



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HIGH COURT SUCCESSION NO. 362 OF 2014

IN THE MATTER OF THE ESTATE OF

CYRUS MURAGE GACEWA.....DECEASED

V E R S U S

JUDITH WAKINI MURAGE.....RESPONDENT

RULING

This matter relates to the estate of Cyrus Murage Gacewa (deceased). A grant of Letters of Administration was issued to Judith Wakini Murage and confirmed on 9/6/1995. The estate of the deceased comprised in Land parcel No.Ngariama/Nyangeni/286 which was distributed as follows:

M N M (minor) Son – 2 Acres.

Elias N M (Minor) Son – 2 Acres.

Ileri Njagi (Brother) – 2 Acres.

Judith Wakiini Murage (Wife) – 1.88 Acres.

This was in Succession cause No. 263/94 in the P.M's Court at Embu.

The application which is now pending determination in this court is dated 17/2/2005 by Jane Kuthii Ileri – Objector Applicant brought under **Section 76(b) and rule 44 & 73 of the Law of Succession Act**. She seeks an order that the grant herein be annulled or revoked for having been obtained fraudulently and by means of untrue allegations. That the lower court at Embu did not have jurisdiction to hear and determine the matter.

The applicant's case is that –

Applicant's case

The succession cause was filed without her knowledge and the petitioner did not disclose that there were other beneficiaries. That she lives on the estate together with her 8 children but were not given a share of the estate. That it is only when going through her husband's documents that she discovered the succession was filed. That the estate was registered in the name of the deceased and her husband's father who transferred it to the deceased so that he shares it with his brother since he was the elder brother and the applicant's husband was a minor.

The respondent Judith Wakiini Murage filed a replying affidavit sworn on 7/3/2005.

Respondent's case

In response, she stated that she filed succession in respect of her husband's estate Cyrus Gacewa and the applicant's husband Ileri Njage filed objection but the grant was issued to her. Ileri Njage did not oppose the confirmation and he was awarded 2 acres out of the estate after consent was entered between his advocate and the applicant's advocates. Therefore the applicant cannot complain to be unaware of the proceedings. That the applicant lives on the 2 acres awarded to her husband.

The issues which arises are whether the grant was obtained fraudulently and by means of untrue allegations and that the lower court did not have jurisdiction to hear the matter.

On the first issue, the applicant depones that the petitioner failed to disclose that there were other beneficiaries of the estate of the deceased. For the court to annul or revoke the grant, the applicant must prove the grounds set out under **Section 76 of the Law of Succession Act Cap 160 Laws of Kenya** provides:

“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) The grant was obtained fraudulently by making of a false statement or by the concealment from the court something material to the case.

c) That the grant was obtained by means of an untrue allegation of a fact essential in a point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently -----“

The applicant has alleged fraud and none disclosure. Section 76 gives situations or the circumstances which when proved will lead the court to revoke the grant either on its own motion or on an application by a party. The applicant must adduce evidence to prove that the grant was obtained fraudulently or through none disclosure of material facts which were material to the case. The applicant who makes allegation that the proceedings were defective must tender such evidence.

The grant may also be revoked where the petitioner fails to apply for its confirmation and the distribution of the estate.

Section 76(d) Provides:

“That a person to whom the grant was made had failed, after due notice and without reasonable cause either –

1. 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.

2. To proceed diligently with the administration of the estate, or

3. To produce to court, within the time prescribed, any such inventory or account of administration as required -----

4. That the grant has become useless and in operative through subsequent circumstances.”

The applicant claim is that her husband Ileri Njagi was a brother to the deceased and that the deceased was holding the estate in trust for her husband and himself.

The Petitioner Judith Wakiini Murage (who passed away and was substituted by her son Elias Njue Murage), depones that the applicants' husband Ileri Njagi objected to the grant of letters of administration but they were issued to her. The said Ileri Njagi did not protest to the confirmation of the grant and it was therefore confirmed on 9/6/1995. The grant is annexed as **annexture “JWI”**. She further deponed that the applicants' husband was represented in the cause by an advocate and he consented that he gets two (2) acres out of land parcel No. Ngariama/Nyangeni/286. Indeed it is evident from the grant that Ileri Njagi was awarded two acres out of the estate.

She depones that the estate was distributed in line with the confirmed grant as shown by the copies of the register. The applicants' husband attended the Land control Board and consent to sub-divide was given. The applicants' husband was registered on Land Parcel No. Ngariama/Nyangeni/879 measuring two (2) acres. That the applicants' husband fully participated in the succession cause No. 263/1995 and at the time of his death the succession had been finalized. The applicant lives on the portion which was awarded to her late husband.

The evidence shows that the deceased Cyrus Gachewa Murage was the registered owner of the land. The applicant is the wife of the brother to the deceased Cyrus Murage Gachewa. I have looked at the objection which was filed by the applicant's husband. In that objection, his contention is that the deceased left all his properties under his care. He has not in the objection stated that the deceased was registered in trust. The applicant's contention that the deceased was registered in trust is not based on any facts because her husband had not made such allegation. Ileri Njagi in an affidavit sworn on 6/7/95 was seeking an order that the Executive Officer executes the document to enable him get a title deed in line with the confirmed grant. This shows that the applicant's deceased husband had no issue with the grant confirmed on 9/6/1995. The applicant cannot be heard to say the grant was obtained by concealment of material facts in view of the objection which was filed and the affidavit which I have cited. The applicant's husband entered a consent for the land to be subdivided and he gets his two acres.

The applicant who is the wife of the brother to the deceased is not a dependant of Cyrus Murage Gachewa to whom this estate relates. Cyrus Murage Gachewa was the registered proprietor of the land in dispute which forms his estate. Ileri the applicant's husband did not in his objection aver that the deceased was registered in trust. Ileri Njagi Gachewa consented to getting two acres as per the confirmed grant. He fully participated in the succession cause, filed an objection and was even represented by counsel.

I am of the view that there is no prove that the grant was obtained fraudulently or by means of making a false statement or concealment of something material to the case. The applicant has not therefore established any grounds to warrant this court to revoke or annul the grant. The applicant and her children are not dependents of the deceased Cyrus Murage Gachewa and are therefore not entitled to a share of the estate. She is only entitled to the two acres which were her husband's share.

On the issue of jurisdiction, there was no averment as to why the court is said to have had no jurisdiction. The proviso to **Section 47 of the Law of Succession Act** states:

“ Provided that the High Court may for the purpose of this section be represented by a Resident Magistrate appointed by the Chief Justice.”

Section 48 gave a Resident Magistrate jurisdiction to entertain any application other than an application under section 76 and to determine any dispute under the Acts. **Section 48(1)** provides:

“(1)Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of Section 49 of this Act, a Resident Magistrate shall have jurisdiction to entertain any application other than an application under Section 76 of this Act and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one Hundred Thousand Shillings:

Provided that for the purpose of this section in any place where both the High Court and Resident Magistrate’s Court are available, the High court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act.”

The court had jurisdiction to entertain the matter. The issue was not raised before the trial Magistrate. The value of the subject matter was stated to be Kshs 100,000/-. I find that the Magistrate had jurisdiction. The issue of jurisdiction is not a ground upon which the court can annul the grant. It can form a ground of appeal if it was raised before the trial court and the court over ruled it.

The applicant has no capacity to bring this application. This is because, her husband having participated in the proceedings and is now deceased, she could only come into the cause as a legal representative of her deceased husband by obtaining Letters of Administration in his estate or letters of Administration Ad Litem. The applicant in my view lacks locus standi to bring this application.

In Conclusion:

The applicant and her children are not beneficiaries in the estate of the deceased.

The applicant has failed to prove any of the grounds set out under **Section 76 of the Law of Succession Act** to warrant the revocation/annulment of the grant.

The applicant’s husband was allocated two acres where the applicant and her children are living.

The application lacks merits and is dismissed with costs.

Dated at Kerugoya this 11th day of October 2018.

L. W. GITARI

JUDGE