



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

MISC. SUCCESSION NO. 78'B' OF 2013

IN THE MATTER OF THE ESTATE OF GACHOKI RUOYA.....DCD

SUSAN MABUTI MITAMBO.....APPLICANT

V E R S U S

BERNARD KABATA MURA.....1ST RESPONDENT

JAMES CHIGITI MURAGE.....2ND RESPONDENT

KINGANGI MURAGE.....3RD RESPONDENT

MURAGE IRANDU.....4TH RESPONDENT

JUDGMENT

This matter relates to the estate of the deceased Gachoki Ruoya who died in 1961 while domiciled in Kenya. Temporary Letters of Administration were issued to Murage Irandu and confirmed on 4/6/1999. The estate of the deceased comprised in Land Parcel No. Kabare/Ngiroche/107 was to be distributed as follows:

- Bernard Kabata Murage – 0.75 Acres
- James Chigiti Murage – 0.75 Acres
- Kingangi Murage – 0.75 Acres
- Grace Kamori Gachoki – 0.9 Acres
- Murage Irandu – 0.75 Acres

Subsequently the applicant Susan Mabuti Mitambo the only daughter of the deceased proceeded to file an application for revocation of grant dated 27/04/2006 claiming that the grant was obtained fraudulently by making false statement. That the grant was made to persons not relatives of the deceased. That she is the only living daughter of the deceased and at the time of making the grant her mother Grace Kamori Gachoki was alive since she died on 19/05/2001 and she was not informed of the filing of the succession Cause.

In response, Bernard Kabata Murage filed a replying affidavit claiming that the estate of the deceased has been fully distributed to the beneficiaries in 1999 and there is nothing left to administer. That the property having been registered in the names of the beneficiaries the application has been overtaken by events. Later, the 4th respondent Murage Irandu (the father to the 1st – 3rd respondents) passed away and he was duly substituted by Bernard Kabata Murage.

He later filed a replying affidavit claiming that his grandfather called Irandu had a stepbrother named Ruoya. Irandu gave birth to Murage Irandu and Ruoya gave birth to Gachoki Ruoya the deceased herein therefore 4th respondent was a cousin of the deceased. That after the deceased died, his widow Grace Kamori Gachoki married their father and they had a child named Wambua who died at age 3 years. That the parties agreed in the presence of the chief on the mode of distribution of the deceased's estate in 1998.

Later in 2004, the applicant agreed to sell her mother's portion to Peter Ngari but does not feel it is proper to sell the land her mother is buried together with the deceased and that is why she brought the suit. That Murage Irandu was the sole administrator and he distributed the estate in 1999 before he passed away in 2002 and the applicant's mother in 2001.

In response to the affidavit, the applicant states that she is a direct child of the owner of the property and the respondents are cousins three

times removed. Therefore they do not come anywhere as described in second schedule of **Rule 7(1)(e) and (11) of the Probate & Administration Rules.**

The parties proceeded by way of giving oral evidence in court after the directions were given. I have considered the affidavits and the evidence tendered in court. The issue which arises for determination is revocation of the grant.

Section 76 of the Law of Succession Act Cap 160 Laws of Kenya gives the circumstances which may lead to a Grant of Letters of Administration being revoked. These are where the proceedings to obtain the grant were defective in substance, the grant was obtained fraudulently by making of a false statement or concealing from the court of something material or by making of untrue allegations. A party need not prove all these factors, it is sufficient if any of these circumstances is proved by the party seeking to have the grant revoked. So if a party proves that the grant was obtained through fraud for example, the court will proceed to revoke the grant. This is the same for concealment or where proceedings are defective.

Section 76 of the Law of Succession Act Cap 160 states;

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

In **Jamleck Maina Njoroge v Mary Wanjiru Mwangi [2015] eKLR**

The court stated while considering **Section 76** (supra):

The circumstances that can lead to the revocation of grant have been set out in Section 76 Law of Succession. 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 by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.

The applicant contends that the grant was obtained fraudulently by making a false statement. This cause was filed at the Senior Resident Magistrate's Court at Kerugoya. A perusal of the documents filed, Form P & A5 at Para -5- Murage Irandu stated that he was a son of the deceased while Grace Kamori Gachoki who is the wife of deceased is listed as daughter in law. Bernard Kabata Murage is stated to be a grandson. In the affidavit in reply sworn by Bernard Kabata on 8/11/2017 he has refuted that Murage Irandu was a son of deceased and states that he was his half brother. Form P & A80 which was filed by Murage Irandu at Para -2- it is stated that he presents the petition in his capacity as 'widow'. Murage Irandu did not produce a death certificate nor did he annex a Chief's letter. The Gazette Notice though quoted in an affidavit has not been annexed. The respondent in the Replying Affidavit sworn on 8/11/2017 at Paragraph 4 confirms that the applicant is a daughter of the deceased. She was however not mentioned anywhere in the Succession proceedings nor was she given a share. From the foregoing it is clear that the grant was obtained fraudulently by stating that the petitioner was the widow of the deceased and that Grace Kamori who was the wife of deceased was stated to be his Daughter-in-law. These were also untrue allegations. It was also concealed from the Court that the Grace Kamori who was the wife of deceased was alive and had a living child who is the applicant in this case. The proceedings were defective in substance. I find that the applicant has shown that all the circumstances under which the court can order revocation are present in the circumstances of this case. The applicant was not informed nor was she involved. There are doubts as to whether the cause was publicized as there is no Gazette Notice annexed nor is there a Chief's letter.

The respondent were not able to explain the relationship between Murage Irandu and the deceased. DW-1- in his evidence stated that Murage Irandu and deceased were cousins. The respondent admitted that Murage Irandu had his land measuring Four Acres. Whether Murage Irandu was a cousin or a half brother of deceased which is not proved anyway, the respondents were not beneficiaries entitled to the estate of the deceased. **Section 29 of the Law of Succession Act** provides:

“For the purposes of this Part, "dependant" means—

a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

b. such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and

c. where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.”

Section 39 of the Law of Succession Act Provides:

1. Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

It is the wife of the deceased and her children who had priority to file succession in the estate of the deceased. The others in that order are parents or a husband if the deceased is a woman. The distant relatives have no right to inherit. The respondents do not come anywhere near the persons described under Probate and Administration Rules 7(i)(e)(i)(ii) which provides:

“(1) subject to the provisions of subrule (9), where an applicant seeks a grant of representation to the estate of a deceased person to whose estate no grant or no grant other than one under section 49 or a limited grant under section 67 of the Act has been made, the application shall be by petition in the appropriate Form supported by an affidavit in one of Forms 3 to 6 as appropriate containing, so far as they may be within the knowledge of the applicant, the following particulars –

(e) in cases of total or partial intestacy –

(iii) for the purposes of determining the degree of consanguinity reference shall be made to the table set out in the Second Schedule.”

The respondent explanation of the relationship with deceased and applicant is incorrigible. They did not take possession of the land nor have they developed it. This must be taken against them and the court must reach a finding they know they have no claim over this land and all they were doing is to use fraudulent means to acquire it.

The respondents confirm that the deceased and their father the 4th respondents were related by having the same great grandfather.

Great Grandfather	
Irandu - grandfather	Guoya - grandfather
Murage Irandu - father	Gachoki Ruoya - father
Bernard Kabata Murage	Susan Mabuti Mitambo
James Chigiti Murage	
Kingangi Murage	

As per Section 29 of the Law of Succession Act above, it has not been proven that the deceased was maintaining the respondents before his death therefore they should not be included in the distribution of the estate. They were not in anyway dependants of the deceased.

In addition under Section 39 of the Law of Succession Act above, the applicant has priority over the respondents. Schedule -2- under the Probate and Administration Rules provides for the degree of consanguinity. The respondents are six (6) degrees of consanguinity from the deceased while the applicant is in first degree.

In Alice Shihundu v Michael Chivolo Murunga [2014] eKLR

The Court held;

The Respondent’s claim for dependency is therefore hinged on Section 29(b) of the Law of Succession Act. The Respondent was required to establish that the deceased maintained them immediately prior to her death. It was clear from the evidence adduced that the deceased lived with the Petitioner in Ngong, Kajiado District immediately prior to her death. The co-wives of the deceased and their children meanwhile lived in Kisumu. The Respondent was therefore not able to establish that the deceased maintained them immediately prior to her death to entitle them to be considered as her dependants.

The respondents testified that their father Murage Irandu had a piece of land measuring 4 acres and the deceased’s land was also measuring 4

acres and they are adjacent to each other. They confirm that they have not built on the deceased's land but only cultivate the same.

In my view therefore for purposes of succession, the respondents cannot have a claim and/or inherit the deceased estate as dependants since he was not maintaining them prior to his death. He had only one wife Grace Kamori Gachoki and the applicant was their only child. The estate should therefore go to the Applicant.

The respondents were perpetrating a fraud by the Chief's letter dated 14/12/98 showing that Grace and Susan were to be given land measuring 0.9 Hactares and the name of Susan does not appear on the grant.

In Conclusion:

I am of the view that the grant was obtained fraudulently by concealing material facts and making false statements. The proceedings were defective in substance as I have shown above. The grant cannot therefore stand. I make the following orders:

1. The grant confirmed on 4/6/1999 is revoked.
2. The applicant Susan Mabuti Mitambo is the rightful sole beneficiary of the deceased Gachoki Ruoya.
3. The respondent Benard Kabata Muna is removed as an Administrator of the estate of the deceased.
4. The Applicant Susan Mavuti Mitambo will replace Bernard Kabata and shall be the sole Administrator.
5. Any documents of titled obtained pursuant to the grant shall be cancelled and the land shall revert to the estate of the deceased to be administered by the Administrator.
6. I award costs of this application to the applicant.

Dated at Kerugoya this 5th day of December 2018.

L. W. GITARI

JUDGE

Read out in open court.

M/s Otieno for Respondent.

Applicant – Absent, No appearance for her.

C/A – Naomi.