



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 307 OF 2015

IN THE MATTER OF THE ESTATE OF MIRIAM NJOKA (DECEASED)

AND

IN THE MATTER OF ANNULMENT AND REVOCATION OF GRANT

EVANSON NDWIGA J. NTHUMBI.....APPLICANT

VERSUS

DAN NYAGA RUGOCHI.....RESPONDENT

R U L I N G

A. Introduction

1. The background facts are that a grant of letters of administration intestate in this cause was issued to **Dan Nyaga Rugochi** on 30th October 2015 with respect to the estate of **Miriam Njoka**. The said grant was confirmed on 23rd May 2016 and a certificate of confirmation of grant dated 25th May 2016 issued to the said administrator, who is the respondent herein. The deceased's estate was distributed to her children save for the applicant.

2. An application for revocation dated 13/12/2016 and forms was thereafter filed and forms the subject of this ruling. The application by **Evanson Ndwiga J. Nthumbi** seeks for orders for annulment/revocation of the grant on the following grounds:

a) THAT the Respondent/Petitioner in respect of the deceased estate never informed me as an elder brother and a dependant to the estate

b) THAT the Respondent/Petitioner filed Succession Cause No. 307 of 2015 in this court of the estate of MIRIAM NJOKA who is our mother.

c) THAT as the son of the deceased I am entitled to a share of the deceased estate No. NGANDORI/ KIRIGI/6546.

d) THAT the grant was obtained by means of false allegation essential in point of law to justify the grant"

3. The applicant in his supporting affidavit sworn on 13th December 2016 states that he is one of the children of the deceased and as such entitled to a share of the deceased estate. He further deponed that the respondent filed the suit for grant of letters without informing him.

B. The Responses

4. The respondent filed a replying affidavit on the 16th March 2017 asserting that the succession case was not secretly filed as the applicant was present at the chief's office when he was obtaining the chief's letter to enable him file the suit.

5. The respondent further stated that the applicant was not entitled to a share of their mother's estate as he had been given 15 acres by the Gicuku Clan through their late father to hold in customary trust for his siblings but later sold it.

6. The respondent further stated that the applicant had bought another parcel of land where he currently dwells with his family this is **NGANDORI/KIRIGI/2002**.

7. On the 20th March 2017, the applicant filed a replying affidavit of the same date in which he stated that the suit property now in dispute was carved out of LR. No. **NGANDORI/KIRIGI/575** which was the asset in his deceased father's estate. He produced a Certificate of confirmation of grant dated 28th April 2000 that was issued to his deceased mother **Miriam Njoka** the deceased in this case. In the schedule to the aforementioned certificate of confirmation of grant, the deceased was assigned 0.63 ha. which the applicant cites as the suit property in this succession cause.

8. The applicant further agreed that indeed he was allocated land by his Gicuku Clan just like other people and that the green card provided by the Respondent was clear proof that no relationship between his own land and that held by his late father.

9. The parties agreed to settle the matter by way of viva voce evidence.

C. Applicant's Case

10. The applicant reiterated his claims as laid down in his aforementioned Application and Replying Affidavit and further testified that his mother owned 0.63 ha. carved out of **LR. No. NGANDORI/KIRIGI/575** which she had inherited from the applicant's late father.

11. He further testified that his brother, Elias Njuki lived on the said piece of land with his deceased mother and that the family had earlier agreed that he, the applicant, would inherit the piece of land in the event that the deceased passed on before him.

12. The applicant testified that the family had engaged the services of an advocate during the succession cause for their father's estate who, had the aforementioned instructions but unfortunately passed on before concluding the matter and subsequently when the title over his mother's land was processed, his name was missing.

13. The applicant further testified that he came to learn of this succession cause as a result of a letter from the Embu Land Registrar who wrote to him on the 1st November 2016 to remove an earlier caution he had filed over the suit property.

14. In cross examination, the applicant further asserted that he never accompanied the respondent to the Chief's office to get the letter to initiate the succession proceedings and further that he wasn't aware of any minutes of meetings where all the family members were present. He concluded by stating that despite being in the country, the Respondents never informed him of the succession suit.

D. Respondents Case

15. The respondent testified that sometime in June 2015, "*he sent someone through the chief*" to inform the applicant that he was filing a succession cause and further that the chief sent the assistant chief of Manyatta sub-location to inform the applicant.

16. The respondent further testified that members of the family met at their mother's home however the he admits he didn't call the applicant nor involve him in the distribution of the deceased's estate as the applicant the applicant had informed the chief that "*he had no intentions in the land.*"

17. The respondent further asserted that the applicant was not entitled to any share in their mother's property as he had sold the Gicuku land GATURI/WERU/498 given by the clan leaders which his deceased father wanted to sell for the benefit of the whole family.

18. The respondent further stated the applicant deserted home after selling the land and never attended their parents' burial. He concluded by stating that he and his brothers had less than 2 acres whereas the applicant had bought 6 acres after selling "*our father's land and therefore put us at a disadvantage.*"

19. DW2 Mica Julius Mbogo, a younger brother to both the applicant and respondent stated that the applicant was never informed about filing of the suit as he had deserted home during the life of their parents and further because "*he sold the family land measuring 15 acres.....and bought himself 6 acres at Manyatta sub-location.*"

20. DW2 further testified that "*my father said the applicant has no right to inherit the land now in issue,*" and that "*my mother said before she died that land was to be shared between his seven children excluding the applicant.*"

21. DW3 Elias Njuki Ngumi, testified that the chief summoned them to his office before the respondent filed the succession cause in 2015 and that the applicant was present. He also strongly opposed the applicant's inheriting his mother's land.

E. Determination

22. After hearing the arguments of the parties, there's need to determine, whether the grounds relied on under **Section 76 of the Act** had been satisfied. These are: -

a) 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; or

b) 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.

23. Indeed, it is worth noting from the onset that the suit property is that which had already passed on to the deceased **Miriam Njoka**, through normal rigours of succession proceedings and for all intents and purposes the suit property herein belongs to the aforementioned **Miriam Njoka**, mother to both the applicant and the respondent.

24. To begin with, when the respondent originally begun this matter, the letter that was issued from the Office of the Chief Ngandori East Location, Manyatta did indicate the applicant as a beneficiary. Therefore, the dependants in this matter remain the ones indicated in the letter dated 17th June 2015 as provided in **Section 29 of the Law of Succession Act**.

25. However, it is noteworthy, from documents filed in court in this matter by the respondent, that despite the consent to the making of grant of administration intestate to person of equal or lesser priority having the applicant's name, it was not signed by the applicant. Likewise, the affidavit in support of confirmation of grant sworn by the respondent and filed in Court on 4th December 2015 did not have the applicant's name and signature despite him being a legitimate heir of the now deceased **Miriam Njoka**.

26. What is instructive is that a look at the testimony by the respondent and the witnesses he chose to rely on reveals that indeed the applicant herein was not informed of the succession cause for letters of administration and subsequently of the confirmation of the grant. In fact, the applicant testified, which was not controverted, that he only became aware of the succession cause after receiving a letter from the Embu Lands Registrar.

27. It is noteworthy that under **Rule 26 of the Probate and Administration Rules**, consent of heir in equal degree is mandatory. It is not in dispute that the consent for distribution was never obtained from the applicant.

28. The applicant is not opposed to the respondent being the administrator of the estate but to the distribution that excludes him as an heir of his mother's estate.

29. It is my considered opinion that the applicant has satisfied the court on the provisions of Section 76(b) of the Act. The respondent failed to disclose to the court that he had omitted the name of the applicant from the list of distribution and failed to state why he had done so. His failure to inform the applicant who is a person entitled to inherit from the deceased that he had filed this cause amounts to non-disclosure of facts material to this case.

30. It is my finding that the application is merited and I hereby allow it in the following terms: -

i. That the confirmation of grant and the certificate thereof is hereby revoked.

ii. That the respondent Dan Rugochi and the respondent Evanson Ndwiga J. Nthumbi are hereby appointed as co-administrators of the estate.

iii. That the administrators or any of them do file an application for confirmation of grant within 30 days after due consultation with all the beneficiaries.

iv. That each party to meet the costs of this application.

31. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF NOVEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Both parties