on the half share of the property that her husband owned with the deceased;

25. Upon perusal of the record the only evidence provided by the applicant is a letter written by the area chief confirming that indeed she is the surviving widow of her late husband; and it is not disputed that she is the widow of the brother to the 1st respondent; and that her late husband was the step-son of the 2nd respondent;

26. After obtaining the letter from the Chief the applicant did not proceed any further as she ought to have which was to apply to court to be appointed as the legal representative to her husband's estate;

27. The record shows that the 2nd respondent filed a Preliminary Objection but did not raise it '*ab initio*' but raised the issue of capacity in the written submissions but did not pursue the issue of capacity to its logical conclusion; and opted to address the issue of concealment instead;

28. The above notwithstanding it is trite law that only the appointed personal representatives have the capacity to sue and be sued; pursuant to Section 82(a) of the Law of Succession Act the objection ought to be upheld and the application ought to be rendered as being incompetent; the section reads as follows;

“82(a) Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers :-

(a) To enforce, by suit or otherwise, all causes of action which by virtue of any law, survive the deceased or arise out of his death for his estate;

29. This court reiterates the fact that the record bears no evidence of the applicant having taken out Letters of Administration even if limited just for the purposes of enforcing her right to the half portion; but there is the letter from the Chief which is sufficient evidence that the applicant is a survivor of the deceased and a beneficiary to his estate and is capable of laying a claim to the estate;

30. As the 2nd respondent merely mentioned this issue in passing and did not pursue the preliminary objection on capacity this court is inclined in the interests of justice not to deal with it conclusively so as to render the application as being incompetent;

Whether the half portion of the parcel known as Muhito/Thiha/13 comprises the estate of the deceased;

31. The applicant's contention is that her late husband and the deceased herein were the joint registered owners of the parcel of land known as **Muhito/Thiha/13** with each owning half share of the land; and produced the copy of the Title Deed (**PEXh.3**) and copy of the Green Card (**PEXh.4**)

32. The 1st respondent offered no evidence to controvert this fact; the 2nd respondent contends that her co-administrator orchestrated the bringing of this action by the applicant so as to frustrate the 2nd respondent in obtaining her rightful share to the estate of the deceased; the 2nd respondent also contends that the issue of concealment does not obtain as the applicant admitted that she was all along aware of the existence of the Cause and had entrusted her brother in law to rightfully safeguard her interest; and further contends that what is rightfully due to her household is held by the 1st respondent; that in the face of her admission the issue of concealment does not arise;

33. The evidence on record shows that the initial title for Muhito/Thiha was in the joint names of Kariuki s/o Njau and Njau s/o Kariuki and both owned half shares in the said property; upon the demise of Kariuki s/o Njau the name of Lawrence Kariuki Njau was registered and took up the said half share; and the registration was done on the 21/12/1994 which was within the lifetime of the deceased herein; the applicant produced the Title for Muhito/Thiha/13 and the Green Card as documentary evidence in support and to prove the above facts; and Lawrence's registered interest survived him upon his demise;

34. This court is satisfied that there is no evidence that has been adduced by the respondents that controverts and or defeats the interest of Lawrence; and finds that the half portion of Muhito/Thiha/13 belonged to Lawrence and did not constitute as being part of the estate of the deceased herein;

Whether to revoke the confirmed grant:

35. Despite the 2nd respondent's assertions that there was an admission by the applicant and knowledge of the existence of the cause and that therefore there was no concealment; it is trite law that the 2nd respondent knowing that the applicant had an interest either as a survivor, a dependant or a beneficiary ought to have personally involved the applicant at all stages and obtained her written consent or in default cited her; there is absolutely no evidence on record that indicates that the 2nd respondent involved the applicant personally or sought and or obtaining her consent;

36. When the 1st respondent filed his petition in Karatina there is evidence he obtained the consent of Lawrence who was alive at that time and obtained his written consent and his signature is appended on the requisite forms;

37. When on the 16th July, 2009 the 2nd respondent filed for the Confirmation of the Grant, at that point in time Lawrence was already deceased having passed on 19th October, 2007; yet the 2nd respondent made an averment and listed him on her supporting affidavit as being one of the survivors to the deceased; this court finds that this averment in the supporting affidavit to be untrue and finds that this is a satisfactory ground for the Revocation of the Grant as the confirmation was obtained by means of untrue allegations of essential facts;

38. This court also notes that the application was also not accompanied by a signed form of consent to the confirmation of grant by any of the beneficiaries listed in the supporting affidavit as required by law; apart from the disinterest of her co-administrator there is no evidence produced by the 2nd respondent to demonstrate that the beneficiaries were duly informed or served and that they all declined to sign; and it goes without stating the obvious that the grant was confirmed in their absence;

39. This court is satisfied that the applicant has demonstrated that the Confirmation of Grant was obtained in a manner that renders it defective as it was obtained by the making of an untrue allegation of fact; and at the time of obtaining the confirmation there was concealment of pertinent facts in this matter that was perpetrated by the 2nd respondent;

FINDINGS

40. In the light of the forgoing this court makes the following findings;

(i) The half portion of Muhito/Thiha/13 belonged to Lawrence and did not constitute as being part of the estate of the deceased herein;

(ii) The Confirmation of Grant was obtained in a manner that renders it defective as it was obtained by the making of an untrue allegation of fact; and at the time of obtaining the confirmation there was concealment of pertinent facts;

DETERMINATION

41. The application for Revocation of the Confirmed Grant is found to have merit and it is hereby allowed;

42. The Certificate of Confirmation of Grant dated the 15th October, 2009 is hereby revoked;

43. The administrators to file a fresh application for Confirmation of Grant exclusive of the half-portion of Muhito/Thiha/13; and any title issued to Mary Wangari Njau and Wallace Mwangi Njau touching on Muhito/Thiha/13 is hereby cancelled.

44. The applicant to regularize her status within the next one (1) year; in default any family member shall be at liberty to petition for Letters of Administration for the estate of the late Lawrence Kariuki Njau;

45. Parties at liberty to apply for further directions;

46. This being a family matter each party shall bear its own costs;

It is so ordered accordingly.

Dated, Signed and Delivered at Nyeri this 12th day of September, 2018.

HON. A. MSHILA

JUDGE