



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**SUCCESSION CAUSE NO. 2893 OF 2015**

**IN THE MATTER OF THE ESTATE OF FRANCIS ITUIKA WANYUGI ALIAS FRANCIS ITWIKA WANYUGI (DECEASED)**

**PHILOMENA WANJIKU KINORO..... 1<sup>ST</sup> APPLICANT**

**JANE NJERI GITHU.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**BERNARD GAKURU ITWIKA.....RESPONDENT**

**JUDGMENT**

1. The deceased Francis Ituika Wanyugi Alias Francis Itwika Wanyugi died intestate on 29<sup>th</sup> November 2015. He was survived by the following beneficiaries:

- a) Mary Wahu Ituika – widow (administratrix);
- b) Annah Wambui Ituika- daughter;
- c) Kennedy Ituika Wanyugi- son;
- d) Bernard Gakuru Itwika – son (respondent);
- e) Philomena Wanjiru Kinoro – daughter (1<sup>st</sup> applicant);
- f) Jane Njeri Githu – daughter (2<sup>nd</sup> applicant);
- g) Phillip Njoroge Ituika – son; and
- h) Titus Kariuki Ituika - son

A grant of letters of administration intestate was issued to Mary Wahu Ituika and Bernard Gakuru Itwika (the respondent) on 16<sup>th</sup> March 2016 and confirmed on 12<sup>th</sup> October 2016.

2. The applicants are the daughters of the deceased. They brought the present application dated 7<sup>th</sup> December 2016 seeking the revocation of the grant on the grounds that:

- a) the proceedings to obtain the grant were defective in substance;
- b) the grant was obtained fraudulently by making of false statements and concealment of material facts; and
- c) the grant was obtained by fraudulent means of untrue allegations.

3. The application was supported by the affidavit of the 1<sup>st</sup> applicant dated 7<sup>th</sup> December 2016. The summary of her case was that their mother is elderly and sickly and incapable of comprehending the nature and duties of an administrator; that the respondent has been taking advantage of their mother's illness and has duped her into signing documents relating to this matter; that the respondent did not allow them to interrogate the documents filed in court and only availed one page for their execution after which he returned the page to their advocates for filing; that the other beneficiaries together with herself were not aware of the proposed mode of distribution of the estate adopted and filed in court and were not agreeable to the same; and that the beneficiaries, including herself, were duped and deceived by the respondent and their then advocate into consenting to the mode of distribution in the certificate of confirmation.

4. The application was opposed by the respondent through his affidavit dated 6<sup>th</sup> February 2017. His case was that there was no evidence that he or his mother fraudulently made false statements and concealed any material facts, that the proceedings were defective in substance, or that the grant was obtained by fraudulent means of untrue allegations. He stated that on 25<sup>th</sup> November 2015 the succession cause was filed with full consultation and it was supported by signed consents of all the beneficiaries; that the summons for the confirmation of grant were also supported by the consents of all beneficiaries including the applicants; that the applicants did not allege that their signatures were forged, that they did not personally appear before lady Justice Achode on 12<sup>th</sup> October 2016, or that they did not verbally confirm to the judge that they agreed with the proposed distribution; that every step in the succession process was done with the full knowledge, information and personal participation of the beneficiaries; that their mother, is not critically sick as alleged, instead she is mentally alert and was personally in court on 12<sup>th</sup> October 2016 during the proceedings leading to the confirmation of grant; that there was no medical evidence placed before the court to show that their mother is unfit to be an administratrix; and that the bulk of the estate has been distributed, and the applicants were the first ones to demand transfer of the parcels allocated to them and have therefore filed the summons for revocation in bad faith.

5. I have considered all the pleadings and submissions on record.

6. The circumstances that can lead to the revocation of grant have been set out in **Section 76 Law of Succession, Cap 160**. For a grant to be revoked, either on the application of an interested party or on the court's own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or there was concealment of something material to the case, or that the grant was obtained by means of untrue allegation of facts essential in point of law. A grant may also be revoked if the person named in the grant has failed to apply for confirmation, or to proceed diligently with the administration of the estate (**Matheka and anor v Matheka [2005] 1 KLR pg 456**). It may also be revoked if it can be shown to the Court that the person to whom the grant has been issued has failed to produce to the Court such inventory or account of administration as may be required.

7. I have considered the evidence on record. As submitted by the respondent, there is no evidence on record to prove that the grant was in any way defective in substance, that the grant was obtained fraudulently by the making of false statement, that there was by concealment of something material to the case, or that the grant was obtained by means of untrue allegation of facts essential in point of law.

8. The applicants stated that they were unhappy with the proposed mode of distribution of the estate. It has been held that revocation proceedings are not the appropriate procedure for a party who is unhappy with the mode of the distribution of the estate, and is only interested in challenging the distribution (**In Re Estate of Gitau (Deceased) [2002] 2 KLR 430**). A party complaining about the distribution of the estate should instead move the court to set aside the confirmation and cancel the certificate of confirmation based on the grant (**In The Matter of The Estate of Laban King'ori Macharia (Deceased) Nairobi High Court P&A Cause No.16 Of 1988**).

9. The record is clear that the applicants were included as beneficiaries of the estate of the deceased, and their consents to the petition for grant as persons equally entitled to petition for grant were sought as required by **rule 26(2) of the Probate and Administration Rules**. The proceedings to obtain the grant were not defective in substance in this regard. They were aware that the grant was being confirmed but claim that the respondent availed only one page for their execution after which he returned the page to their advocates for filing. They did not see or appreciate the full contents of what they were signing. It was incumbent upon the applicants to interrogate the papers they were asked to sign and agree with the contents before signing them. Further, when the parties appeared before court on 12<sup>th</sup> October 2016 for the confirmation of grant, the applicants had the opportunity to raise their objections. They sat through the proceedings, and cannot now be heard to say that they were not involved or did not have actual knowledge of what was going on. What is important is that they duly signed the consent to confirmation of the grant. They have not claimed that the said signatures were a forgery, or were obtained by coercion or duress. I find that their claims have no basis. They duly consented to the confirmation of grant. They cannot be allowed to resile from what they agreed to in the consent.

10. Consequently, the application dated 7<sup>th</sup> December 2016 is dismissed with costs.

**DATED and DELIVERED at NAIROBI this 1<sup>ST</sup> day of OCTOBER 2018**

**A.O. MUCHELULE**

**JUDGE**