



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
SUCCESSION CAUSE NO. 114 OF 2015

In the matter of the Estate of NJAGI MAGUTA (Deceased)

JENNIFER GICIKU KIURA.....APPLICANT/1ST RESPONDENT

V E R S U S

NJOKA M. MBARIOADMINISTRATOR

EDWARD NYAGA NJAGI.....2ND RESPONDENT

AND

KORIA NJAGI.....BENEFICIARY/APPLICANT

R U L I N G

1. The applicant in his Summons General dated 3/06/2016 seeks for orders that the consent order of the parties dated 15/06/2015 adopted as a court order on 30/06/2015 be varied, vacated and, or set aside.
2. The grounds relied on by the applicant in his affidavit is that some beneficiaries including himself were not involved in the consent which revoked the grant issued at Runyenjes court.
3. It was stated that the grant had catered for every beneficiary and that there was no complaint apart from the two applicants Jennifer Gichuku and Jane Kina. It is contended that the respondents colluded to have the consent recorded in the absence of other beneficiaries and adopted as a court order. The applicant herein states that the estate had already been distributed and title deeds issued and if the consent order is not set aside, he will suffer irreparable loss.
4. The application was opposed by the respondents relying on the affidavit of the 2nd respondent Edward Nyaga Njagi. He depones that the consent was agreed on by the parties and recorded before the court. He states that there is no existing grant and that the parties have to apply for a fresh grant. It is denied that there is no threat by the respondents to evict the applicant as alleged.
5. Ms. Muthoni Ndeke for the applicant submits that the consent recorded by the respondents came after the Runyenjes court grant had been implemented and all the parties acquired titles to their respective parcels. It is argued that the consent was not genuine because most of the beneficiaries including the applicant were not involved. The effect of the consent was to annul the grant and render useless the title deeds issued to the beneficiaries.
6. It is submitted further that the 2nd respondent has given a false statement in the replying affidavit that

the parties appeared before F. Muchemi Judge which is not supported by the record. It is not correct to say that all parties were present in court. The counsel further submitted that the applicant no longer feels safe on his parcel of land due to the threat of eviction. The deceased had subdivided his land and parties occupied their portions. It is further argued that the effect of the consent is to disinherit some of the beneficiaries.

7. The 1st respondent in his submissions states that he was the administrator in the Runyenjes cause and that he agreed to be party to the consent because he realized that the Runyenjes grant did not cater for his sisters.

8. He also states that all the parties appeared before the court when the consent was recorded. He states that all other beneficiaries are in agreement with the consent except the applicant who has not disclosed the reasons for opposing it.

9. Mr. Gachiengo Gitau for the respondents argued that the consent was properly recorded before the court. For it to be interfered with, there must be overwhelming reasons. He reiterated that all the parties agree with the consent except the applicant. He has not satisfied the court that he was absent when the consent was adopted or that the other beneficiaries were not involved.

10. It was further argued that the grant issued by Runyenjes court was flawed because it did not cater for the daughters of the deceased. It is therefore appropriate for the parties to start afresh and apply for the grant.

11. From the evidence and submissions of the parties I have made several observations. Firstly, that the administrator now 1st respondent Edward Nyaga Njagi was the administrator in Runyenjes Succession No. 69 of 2008 while the 2nd respondent Njoka Mbario was the protester.

12. The court in confirming the grant adopted the mode of distribution of the protester and shared the land as follows:-

- (i) *Nguru Njagi to get Kyeni/Mufu/5665*
- (ii) *Albert Muthungu Njagi Kyeni/Mufu/5666*
- (iii) *Edward Nyaga to get Kyeni/Mufu/5664*

Parcel Kyeni/Mufu/5663 be shared as follows:-

- (a) *Koria Njagi to get 0.31 Ha.*
- (b) *Njoka Mbario to get 0.06 Ha.*
- (c) *Felicia Karu to get 0.06 Ha.*
- (d) *Risper Muthanje to get 0.06 Ha.*
- (e) *Jennifer Giciku to get 0.06 Ha.*
- (f) *Jane Kina to get 0.06 Ha.*

13. The application for revocation/annulment of grant dated 15/06/2015 was filed in this court by two beneficiaries who are daughters of the deceased Jennifer Gichuku and Jane Kina Njagi. They are therefore the applicants in this case while the administrator Edward Nyaga Njagi and Njoka M. Mbario the respondents in the said application. It is evident from the grant that the applicants herein had been catered for.

14. This court called for the Runyenjes Succession Court file No. 69 of 2008 for purposes of hearing the revocation of grant application. After the controversial consent was recorded the matter proceeded before Bwonwonga, J. However, the Runyenjes file was never availed. In the absence of the said file, which consists the list of the beneficiaries among other documents, this court is at a loss as to who are the beneficiaries of the estate.

15. On perusal of the proceedings before Bwonwonga, J., it is noted that nine beneficiaries including the parties in this application appeared before the honourable judge on 16/06/2016. This demonstrates that the estate has not less than nine beneficiaries. The miscellaneous application dated 15/06/2015 and this summons general focus on only four beneficiaries who are parties therein. Any order made on any of the two applications including the consent order affects the rights of all the beneficiaries.

16. Back to the consent, I note that it was signed by the respondents herein and the advocate for the applicants in the revocation of grant application namely Jennifer Gichuku Njagi and Jane Kina Njagi.

The order reads:-

By consent of the indicated parties, the following consent be recorded.

(i) the grant of representation issued to Edward Nyaga Njagi and later confirmed on 8/04/2010 be nullified.

(ii) Fresh petition for letters of administration to the estate of the late Njagi Maguta be filed within the next thirty (30) days from the date of this consent.

(iii) Any Act done pursuant to the grant herein stands automatically annulled and titles issued stand cancelled.

(iv) Cost in the cause.

17. The parties who were present in court during the adoption are listed as:-

(i) Mr. Chadianya for Gitau Gachiengo & Co. Advocates for the applicants in the application dated 15/06/2015.

(ii) Koria Njagi (the applicant herein) in this application dated 3/06/2016.

(ii) Njoka Mbaria

The firm of Gachiengo Gitau & Co Advocates represents Jennifer Gichuku and Jane Kina. The above is representation of only four (4) beneficiaries as opposed to nine or more. The five or more absent beneficiaries did not sign the consent.

18. They are stakeholders in the deceased's estate and the consent order affects their interests. Some of those absent in court were given shares in the grant by Runyenjes court. This means that no one can take away or alter their shares without their consent. The applicant was present in court as shown by the record but he had not signed the consent. He ought to have been involved together with the other beneficiaries.

19. The Probate and Administration Rules require that all beneficiaries and interested parties in the estate be served with any application or summons before it is heard. Similarly, no consent may be recorded in absence of some beneficiaries. In this case, six beneficiaries including the applicant were left out.

20. Notwithstanding the consent order, the proceedings in this court were initiated by the initial applicants (Jennifer Gichuku and Jane Kina) with a view of revoking the grant. In these proceedings the said applicants in conjunction with the respondents have no capacity to revoke the grant without the consent of

all the beneficiaries or without a court order.

21. The only capacity the applicants possess in these proceedings is the power to withdraw their own application for revocation subject of course, to costs, if any. For this kind of action, the applicants do not need the consent of the other beneficiaries.

22. I find that the consent recorded on 30/06/2015 is null and void for all purposes. I find this application dated 3/06/2016 merited and allow it in the following terms:-

(i) That the consent and any consequential orders are hereby declared null and void.

(ii) That the applicants Jennifer Gichuku and Jane Kina are at liberty to prosecute their application dated 15/06/2015 or to withdraw it altogether within 30 days.

(iii) That status quo be maintained by the parties and the beneficiaries pending determination of these proceedings.

(iv) That each party meets their own costs of this application.

23. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 20TH DAY OF MARCH, 2017.

F. MUCHEMI

J U D G E

In the presence of:-

All parties present

Ms. Muthoni for Applicant