

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 580 OF 2014

IN THE MATTER OF THE ESTATE OF FLORENCE MUKAMI KINYUA (DECEASED)

RMM (minor suing through mother and next friend, M W)APPLICANT

-Versus-

PATRICIA NYAWIRAMURIITHI

HARRY THUKU KINYUA.....PETITIONER/RESPONDENTS

JUDGMENT

What is before me is the summons for Revocation or Annulment of Grant dated 9th February 2017 as amended on 17th January 2017 brought under Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules by RMM through her mother and next friend, M W.

The deceased, Florence Mukami Kinyua, who died on 16th November 2013 was mother to Antony Mchekah Mukami who pre deceased his mother. Antony was married to M W, and they had one child, the minor. According to the chief's letter dated 23rd April 2014 the beneficiaries to Florence Mukami's Estate were:

No.	Name	Age	Relationship
1.	Anthony Mchekah Mukami	Deceased	Son
2.	Regina Mukami Mcheka	4	Granddaughter
3.	Patricia Nyawira Muriithi	49	Sister
4.	Lydia Gathoni Kinyua	75	Mother
5.	Harry Thuku Kinyua	59	Brother
6.	Benedict Maina Kinyua	56	Brother
7.	Mary Nyaguthii Kinyua	54	Sister

She died intestate and her estate comprised of the following properties: -

1. L.R Nyeri/Naromoru/1880
2. L.R Nyeri/Naromoru/4255
3. L.R Mavoko Town Block 35/454
4. L.R Mavoko Town Block 3/15193
5. Allotment Card for Plot No.413 Juja Scheme
6. Gratuity with National Youth Service
7. Post Bank Account
8. Equity Bank Account

Patricia Nyawira Muriithi and Harry Thuku Kinyua, a sister and brother to the deceased respectively, applied for Letters of Administration Intestate of the estate of the deceased on 3rd July 2014. The grant was issued on 23rd September 2014. Through Summons for Confirmation of Grant dated 4th May 2015 the administrators sought to distribute the estate and on 2nd July 2015. The grant confirmed their proposal in the following terms:

No.	Description of Property	Heir
1.	LR.NO.NYR/NRM/4255	Patricia Nyawira Muriithi
2.	L.R NO.NYR/NRM/1880	Patricia Nyawira Muriithi
3.	MAVOKO TOWN BLOCK 35/454	Regina Mukami Mcheka
4.	MAVOKO TOWN BLOCK 3/15193	Regina Mukami Mcheka
5.	Allotment card for Plot No.413 Juja Scheme	Patricia Nyawira Muriithi
6.	Gratuity with National Youth Service	To be shared equally between Patricia Nyawira Muriithi and Regina Mukami Mcheka

On 8th September 21st March 2016, the grant was rectified to include two bank accounts held at Equity bank and Post bank had been omitted. Both were inherited by Patricia Nyawira Muriithi.

The said Summons seek for the following orders: -

1. ...spent
2. (a) That the grant made on 2nd July 2015 and rectified on 8th September 2016 be and is hereby revoked and/or annulled.
3. Costs

The grounds for the application as set out on the face of the summons are:

1. THAT the proceedings to obtain the grant were defective in substance.
2. THAT the grant herein was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case.
3. 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.

A. The Applicant's case

In her supporting affidavit sworn 9th February 2017 the applicant deponed that the respondents failed to disclose sought to the court that she was the surviving daughter-in-law, and the mother and next friend to RMM. That as the daughter in law she was entitled to a share of the deceased's estate. That the 1st Petitioner accessed the deceased's estate without the involvement of herself and her child yet they were beneficiaries of the deceased's estate. In addition, the deceased had appointed RMM as her next of kin to her employer, the National Youth Service (NYS), yet the petitioner had arrogated herself an equal share of the deceased's benefits from the said employer. She therefor sought the revocation of the grant and issuance of a fresh grant including her as an equal beneficiary with the respondents.

B. The Response

The Respondents replied through the 1st respondent's Affidavit sworn on the 13th March 2017. It is their position that the minor's mother is not entitled to any share of the deceased's estate. That the only one beneficially entitled was the minor, and she and her co administrator would hold her share in trust for her. That next of friend had abandoned the deceased when she received compensation for her late husband's death in the army and it had been left to the 1st Respondent to take care of the deceased and pay all her bills until she died. In any event, that the deceased had distributed her property before she died.

She also deponed that Land parcels number **NYERI/NAROMORU/1880** and **NYERI/NAROMORU/4255** were given as gift to the deceased by the Respondent's late father to hold in trust for the deceased's mother who was living on land parcel NYERI/NAROMORU/4255. That The 1st Respondent was to take rent from the property on NYERI/NAROMORU/1880 for the sake of taking care of their mother.

C.

Before the hearing, by an order dated 17th November 2017, the petitioners were ordered to comply with s. 83(ii) of the Law of Succession Act and an affidavit of the accounts was filed on 17th January 2018.

D.

The matter was heard vide viva voce evidence on 12th February 2018. In her testimony the next friend told the court that the respondents neither informed her that they were filing this succession cause nor did they mention her in any court documents. She stated that she learnt about it when the estate had been distributed and that she was disinherited. She further stated that the Respondents withdrew money from the deceased's Equity bank account amounting to Ksh. 2.1 million belonging to the estate and only gave her Ksh. 250,000/-. The respondents had also allocated themselves the minor's inheritance given to her during the lifetime of the deceased made up of the money at NYS where the deceased was working, which money she had appointed the Applicant as her next of kin to receive and that the 1st Respondent was the alternative next of kin to receive the money only in absence of the 1st Respondent. She conceded that she had been given Ksh. 350,000/ from the deceased's dues from NSSF.

On cross-examination, she stated that she had an agreement with the 1st Respondent on how to share the estate. She stated that she was aware that there are some properties that would go the Applicant according to the grant. She confirmed that she was paid 4.7 million as compensation for her deceased husband and denied she had remarried. She also conceded that she had received the Kshs. 350,000/- from the deceased's estate before the succession cause was filed but still brought a complaint that the minor was in need dire need of money. She admitted that the 1st Respondent had also given her Ksh. 250,000/- which she said she used to pay school fees and rent for the minor. She stated that she brought this case for her daughter and not herself.

The 1st Respondent relied on her affidavits. On cross-examination, she stated that the deceased was her sister. She did not dispute that if her sister had children she would not be directly entitled to her inheritance. She admitted that her sister was predeceased by her only son and the minor was his daughter. That the minor's mother was not among the beneficiaries of the deceased because she had not wished her to inherit anything from her. She confirmed that she had not sought the next friend's consent when filling this cause as she did not know her whereabouts. She was not even aware that the next friend would want anything from her late mother-in-law's estate. She conceded that the minor's interests ought to be taken care of by the parents of the minor. She also conceded that she never disclosed to the court that the minor had a living parent. She conceded in the same breath that though she did not know their whereabouts she was still able to give the next friend Ksh. 250,000/-.

E. Submissions

The Applicant's submissions were filed on 3rd September 2018. The submissions reiterate that the Respondents are required by law to declare to court truthfully all the persons who would be entitled to share in the estate, whether they would be entitled or not in the distribution. The Applicant also submitted that a parent to a child shall always be deemed to be the best person to exercise power and control and parental responsibility over the child and that the court should not be called upon to cut out a parent from this role without the parent being afforded a hearing.

F. Issues

1. Whether the Applicant has established the requirements set out in Section 76 of the Law of Succession Act to warrant revocation the grant issued to the Respondents.

G. Analysis

A grandchild is a direct heir to the estate of the grandparent where the parent predeceased the grandparent. The grandchildren get into the shoes of their deceased parents and take the parent's share in the estate of the grandparents. This was stated in **Re Estate of Wahome Njoki Wakagoto (2013) eKLR** where it was held:-

“Under Part V, grandchildren have not right to inherit their grandparents who die intestate after 1st July 1981. The argument is that such grandchildren should inherit from their own parents. This means that the grandchildren can only inherit their grandparents' indirectly through their own parents, the children of the deceased. The children inherit first and thereafter grandchildren inherit from the children. The only time grandchildren inherit directly from their grandparents is when the grandchildren's own parents are dead. The grandchildren step into the shoes of their parents and take directly the share that ought to have gone to the said parents.”

The minor herein got into the shoes of her deceased's father upon his demise, acquiring equal rights with the Respondents to apply for the letters of Administration as they fall in the same degree of consanguinity, 2nd Degree, according to Rule 7(1)(e)(iii) and rule 4 of the Second Schedule to the Probate and administration Rules See **Immaculate Wangari Munyaga vs Zachary Waweru Ireri (2016) eKLR**.

Rule 4 states:

In determining the degree of consanguinity of a person from the deceased by tracing through an intermediate relative it is not necessary that such relative was living at the death of the deceased, e.g. a grandchild of the deceased living at the latter's death would be included among the relatives notwithstanding that his parent (i.e. the deceased's child) had died before the deceased.

The minor ought to have been informed of and involved in the succession proceedings through the next friend. There next friend having been married to the deceased's son deserved a mention in the same breath as her child so that she would have the opportunity to pursue or take care their interests in the deceased's estate

In **Nahashon Karungu Macharia vs Rosemary Kahura Njoroge (2016) eKLR** it was held that a daughter-in-law of a predeceased son is a beneficiary of the estate of the latter deceased parent-in-law thus: -

*“The Deceased was survived by the said Administrator and another son, **Patrick Muthemba Macharia**. He was also survived by a daughter-in-law called **Rosemary Kahura Njoroge** (a widow of another son, now deceased, **James Njoroge**). There had been yet another son, **John Kimani**, who died after the Deceased. It is common ground that he died without wife or issue. So, in effect there are only three beneficiaries to the estate of the Deceased – his two surviving sons and the widow of another son, since deceased.”*

See also **In Re Estate of Samuel Gichuhi Mugambi Alias Gichuhi S/O Mugambi (Deceased)2018 eKLR**

Rule 26 of Probate and Administration Rules states that letters of administration shall not be granted to any applicant without notice to every person entitled in the same degree as or in priority to the applicant. **In re estate of Wahome Mwenje Ngonoro (2016) eKLR** it was held: -

“It is trite law that if a grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case; or that the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently, such a grant can be revoked or annulled. The law permits the court to revoke a grant on its own motion or on application by an interested person.

The evidently deliberate failure by the Respondent to involve the applicants at the time of filing these proceedings, failing to list them among the beneficiaries or seek their consent or renunciation was in view in bad faith and amounts to concealment of material facts. My conclusion is that the proceedings leading to the issuance of the grant are defective in substance and that material information was not disclosed to the court in that had the court been made aware that there were other beneficiaries who were interested in the deceased's estate, the court would have hesitated to issue the grant.”

H. Conclusion

The Respondents concealed material facts in the succession cause being the existence and interest if any of the next of friend. The allegation by the Respondents that the estate was distributed as per wishes of the deceased is baseless as the deceased died in intestate. The petition for letters of administration was made for an intestate estate and in the proceedings no will written or oral will was alleged to have been made.

Further, it being a requirement of the law that there be a continuing trust in favour of the minor's share it was mandatory to include the next friend in the proceedings or seek the appointment of a guardian ad litem if they thought the next friend was not competent to properly preserve the interests of the minor.

In the circumstances, I am satisfied that the interests of the minor herein will best be served if the grant of letters of administrations made on 2nd July 2015 and rectified on 8th September 2016 is revoked, which is and is hereby revoked.

A fresh grant one to issue jointly to the respondents Patricia Nyawira Muriithi Harry Thuku Kinyua and M W in her capacity as daughter in law of the deceased and as mother and next friend to RMM.

All or each party is at liberty to file summons for confirmation of the grant within 30 days hereof.

No orders as to costs

Dated delivered and signed at Nyeri this 16th day of November 2018.

Mumbua T Matheka

Judge

In the presence of:

CA Ester

Mr. Karweru for the protester

Mr. Muchiri wa Gathoni for the petitioner