



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NO.341 OF 2009

IN THE MATTER OF THE ESTATE OF THE LATE JOHN KINYANJUI KIMANI (DECEASED)

JAMES KINYANJUI KIMANI.....OBJECTOR/APPLICANT

VERSUS

RACHEAL NDUTA KINYANJUI.....1ST ADMINISTRATOR

MONICAH WAITHERA KINYANJUI.....2ND ADMINISTRATOR

JAMES KIMANI KINYANJUI.....OBJECTOR

CHARLES KURIA CHEGE.....1ST INTERESTED PARTY

PETER WARUI KAMENYA.....2ND INTERESTED PARTY

FULL GOSPEL CHURCH WAMWANGI.....3RD INTERESTED PARTY

RULING

INTRODUCTION

1. JAMES KINYANJUI KIMANI (hereinafter the applicant) has vide a summons dated 6th March, 2014 moved this court for the annulment of the grant made on the 11th December, 2010 and confirmed on the 13th October, 2010

2. The application is premised on grounds that:

a. The proceedings to obtain the grant and certificate of confirmation were defective as the biological son of the deceased **JAMES KINYANJUI KIMANI** was neither involved nor did he appear in court during the confirmation.

b. The said grant and certificate of confirmation was obtained fraudulently by the concealment from this court of a material fact and misleading the court that the deceased was only survived by **Rachael Nduta Kinyanjui, Monicah Waithera Kinyanjui** and **Mary Njeri Warui**, leaving out **James Kinyanjui Kimani** who is the biological son and a dependant of the deceased at the time of his death.

c. The applicant herein was never involved in proceedings to making of the said grant and confirmation thereof and the neither gave his written consent as person of equal or lesser priority.

The applicant has sworn an affidavit in support therefore.

3. In a nutshell, it is the applicant's case that he is a son to the deceased. The deceased died on 31st October, 2007. Rachael Nduta Kinyanjui and Monicah Waithera Kinyanjui went behind his back and without his knowledge obtained a grant of letters of administration intestate on the 17th December, 2007.

4. That grant was obtained at the High Court at Nakuru yet the deceased's property was at Gatundu Kiambu and the administrators ignored the territorial jurisdiction by filing the cause in this court.

5. In the form P & A5, the administrators indicated that they were the only surviving dependants of the deceased a statement which was false and concealed material facts that they had left out a biological son of the deceased.

6. The applicant's counsel filed written submissions.

THE RESPONDENT'S CASE

7. It is noted that todate no replying affidavit has been filed to rebutt the averments in the supporting affidavit.

8. The respondents have however filed submissions

ANALYSIS AND DETERMINATION

9. I have had occasion to consider the summons, the grounds and affidavit in support as well as submissions by the rival parties.

10. Of determination is whether:

a. The applicant has met the threshold for revocation of grant set in **Section 76** of the **Law of Succession Act**.

b. If in the affirmative, what other orders are available to the applicant in the circumstances of this case.

11. **Section 76** of the **Law of Succession Act** provides:

“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 has ordered or allowed; 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”.

12. The applicant's assertion on oath that he is a son to the deceased is not controverted by any alternative evidence.

13. The petition for grant by the administrator is *ipso factor* laced with a deliberated effort to conceal material facts relating to the entire estate of the deceased

14. In his letter to the Deputy Registrar introducing Rachel Nduta Kinyanjui (the 1st respondent herein), the Assistant Chief Ndungiri Sub-location wrote:

“RE: RACHAEL NDUTA KINYANJUI – ID. NO.2570993

The above named is wife (only) to the late John Kinyanjui Kimani and hails from Mutukanio (Ndungiri) in my area of jurisdiction.

She's the beneficiary to the deceased and entitled to run the deceased estate.

Please assist her accordingly.

Steve T. Njuria

ASSISTANT CHIEF

NDUNGIRI SUB-LOCATION

SIGNATURE”

15. This letter is curious and suspect. Such a letter is normally intended to assist the court to know the status of the deceased before his death, e.g his wife (wives), children, property etc. The rationale is that the local administrator is deemed to know his/her subjects well and would be expected to provide a true and accurate position of the persons surviving the deceased and more often than not his properties especially those held in their jurisdiction.

16. The above letter is quite economical on information. One reading it would be excused to believe that Rachael Nduta Kinyajui was wife of the deceased and the only beneficiary.

17. The Form P & A 5 filed when petition was lodged indicates the survivors of the deceased as:

- a) Rachael Nduta Kinyanjui
- b) Monica Waithera Kinyanjui
- c) Mary Njeri Warui

It is clear in black and white that the name of the applicant was omitted

18. The consent to the making of the grant is only signed by Mary Njeri Warui. Again the applicant is not involved.

19. Certainly the administrators did not include the applicant as a child of the deceased when lodging the petition.

20. Failing to include him was fatal to the grant. It amounts to concealment of a material fact. There is no evidence that the applicant ever renounced his claim to the estate.

21. It is very telling that even in their submission, the respondents conveniently avoided the question of whether the applicant is a son to the deceased and whether he was left out in the administration of the estate.

22. Great effort has been expended by the respondents in the submissions on record justifying the sale of part of the estate to a 3rd party and clutching at the protection provided to such a purchase under **Section 93** of the **Law of Section Act**.

23. Following with approval the decision in Re: **Estate of Christopher Jude Adela** (Deceased), [2009] eKLR and to quote therefrom:

“It shall be a very weak or unfair system of Law if it gives a Carte Blanche of absolute immunity against challenges to transfer of immovable properties of estate by a personal representative, it shall be simply against all notions of fair justice. No court can encourage such interpretation while a personal representative will be protected even while undertaking unethical or illegal actions prejudicing the interests and rights of right beneficiaries of the estate. In short, I do not agree that Section 93 of the Act prohibits the discretion of the court to invalidate a fraudulent action by a personal representative.”

24. The administrators herein acted fraudulently all through the process of obtaining the grant, having it confirmed and disposing off part of the estate to 3rd parties.

25. The magnitude of the fraud is more exemplified when this hawk eyed court discerns from the record that Peter Warui Kamenya, the 2nd interested party herein was named in Form P & A 11 (the affidavit of justification of proposed sureties) as the 1st surety and yet is now one of the interested parties to whom part of the estate has been transferred.

26. Consequently and for the above stated reasons, the grant issued and confirmed herein and all consequential transactions cannot stand. The same is hereby annulled and all sub-divisions and/or transfers of the estate cancelled forthwith.

27. This is a family matter. However, the circumstances surrounding the current application necessitate that the applicant be awarded the costs thereof. It is so ordered.

Dated, signed and Delivered at Nakuru this 2nd day of February, 2017.

A. K. NDUNG'U

JUDGE