



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE 224 OF 2006
IN THE MATTER OF THE ESTATE OF NDIINGURI KARUGIA (DECEASED)
JUDGMENT

PLEADINGS

The deceased died on 7th June 1988

By an application brought under certificate of urgency filed on 20th September 2006, brought under Section 76 of Law of Succession Act Cap 160 and Rule 44,49 & 73 of Probate and Administration Rules; the Applicant, David Nganga Ndinguri sought the following orders;

a) The grant of letters of administration issued to Hannah Muthoni Gichuri on 27th March 2006 and confirmed on 17th August 2006 be revoked.

The Applicant based the application on the following grounds;

- a) The grant was obtained in secrecy and through misrepresentation of material facts and she excluded other beneficiaries of the estate.**
- b)The Petitioner, daughter-in-law purported to be the sole beneficiary of the father -in- law's deceased's estate and she did not obtain grant of letters of administration of her late husband's estate.**
- c) The Petitioner gave misleading facts to the Chief of Ngewa and resulted in excluding other beneficiaries of the deceased's estate.**
- d)The petitioner applied for grant to be confirmed before 6 months on the basis of a letter allegedly from Ministry of Lands marked DNN2 and she intended to charge and/or dispose off the deceased's estate without the other beneficiaries obtaining their share of the estate.**

The Respondent, Hannah Gathoni Gichuri filed Replying Affidavit on 14th November 2007 and opposed the application for revocation of grant.

The Respondent contended that the deceased had only 1 wife Agnes Wambui Ndinguri as shown by the copy of marriage certificate attached and **marked HGG2**

The Respondent stated that the Applicant was not a child of the deceased and he should take a paternity test to determine if he is a child of the deceased or not.

The Respondent reiterated that she legally and procedurally applied and obtained the grant and confirmed

grant to the deceased's estate and she did not conceal material facts and she did not obtain the said grant fraudulently.

Therefore the application of 20th September 2006 should be dismissed as it lacks merit and is an abuse of the Court process.

HEARING

On 9th November 2016, the parties adjourned the hearing of this matter because the Respondent lost her son. Being a matter from 2006, the Court record confirmed that the Objectors were in Court severally but the matter did not take off. The matter was adjourned in light of the Respondent's application to 29th November 2016.

On 18th January 2017 the date obtained from the Registry as this Court did not sit on 29th November 2016, the Respondent was served as evidenced by affidavit of service filed on 11th January 2017.

The Court was satisfied that the Respondent was duly served and in compliance of Order 12 Rule 2& 4 of CPR 2010 the matter proceeded ex parte.

David Nganga Ndinguri testified that his late father the deceased herein married 2 wives; Agnes Wambui Ndinguri and Esther Wambui Ndinguri.

The children of the 1st wife Agnes Wambui Ndinguri are;

- a. Herman Ndinguri(deceased) represented by widow/Respondent Hannah Gathoni Gichuri**
- b. Grace Wachu**
- c. Beth Njeri**
- d. Nyakega Muiruri**
- e. Mary Wanjiru Kimani**

The Children of the 2nd wife Esther Wambui Ndinguri are;

- a. Charles Boro**
- b. David Nganga (PWI)**
- c. Mary Wanjiru Mwaniki**

The Applicant PW1 stated that their sister in law moved the Court and filed petition for grant of letters of administration of the deceased's estate without consulting the children and family members of deceased. The Chief's letter attached to the Petition did not include all the children of the deceased.

The grant and confirmed grant of 17th August 2006 were obtained fraudulently; the Respondent did not disclose material facts as regards family of the deceased and properties that comprise of the deceased's estate. The Respondent has since confirmation of grant sold Mavoko 7340/59 which had transferred to her name. The Respondent also sold Githunguri/Kimathi/1762 which she had transferred to her name.

The witness stated that this matter has been in Court for over 10 years and has not been heard, on numerous occasions, the Court file is misplaced and other instances the Respondent has adjourned the matter with a view to delay hearing and determination of the summons for revocation of grant.

DETERMINATION

The key issue for determination is whether the Applicant has made out a case to warrant the revocation of the Grant of Letters of Administration. In that regard, Section 76 of the Law of Succession Act provides for the alteration and revocation of Grants. It states that:

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

(iv) That the grant has become useless and inoperative through subsequent circumstances.

The Applicant's evidence is based on the fact that the grant issued to the Respondent and confirmed was granted under irregular and defective proceedings.

The Petitioner /Respondent filed petition for grant of letters of administration on 3rd February 2006 and listed those surviving the deceased as;

a. Agnes Wambui Ndinguri- widow 69 years died on 4th Dec. 1984.

b. Herman Gichuri Ndinguri-son 64 years died 19th Sept. 2004.

c. Hannah Gathoni Gichuri daughter in law 63 years wife of the deceased death certificate marked HN1 and NK I attached late son; deceased had no daughters.

The assets were outlined as;

i. L.N. 7340/59

ii. Githunguri /Kimathi/T66

Attached to the petition were copies of the following documents;

a. Grant number 70425 freehold under Registration of Titles Act.

b. Certificate of marriage between Ndinguri Karugia (deceased) and Wambui Gichuri on 30th December 1939.

c. Certificate of marriage between Herman Gichuri (deceased) son to the deceased and Hannah Gathoni (Respondent) on 18th September 1991.

d. Certificate of Death of the deceased.

e. Copy of Identity card of the Respondent Hannah Gathoni Gichuri.

f. Land Certificate of Githunguri/Kimathi T. 66

g. Michael M. Mbugua; Chief Ngewa Location Letter dated 3rd January 2006 confirming his widow and son were deceased and therefore the daughter-in-law ought to inherit the deceased's estate, his widow's estate and his son's; her late husband's estate as the rightful heir.

By a letter dated 24th April 2006 the Respondent wrote to Deputy Registrar High Court Nairobi, explained that there no other beneficiaries to consent to grant of letters of administration of the deceased's estate.

From the detailed chronology of the documents that the Respondent lodged for grant of letters of administration intestate, she did not disclose all children and family of the deceased.

The non disclosure of all beneficiaries of the deceased's estate amounted to concealment of material facts. The grant of 27th March 2006 confirmed on 17th August 2006 were fraudulently obtained by means of an untrue allegation of a fact essential in point of law to justify the grant. The Applicant narrated in Court the children of the deceased from both the 1st House and 2nd House.

This followed the subsequent letter dated 31st August 2006 annexed to the Applicant's application from the same Chief Michael M. Mbugua of Ngewa location.

In the case of **ALBERT IMBUGA KISIGWA V RECHO KAVAI KISIGWA, SUCCESSION CAUSE NO.158 OF 2000**, Mwita J. in a decision rendered on 15th November, 2016, noted thus:

[13] Power to revoke a grant is a discretionary power that must be exercised judiciously and only on sound grounds. It is not discretion to be exercised whimsically or capriciously. There must be evidence of wrong doing for the court to invoke section 76 and order to revoke or annul a grant. And when a court is called upon to exercise this discretion, it must take into account interests of all beneficiaries entitled to the deceased's estate and ensure that the action taken will be for the interest of justice.

Therefore the beneficiaries of the estate of the deceased were excluded contrary to **Section 51 (2) (g) of the Law Succession Act and Rule 7(1) Probate & Administration Rules.**

Consequently, non-disclosure of all other beneficiaries pre-empted the required written consents to be availed to petition of grant of letters of administration and confirmation of grant.

Secondly, non disclosure of the deceased as a polygamous man made the grant of letters of administration intestate and the confirmed grant to be processed in contravention of **Section 40, Section 58 and Section 84 of the Law of Succession Act Cap. 160.**

The evidence adduced by the Applicant was not controverted by any testimony by the Respondent who despite service did not attend Court.

The Court has considered the Replying affidavit filed by the Respondent in which she raises 2 pertinent issues; that the deceased married the 1st wife Agnes Wambui Ndinguri only as per the attached certificate of marriage.

The deceased died in 1988 after the advent of **Law of Succession Act 1981**. His estate shall be administered under the said Act. **Section 3 (5)** provides;

Notwithstanding provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman; nevertheless a wife for purposes of this Act, and in particular Sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.

Therefore if the 2nd wife Esther Wambui Karori was married by the deceased under Kikuyu Customary Law for purposes of Succession process, she and her children are entitled to beneficial interest in their share of the deceased's estate. There is no evidence on record to contest the fact that she was wife to the deceased.

The second issue the Respondent raised in her Replying affidavit is that the Applicant was not a child of the deceased. She further contended that he ought to have DNA testing to prove paternity. The applicant is listed as one of the children of the deceased by the 2nd wife/widow. There is no evidence adduced to confirm that he was not a child of the deceased. Even then the definition of child under **Section 3 (2) of Law of Succession Act** includes:

“A child the deceased expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.”

In the absence of cogent evidence to contest and rebut the evidence of the Applicant, this Court finds the applicant's evidence on a balance of probability discloses the grant obtained and confirmed with regard to the deceased's estate was irregularly obtained to the exclusion and consents of all beneficiaries.

DISPOSITION

1. **The grant issued on 27th March 2006 confirmed on 17th August 2006 is revoked.**
2. **The beneficiaries of the deceased's estate to appoint administrators of the deceased's estate pursuant to Section 66 of Law of Succession act Cap 160.**
3. **The properties that comprise of the deceased's estate to revert back in the name of the deceased.**
4. **In default the registered owners shall hold such properties in trust for all beneficiaries of the deceased's estate until grant is obtained, confirmed and distribution commences.**
5. **Each party to bear own costs.**

DELIVERED DATED & SIGNED IN OPEN COURT ON 6TH MARCH, 2017.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

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