



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

SUCCESSION CAUSE NO. 153 OF 2005

IN THE MATTER OF THE ESTATE OF M'IKIUGU N'TUERANDU (DECEASED)

ELIJAH MURIUKI M'IKIUGU.....PETITIONER

Versus

PAUL MARANGU M'IKIUGU.....PROTESTOR

JACINTA KARUIRWA MURUGU.....1ST APPLICANT

LUCY RIGIRI M'KALIA.....2ND APPLICANT

RULING

Indolent suitor

1. Before me is a Summons for revocation or annulment of grant dated 5th February 2018 which is expressed to be brought under **Section 76(2), (b), (c), (d) (ii), (iii) and (e) of the Law of Succession Act and Rules 44 (1) (2) (a) and (3) and 73 of the Probate and Administration Rules CAP 160 Laws of Kenya** and all the enabling laws. The application seeks revocation of the grant letters of administration issued to Paul Marangu M'Ikiungu and Elijah Muriuki M'Ikiungu on 2nd October 2006 and confirmed on 14th September 2009.

2. The grounds upon which the application is grounded are contained in the application, affidavit of Jacinta Karuiwa Murugu and further supporting affidavit sworn on 26th January and 14th June 2018 respectively. It is contended that the applicants who are the biological daughters of the deceased were never provided for in the deceased's estate. The administrators herein who are brothers to the applicants refused to provide for them in spite of their demand. They accused the administrators of failing to disclose to the court that they were equally entitled. They stated that they have all along been pleading with the administrators to give them a share but they have been giving them empty promises until one of the administrators, Elijah Muriuki M'Ikiungu passed on. The person now remaining as the administrator is Paul Marangu M'Ikiungu. They urged another point; that the person to whom the grant was made failed to proceed diligently with the administration of the estate in that they failed to produce to court within the time prescribed any such inventory or account of administration as required by the provisions of paragraphs (e) and (g) of Section 83 of the Law of Succession Act, CAP 160.

3. They contended that it is only by revoking the grant that they shall be able to file a protest to claim for their respective shares of their father's estate. According to them, even if Meru Customary Law prohibits married women from inheriting the same is not acceptable because Cap 160 and the old and new Constitution 2010 prohibit so. In their elaborate submissions filed 13th November 2018, they have emphasized their entitlement in equality with the sons of the deceased and discussed in great depth the purport of the Constitution as well as section 38 of the Law of Succession Act thereto. Relevant case law as cited on prohibited discrimination.

4. This application was opposed vide the replying affidavit of Paul Marangu M'Ikiungu sworn 17th May 2018. He deponed that the petitioner with the consent of the two applicants and without his knowledge filed this cause of which during the hearing they ganged up with the petitioner to claim that he was not the son of deceased and that the deceased only gave him 2 acres. However the court dismissed their allegations as mere fabrications and ruled that he should get the parcels on which the deceased had given him while he was alive and petitioner to get the others. The deceased wanted to sell but his mind was changed and gave the subdivided portions to him and petitioner. That the two applicants were married during their father's lifetime and none of them occupied or cultivated any portion of the estate. The applicants participated in the hearing but neither of them was claiming entitlement of a share why then are they coming to court after 9years. Under Meru Customary Law married women were not entitled to a share of which the applicants know and failed to assert their claim when they testified. It is not true that the applicants have been claiming from him and the petitioner has refused to give them a share or that they gave bare promises. He has four sons who occupy and have fully developed the parcels awarded to him and should be left to enjoy judgment

of court. The application is bad in law and abuse of the process of court for it was an afterthought. That they are trying to revive the matter because they have been informed that the constitution of Kenya 2010 does not discriminate daughters in distribution of the estate of deceased. The petitioner filed submission on 13th November 2018 reiterating all the foregoing but emphasizing that this application is an indirect way of frustrating the petitioner.

ANALYSIS AND DETERMINATION

Issue

4. The issue for determination is:-

a. Whether or not to revoke the grant on 2nd October 2006 and confirmed on 14th September 2009 be revoked.

5. The threshold for revocation of grant is as per Section 76 of the Law of Succession Act below; :

“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) that 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;

(c) 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;

(d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either—

(i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or

(ii) to proceed diligently with the administration of the estate; or

(iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or

(e) that the grant has become useless and inoperative through subsequent circumstances.”

Grief of a daughter

6. I hear the cry of the applicants, that, they are daughters of the deceased, yet, they were not provided for in the estate of their late father. I also hear their meek request that they are simply seeking remedy to the injustice they see in the judgment delivered on 23rd July 2009 ordering that Parcel No. Kibirichia/2263,2264,2265 and 2266 be distributed to Paul Marangu M'Ikiungu and Parcel No. 2258, 2259,2260,2261 and 2262 be distributed to Elijah Muriuki M'Ikiungu. Their arguments on the Constitution and section 38 of the Law of Succession Act on equality amongst all children of the deceased, and I mean all- not all of a particular gender but all the children- in inheritance law are valid. I agree that the right of daughters to inherit their deceased parent should not be left to the mercies or magnanimity of their brothers or tradition. But what is the situation herein?

Scary-edge case

7. With a lot of trepidation, I am forced to fall back to the record. The record shows that, when the petitioner filed this cause the applicants consented to the filing thereto; they also gave their oral testimonies in the hearing of the case as **DW2** and **DW4**. Subsequently, the decision was made distributing the estate only to their two brothers, Elijah and Paul. Thereafter, Elijah was dissatisfied with the said decision and filed an appeal in the Court of Appeal at Nyeri to challenge the judgment. The appeal was, however, dismissed on 7th February 2013 for non-appearance on the part of the appellant.

8. In my view, as the applicants were already involved in the proceedings and are also beneficiaries of the estate, they have undisputed right of appeal on the judgment complained of. None of them filed any appeal or sought to pursue the appeal filed by Elijah. The course they have taken and the arguments they are propounding before me portend that I should sit on appeal on the judgment of a judge of concurrent jurisdiction. Such treading would be dangerous and not in deference to the hierarchy of courts which serves a useful purpose in administration of justice. I may be wrong on this position I have taken, but I honestly believe the applicants should attempt to file an appeal- but of course after seeking leave of court to enlarge time- so that their elegant and potent arguments they have placed before me will find place and grace in law. For those reasons, I have deliberately restrained myself from discussing the potency or otherwise of the substantive arguments before me.

9. Taking all factors into account, I dismiss the application for revocation of grant. But I still believe that they should exploit the avenue of

appeal and they will find an ear to listen to them. Each party shall bear own costs.

Dated, signed and delivered in open court at Meru this 13th day of November 2018

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F. GIKONYO

JUDGE

In presence of

Mburugu for protestor

Nyamu Nyaga for applicants

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F. GIKONYO

JUDGE

13/11/2018