



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**SUCCESSION CAUSE NO. 135 OF 1985**

**IN THE MATTER OF THE ESTATE OF JACKSON MURIAMA NJUGUNA (DECEASED)**

**RULING**

1. There are three applications dated 18<sup>th</sup> February 2014, 23<sup>rd</sup> May 2014 and 30<sup>th</sup> April 2015.
2. The application dated 18<sup>th</sup> February 2014 seeks reconstruction of the court file herein as well as revocation of a grant that had been made in 1996. There are also prayers for injunctive orders and for removal of a caution. The said application founded on the facts deposed in the affidavit of counsel for the applicant, Henry Ruhii Mungai. The advocate's affidavit was sworn on 18<sup>th</sup> February 2014. He avers that the administrator refused to carry out his mandate of distributing the estate after the grant was confirmed on 9<sup>th</sup> October 2010, and it is on that basis that revocation is sought. He also avers that the original court file has been untraceable, and prays for reconstruction.
3. The reply to the application is in an affidavit sworn on 1<sup>st</sup> March 2014 by the administrator, Henry Ruhii Jackson. He states that the applicant was his nephew, being a child of his late brother, Evanson Muiga Jackson. The property the subject of the proceedings is known as Limuru/Ngecha/328. He states that he and his late brother had divided the property into two equal portions. The two sons of the deceased were to thereafter give their sons their respective portions. Limuru/Ngecha/2214 to 2222 are subdivisions from Limuru/Ngecha/328. He pleads that he was not responsible for the disappearance of the court file. He avers that the applicant's mother sold their share of the estate property, and he accuses the applicant and his siblings of having neglected their mother after their father's demise. He states that the applicant had been allocated Limuru/Ngecha/2214. He says that the persons that the applicant refers to as squatters are actually the persons who bought land from the applicant's mother, some of whom paid of her medical bills when she was hospitalized. He states that he was not party to the sales.
4. The application dated 23<sup>rd</sup> May 2014 is also for revocation of the same grant. There are also prayers for injunctions, cancellation of a registration in favour of a Christopher Njoroge Ruhii., a DNA test on the said Christopher Njoroge Ruhii and for accounts. The application is at the instance of George Njuguna Ruhii, who swore an affidavit on 25<sup>th</sup> May 2014. He is a grandchild of the deceased. He complains that he was not involved in the substitution the original personal representative of the will upon his death. He states that the administrator has been misusing the grant made to him. He complains that the administrator has allotted a share of the estate to a non-beneficiary, one Christopher Njoroge Ruhii. He argues that the said Christopher Njoroge Ruhii is not named in the will of the deceased as a beneficiary. The administrator is accused of fraud in that he obtained a grant of letters of administration intestate yet the deceased died testate. He is accused of the various misdeeds set out in his affidavit.
5. The administrator responded to the application through his affidavit sworn on 21<sup>st</sup> November 2014. He states that the applicant is his son. He asserts that he was appointed executor of the will of the deceased

on 12<sup>th</sup> July 2006, and the grant of probate was confirmed on 9<sup>th</sup> October 2007 as per the deceased's will made on 6<sup>th</sup> April 1983. He says that he caused the District Surveyor responsible for Kiambu to have the land subdivided to each of the beneficiaries as per the will including the applicant, in an exercise that involved the surveyor. He states that he transferred his own share of the property to his son Christopher Njoroge Ruhii.

6. Together with the replying affidavit, the administrator filed a preliminary objection alleging that the court had no jurisdiction to entertain the matter having presided over the distribution of the estate. He further alleges that he had become *functus officio* after having discharged his duties as executor of the will of the deceased. His notice of preliminary objection is dated 21<sup>st</sup> November 2014.

7. The third application is dated 30<sup>th</sup> April 2015. It is brought at the instance of Henry Rohio Jackson and Christopher Njoroge Rohio. It seeks several injunctive reliefs against George Njuguna Rohio. The affidavit in support was sworn by Henry Rohio Jackson. He alleges that after the grant was confirmed he distributed the estate strictly according to the wishes of the deceased. He got his four (4) acres, and transferred one decimal one four acres (1.14) to George Njuguna Rohio. He accuses George Njuguna Rohio of trespassing on the portions that had not been allotted to him under the will and the scheme of distribution founded on the certificate of confirmation of grant. Christopher Njoroge Rohio swore his own affidavit on 29<sup>th</sup> April 2015, stating how he was given a piece of land by the administrator, being Limuru/Ngecha/2628 and how the same has been encroached upon by George Njuguna Rohio.

8. To that application, the respondent, George Njuguna Rohio, filed a replying affidavit and an answer to the preliminary objection. On the preliminary objection he asserts that the High Court does have jurisdiction to hear and determine the dispute. In his affidavit, he states that the administrator had not distributed the estate as per the wishes of the deceased as set out in his will. He points to the fact that the property was given to persons other than those mentioned in the will.

9. I directed on 30<sup>th</sup> September 2016 that the three applications be disposed of simultaneously. I further directed that disposal be by way of written submissions. There has been compliance with the directions by Henry Ruhii Mungai and George Njuguna Ruhii. I have perused through their respective written submissions and noted the arguments made therein. I have also read through and noted the arguments made in the authorities cited.

10. The deceased herein died on 9<sup>th</sup> December 1984. Representation to the estate was sought by Albert Mwaura Nduti and Simon Mwiruti, the alleged executors of the will of the deceased, in a petition lodged herein sometime in 1985. Objections were raised to the petition, and an answer to the petition and a cross-petition filed by Evanson Mungai and Henry Rohio on 7<sup>th</sup> June 1985. Their case was that the deceased had died intestate, and dismissed the will presented by the petitioners as a forged document. The objection was subsequently withdrawn by the objectors through a letter signed by both of them dated 29<sup>th</sup> February 1996 and lodged herein on 2<sup>nd</sup> April 1996. They also consented to a grant being made in accord with the will on record, not to the executors named in the will, but to Manasseh Kuria. An order of the court was extracted from the said consent in those terms. The order was dated 6<sup>th</sup> April 1996 and issued on 25<sup>th</sup> June 1986. A similar order was extracted on 25<sup>th</sup> March 1997. A grant of probate of the written will was accordingly made to the petitioners/executors, Albert Mwaura Nduti and Simon Mwiruti, on 6<sup>th</sup> April 1996. The grant of probate was amended on 29<sup>th</sup> November 1996 to conform with the consent of 29<sup>th</sup> February 1996, and a new certificate issued granting representation to Manasseh Kuria. Manasseh Kuria died on 19<sup>th</sup> September 2005, and representation was thereafter granted to Henry Ruhii Jackson on a petition dated 30<sup>th</sup> March 2006 for a grant of representation of the assets unadministered. A grant of letters of administration *de bonis non* was issued to him on 12<sup>th</sup> July 2006. The grant of 12<sup>th</sup> July 2006 was confirmed on 9<sup>th</sup> October 2007 and a certificate to that effect duly issued.

11. The will the subject of the proceedings herein is on record. It was made on 6<sup>th</sup> April 1983. It disposes of three assets - Limuru/Ngecha/41, 42 and 328. Limuru/Ngecha/41 and 42 were willed to Sarah Wambui

absolutely; while diverse portions of Limuru/Ngecha/328 were given to Evanson Mungai Jackson, Henry Ruhii Jackson, George Njuguna Ruhii, Kenneth Njoroge Ruhii, Henry Ruhii Mungai and Samuel Mote Mungai.

12. The applications for revocation of grant before me are brought by two of the persons named as beneficiaries of Limuru/Ngecha/328, entitled to portions measuring 1.00 and 1.45 acres, respectively. Although they seek revocation of the grant, and one of them has raised questions on the manner it was granted to the administrator, their primary concern is with the distribution. They do not appear to have received what was given to them under the will of the deceased. The administrator's response to these applications appears to me to be merely defensive. He does not answer the issues raised as he should. An administrator is a trustee of the property vested in them by section 79 of the Law of Succession Act, Cap 160, Laws of Kenya. The property vests in him so that he holds it in trust on behalf of the estate, the survivors or beneficiaries, and the creditors. He stands in a fiduciary with respect to the estate and the beneficiaries. Being a trustee, he is accountable to those on whose behalf he holds the property or the estate. An application for revocation of grant, where the applicants are not so much concerned about the way the grant was made but about the way the distribution was done, are in reality calling upon the administrator to account for how he has administered the estate, and more particularly with the manner in which he has distributed the estate.

13. In the preliminary objection, the administrator charges that this court has no jurisdiction to entertain the applications before me for revocation of the grant. I understand him to be saying that this court has become *functus officio*, for it presided over the distribution of the estate and the estate had been completely distributed. The administrator has not provided legal material that would support that argument. The mere fact that a court has confirmed a grant does not render it *functus officio*. A probate matter is not concluded at the point of confirmation of grant. It remains alive for the beneficiaries are still entitled to move court thereafter for accounts. In any event the office of personal representative is for life and the personal representative can be called upon to account at any time, even long after distribution of the estate had been completed. Indeed, the matter closes effectively upon the filing of the accounts envisaged in section 83(f) of the Law of Succession Act. The court therefore does have jurisdiction. In any event, the administrator herein is blowing both hot and cold. He asserts that this court lacks jurisdiction after it confirmed the grant, yet he still comes back to the same court to ask that the court makes certain orders with regard to the same estate. Surely, the court cannot be said to lack jurisdiction only when it does not suit the administrator.

14. I note that the administrator asserts that he had been appointed executor of the will of the deceased by the court in 2006. Executors are appointed by the testator, not the court. The court appoints personal representatives and administrators. The will of 6<sup>th</sup> April 1983 had appointed Albert Mwaura Nduti and Simon Mwiruti as executors of the will, it did not appoint Henry Ruhii Jackson executor thereof at all. The grant of 12<sup>th</sup> July 2006 appointed Henry Ruhii Jackson administrator of the estate, for it is a grant of letters of administration *de bonis non* that was made to him. He never was an executor of the will of the deceased as he purports. For avoidance of doubt, section 6 of the Law of Succession Act states that 'A person may, by will, appoint an executor or executors.'

15. The deceased herein died testate. His will carries very clear terms on how his estate is to be distributed. He has identified the assets for distribution and the persons to benefit from the assets, and he has given the mode of the distribution of the assets. When the grant made to the administrator was confirmed, it was specific that the estate was to devolve as per the will of the deceased. All this ought to make the life of the administrator quite easy.

16. When faced with a call to account one would expect that the administrator would go back to the will, and then give a blow by blow account of how he has distributed the property indicated in the will. He alleges in his affidavits that he distributed the assets as per the will of the deceased, yet he has provided little proof thereof. The property in question is land, which is subject to registration. Any transaction relating to it must surely be documented. He should have provided an account that Limuru/Ngecha/41 and 42 had been transferred to the name of the beneficiary called Sarah Wambui, and attached copies of the title documents that reflect the relevant transfers. Regarding Limuru/Ngecha/328, he should have given an

account showing that the same was subdivided into six (6) portions, two measuring 4 acres, one 1.45 acre, one 1.4 acres and two 1 acre each. He should have demonstrated that the resultant subdivisions had been transferred to the beneficiaries as per the terms of the will so that Evanson Mungai Jackson got 4 acres, Henry Ruhii Jackson 4 acres, George Njuguna Ruhii 1.45 acres, Kenneth Njoroge Ruhii 1.40 acres, Henry Ruhii Mungai 1 acre and Samuel Mote Mungai 1 acre. It should be that simple.

17. I have carefully read through the affidavits sworn and filed herein by the administrator. I get the sense that he has not complied with the instructions of the deceased as set out in his will. That would explain why he has avoided giving a coherent account of what he has done with the property of the deceased. He appears to have had subdivided Limuru/Ngecha/328 into eight portions instead of the six envisaged in the will of the deceased. He talks of creating Limuru/Ngecha/2214 to 2222 out of Limuru/Ngecha/328. He talks too of portions of Limuru/Ngecha/328 having been sold after the deceased died. He claims that he was not party to the sales, yet he was the administrator at the time of the alleged sales, and the property vested in him at the material time by virtue of section 79 of the Act.

18. Before I can decide the matter one way or the other, including considering whether or not to grant the injunctive reliefs sought, I should give opportunity to the administrator to prove that he has indeed distributed the estate according to the will of the deceased, in terms of transferring Limuru/Ngecha/41 and 42 to Sarah Wambui and Limuru/Ngecha/328 to Evanson Mungai Jackson, Henry Ruhii Jackson, George Njuguna Ruhii, Kenneth Njoroge Ruhii, Henry Ruhii Mungai and Samuel Mote Mungai in the proportions indicated in the will. The account must be supported by copies of the title deeds issued to the beneficiaries upon the transfers of the properties to their names. I do hereby give the administrator thirty (30) days to comply. Further orders to follow thereafter.

19. I note that the estate of the deceased comprises of assets situated in the Limuru area of Kiambu County. I shall accordingly direct that the matter be transferred to the High Court of Kenya at Kiambu for final disposal.

**DATED and SIGNED at NAIROBI this 3<sup>RD</sup> DAY OF MAY, 2017.**

**W. MUSYOKA**

**JUDGE**

**DELIVERED and SIGNED this 5<sup>TH</sup> DAY OF MAY, 2017.**

**M. MUIGAI**

**JUDGE**