REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

SUCCESSION CAUSE NO.114 OF 2017

IN THE MATTER OF THE ESTATE OF CHEGE NDUGA KANYI (DECEASED)

A N D

MARGARET WANJA MWANGI

LUCY WAMBUI MBUGUA .....APPLICANTS

HANNA NJAI NJIHIA

TERESIA MUMBI GITAU

V E R S U S

TABITHA GAKUI CHEGE..... RESPONDENT

A N D

KAMORO CHEGE NDUGA

JOHN JORA WAKIARIE

JOSEPH NDICU CIRA.....INTERESTED PARTIES

JUDGMENT

This matter relates to the estate of Chege Nduga Kanyi. The deceased applied to the High Court at Nakuru for grant of letters of administration. Grant of letters was issued on 25/7/1994 and confirmed on 9/6/1999. The deceased's estate devolved to the petitioner and John Jora Wakiarie who was a purchaser.

On 7/4/2017, Margaret Wanja Mwangi, Lucy Wambui Mbugua, Hannah Njeri Njihia and Teresia Mumbi Gitau, (1st to 4th applicants) all daughters of the deceased and the petitioner, filed this application seeking orders that:

1. ***The grant of letters of administration issued to Tabitha Gakui Chege on 25/7/1994 and confirmed on 9/6/1999 be revoked;***

2. ***That LR Nyandarua/Melangine 2437 and 2438, which are a subdivision of LR.No.Nyandarua Melangine/1913 be cancelled and the original number be reinstated to be distributed in accordance with the deceased's will dated 30/6/1988.***

The application was predicated on grounds that the grant was obtained fraudulently by making false statements and by concealment from the court of material facts; that the grant was obtained by nondisclosure of the existence of the lawful dependants and existence of a written Will dated 30/6/1988.

The applicants filed an affidavit in support of the application in which they stated that the deceased is survived by the applicants, the sister Kamoro Chege Nduga, 1st Interested Party and their mother the petitioner/respondent; that their father left behind land Parcel No.Nyandarua/Milangine/229 which he acquired from Settlement Fund Trustee and the petitioner transferred it to herself on 16/8/1999 without their knowledge and later subdivided it into two portions: parcels 1913 and 1914 on 3/4/2000; that parcel 1913 was transferred to herself while 1914 was transferred to John Jora Wakiarie who had purchased 2 acres from the deceased; that the petitioner further subdivided parcel 1913 into 2 portions 2437 and 2438 as per the green card exhibited as MWM.2 & 3. That the petitioner transferred 2437 to the 1st Interested Party and 2438 to the 3rd Interested Party on 9/3/2006; that the 3rd Interested Party is unknown to them; that they learned of this

Succession Cause in March, 2017 as the petitioner had refused to disclose its existence despite enquiries. The applicants contend that they are entitled to their deceased father's estate which they contributed to by farming and that their father left behind a Will bequeathing each of them 3 acres. They annexed a copy of the alleged Will, MWM.6.

The application was opposed through a replying affidavit sworn by 1st Interested Party, Kamoro Chege who deponed that in 1983, the deceased called his children to a meeting on completion of the loan repayments so that the title could be released; that it is only her who turned up and she agreed to repay the loan; that on 30/6/1998, the deceased transferred 2 acres to the 2nd Interested Party and that the applicants coerced the deceased to state that the daughters would receive a portion of the land; that the applicants cannot rely on the said letter as a Will; that the deceased on 22/4/1993, transferred 10 acres to her, 5 acres to himself and 6 acres to the petitioner while 2 acres were to go to the purchaser, 1st Interested Party; that upon the death of the deceased, the petitioner petitioned the court for grant of letters of administration in Nyahururu SRM.17/1994; that the petitioner did not require the applicants' consent to file the cause. She also deposed that it is her who has planted trees on the land and can deal with them as she wishes.

The 3rd Interested Party did not take part in the proceedings though served. The parties agreed that the objection proceedings proceed by way of written submissions and each party filed their respective submissions which were highlighted by counsel in court.

Mr. Waichungo filed his submissions on 10/5/2017. He reiterated the contents of the affidavit in support of the application. He submitted that if the court finds that the letter dated 30/1/1988 is not a Will, it should proceed to distribute the estate under Section 35 of the Law of Succession Act.

In reply, Ms. Karuga also filed submissions on 3/7/2018 and submitted that the applicants had to satisfy the grounds for revocation which are found in Section 76 of the Act; that it is not mandatory that the court revokes the grant but can instead include the applicants in the grant as beneficiaries so that the matter is not drawn back. For that proposition, counsel relied on the decision of ***Kipkurgat Arap Chepsiror & another v Kisugut Arap Chepsiror HCA.24/1991***.

Counsel also urged that the court should not revoke the grant if it is meant to settle a score as was held in ***HSC.343/2013 Elisha Makokha Shamala v Rebuben Mutuka Kombo***; the court observed that the order sought is discretionary and the court is not bound to revoke the grant but to ensure that the deceased's estate is dealt with in accordance with the law.

I have now considered the summons for revocation, the affidavits filed herein and the rival submissions of counsel.

Section 76 of the Law of Succession Act confers on the court the power to revoke or annul a grant. The Section Provides as follows:

> ***"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."***

From a reading of the said Act, the mandate of the court is discretionary and must be exercised judiciously to ensure that the deceased's estate is administered for the best interests of the beneficiaries. The said power can be exercised by the court *suo motto* or through an application of a party interested in the deceased's estate.

It is not in dispute that the four applicants are the daughters of the deceased and therefore beneficiaries of his estate. In fact I have seen that in the Chief's letter of introduction dated 18/1/1999, the applicants, the petitioner and 1st interested party were named as the beneficiaries of the deceased.

It is also a fact that when the petitioner filed this cause, she indicated that the only heirs of the deceased were the petitioner, 1st and 2nd interested parties, which was not the correct, position and that offends Rule 26(1) of the P & A Rules which provides that all beneficiaries

shall be notified of the application for grant of letters of administration. Rule 26(1) reads as follows: "***Letters of Administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant."***

The applicants being daughters of the deceased ranked in same degree of priority as their sister, the 1st interested party. They should have been notified of the filing of this Succession Cause. The petitioner therefore concealed from the court a material fact that other beneficiaries had not been informed of the filing of this cause. In her affidavit, the applicant was totally mistaken when she deposed that she had no obligation to inform the applicants of this cause. The deceased's estate is not her property. She is a beneficiary just like her daughters.

The petitioner was legally obligated to inform the applicants of the application so that if they were not interested in inheriting from the estate, they would have filed affidavits to that effect or filed consent denouncing their interest in the estate but they were not given that chance.

In the case of the estate of ***Wahome Mwenje Ngonoro deceased Nyeri Succ.196/2005***, the court in considering the effects of failure to comply with Rule 26 cited ***Al-Amin Abdurehman Hatimy v Mohamed Abdulrehman Mohamed & another (2013) KLR***, where the court held that the Law of Succession by virtue of Rule 26 requires that any application for issue of a grant must be accompanied by a consent duly signed by all persons entitled in the share in the same estate. The petitioner totally flouted the above rule in filing this case without disclosing to her own children. The applicants deponed that despite numerous requests to the petitioner on the status of the estate, it was kept a secret till they learnt of this cause in March, 2017 when they quickly moved to file this application.

The applicants contend that their father had left a Will on how his property would be distributed.

Section 11 of the Law of Succession Act provides for what constitutes a written Will. The Section reads as follows:

> ***"No written will shall be valid unless –***
>
> ***(a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;***
>
> ***(b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;***
>
> ***(c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."***

The document exhibited was thumb printed by the deceased, signed by the chief of the area and all the beneficiaries. In fact, the interested party does not challenge its authenticity.

The alleged Will was exhibited as MNM.6, written in Kikuyu and a translation in the English language exhibited. The 1st interested party denied that there was a will because the said will was revoked by another one written by the deceased on 22/4/1993.

The 1st petitioner exhibited the said letter or note dated 22/11/1993 as KCN.II. However, the document is written in a language that is unknown to the court and has no translation and therefore of no value to this court. What is clear is that the 1st interested party does not deny that the deceased made the letter dated 30/6/1988. She also added that the applicants coerced the deceased into allocating them land as indicated in the said will. However, taking into account the 1st interested party and petitioner's conduct of keeping this whole process of Succession a secret from the applicants and then subdividing the land to themselves and others without the knowledge of the applicants.

I doubt that the petitioner told the court the truth. Having admitted the existence of the letter dated 30/6/1988, I am satisfied that the deceased left a will in which he had distributed his estate. I am further persuaded to believe the contents of the said will because it also provided for the purchaser, 2nd interested party whom the applicants knew to be bona fide purchaser. I am satisfied that the deceased left a will and therefore died testate. The petitioner failed to disclose to the court the fact of the existence of the will.

The actions of the petitioner and 1st interested party clearly demonstrate their intention as to why they did not disclose the existence of the will to the court. After the 2nd interested party was given his portion of 2 acres, the 1st interested party was given parcel 2437 measuring 7.89 HA (10 acres) while 2438 measuring 0.81 HA was transferred to the 3rd interested party who is not the deceased's beneficiary. The said 3rd interested party, even though served, did not file any response or appear. The applicant's evidence is therefore unchallenged; that the 3rd interested party is a stranger to the deceased estate.

The petitioners' intention was to defraud the applicants of their right to inherit from the deceased's estate.

The applicants are married while the 1st interested party is not. It seems the petitioner decided to collude with the 1st Interested Party to disinherit the sisters because she is not married. However, under the Law of Succession Act, even married daughters are entitled to inherit from their parents unless they renounce their interest. The Laws of Succession act is further buttressed by Article 27(4) of the Constitution which prohibits discrimination on account of race, sex, marital status e.t.c. All the deceased's children have equal rights to inherit the deceased's estate and so even without a will, the applicants are still entitled to inherit under Section 35 o the Law of Succession Act.

Whether the grant should be revoked; I have found that indeed the petitioner concealed material facts from the court in obtaining the grant. The intention of so doing is clear, that the petitioner intended to defraud the applicants by denying them their inheritance. The land has been subdivided and distributed contrary to the will of the deceased. In that respect, it would not serve any purpose merely recognizing the applicants as beneficiaries of the estate. The grant has to be revoked and the subdivisions cancelled to make provision for the applicants in terms of the will. The only parcel of land that should not be affected is parcel No.1913 belonging to the 1st interested party. There is no evidence that the applicants intend to seek revenge against the 1st Interested Party and petitioner as alleged.

In the end, I find that the applicants have satisfied this court that the grant was obtained by making of false statement by concealment of material facts to this case. There was also nondisclosure of the existence of a will and the grant should be and is hereby revoked. I also direct that Nyandarua/Melangine 2437 and 2438 be and are hereby cancelled to revert back to parcel 1913 so that it can be subdivided afresh to include the applicants in accordance with the deceased's will.

The respondent will bear costs of this application.

Dated, Signed and **Delivered** at ***NYAHURURU*** this ***9th*** day of ***November,*** 2018.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Wanjiru for applicant

Mwaura - Court Assistant