



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE 1499 OF 2012

IN THE MATTER OF THE ESTATE OF NJOROGE WATATHI (DECEASED)

EUNICE MUTHONI KIHARA.....1ST APPLICANT

JOSPHAT NJAU KIHARA.....2ND APPLICANT

VERSUS

MARGARET MWIHAKI WAINAINA.....RESPONDENT

RULING

APPLICANTS' CASE

The deceased died on 10th December 1987.

By an application filed on 2nd March 2017, the Applicants sought orders that the Court grants vacant possession of the following suit properties on grounds that the registered proprietors of Land Parcel Kiganjo/ Gateti/2511, 2512 & 2513 are in urgent need to take up their respective parcels of land. If not granted vacant possession they shall suffer irreparable loss.

The Applicants stated that on 12th February 2003 as widow and son to the deceased they obtained confirmed grant in **Thika Court Succession Cause 171 of 1991**. In effect Land parcel Kiganjo/Gatei/524 was subdivided and mutation forms prepared and there are new parcels for all beneficiaries.

The Respondent was shown her portion but she declined to move to the said land . Instead she occupies land on parcels Kiganjo/ Gateti/2511, 2512 & 2513 and is frustrating efforts to have the entitled beneficiaries take up possession.

The 2nd Applicant informed this Court on 25th April 2017 that the distribution of the deceased's estate was according to the deceased's Will of 2nd December 1987 written in Kikuyu and the translated version in English both copies were availed to Court. The 2nd Applicant also presented the affidavit filed in support of confirmation of grant application filed in **Thika Court Succession Cause 171 of 1991** which lists all the beneficiaries of the deceased's estate. In his view the matter was determined and all beneficiaries agreed to distribution of the deceased's estate. Therefore the Respondent is only being difficult, reneging to the agreement and delaying distribution of this matter.

RESPONDENT'S CASE

The Respondent also filed an application on 24th February 2016 against the Applicants and sought orders to restrain them from subdivision of the suit property Kiganjo/Gatei/524 and the Land Registrar Thika restrained from issuing new titles to alleged proprietors. The court to issue orders restraining the applicants from evicting the Respondent and interfering in her quiet possession and enjoyment of Plot number Kiganjo/Gatei/524. It is this application that necessitated the Respondents to file the pending application.

The Respondent's grounds are;

The application for revocation of grant of 12th July 2012 was dismissed for want of prosecution due to inadvertence of the previous Counsel on record.

Subsequently the applicants filed several applications that were heard *ex parte* on the basis that the Respondent was served.

The Respondent was not served at any one time for any of the applications. Her advocate did not inform her that they ceased acting for her and did not serve her with the application.

The Respondent realized what happened upon being issued with eviction notices from the suit property.

The distribution of the deceased's estate was not in accordance with the law; all family members were not informed, consulted and did not give their written consents to the proposed mode of distribution of the estate.

The deceased had 2 wives; namely Monica Nyambura Kihara (deceased) and Eunica Muthoni Kihara widow and administrator of the deceased's estate. The distribution of the estate in terms of the confirmed grant favored the 2nd house and left out the 1st house.

DETERMINATION

The law on revocation of grant is set out in Section 76 of Law of Succession Act Cap 160 which 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;

Refer

IN THE ESTATE OF GITAU 2002 2KLR 430 The Court held;

The relief of revocation[of grant] is not available to a litigant who is complaining about distribution only

Therefore the revocation should be successfully pursued if there is contravention of Section 76 of the Law of Succession Act.

The Court has perused the record and finds as follows;

The Respondent filed Summons for Revocation of grant on 11th July 2012 and sought revocation on the basis that the grant issued on 17th February 1992 and confirmed on 12th February 2003 was obtained fraudulently by concealment of material facts.

The fact that the deceased had 2 wives and 2 houses; the 1st house of Monica Njoki Kihara (deceased) and 5 children 2 4 daughters and one son now deceased and the Applicant herein is the widow of the only son of the 1st wife of the deceased.

There is the 2nd house of the Respondents; Eunice Muthoni Kihara and 10 children 5 girls and 5 boys.

All these members of the family of the deceased were not consulted and did not give written consents to

a) The appointment of administrators

b) Proposed mode of distribution

c) The summons of confirmation proceedings

d) Subdivision of the suit property Kiganjo/Gatei/524

The Respondent/Applicant Margaret Wangechi Kihara widow of late Joseph Njuguna only son of Monica Njoki Kihara 1st wife of the deceased have always resided on the suit property to date.

The Respondent/Applicant attached an affidavit of protest to the confirmation of grant on 12th March 2001 and yet without hearing and determination of the protest the grant was confirmed on 12th February 2003.

Eunice Muthoni Kihara filed Replying Affidavit and opposed the protest and that distribution ought to be as per the confirmed grant.

On 31st May 2013 the Respondent/Applicant filed an application seeking restraining orders pending hearing and determination of the application on distribution of the estate.

The 2nd Applicant Joseph Njau Kihara filed Replying affidavit on 11th June 2013 that the Respondent had no claim to the estate as the deceased a written will and the land was to be distributed amongst the 6 sons only.

The Respondent/Applicant was allocated Kiganjo/Gatei/T.71 and not the suit property Kiganjo /Gatei/524.

All these applications were not heard and determined; meanwhile; on 25th November 2014, the 2nd Applicant Josephat Wakihara informed Court that he wanted to serve the application for dismissal of the revocation of grant application through substituted service. he court declined in the absence of reasonable grounds.

On 8th December 2014 confirmed service of the application through the Respondent's advocates on record. The 2nd Applicant could not reach the Respondent/Applicant at her home, on phone and that she left the country. The court allowed the matter be set down for hearing.

On 2nd February 2015, the Court declined to proceed as the service to the Respondent's advocate declined to accept service. On 10th March 2015 confirmed he served the Respondent /Applicant with the application and she was not represented or present in court. in the absence of any appearance or information; the Court granted the *ex parte* orders that the summons for revocation of grant was dismissed for want of prosecution.

Thereafter, the 2nd applicant filed various applications to effect the confirmed grant, subdivision and

distribution of the suit property and evict the Respondent/Applicant. At this point, the Respondent/Applicant appeared in Court on 5th December 2016 and stated she has never been served with any application and her advocates did not inform her of any application.

On the basis of the above summary, this Court is satisfied that the 2nd Applicant abused the Court process and obtained *ex parte* orders on the pretext that the Respondent /Applicant was served through her advocates as she could not be traced yet it is now on record she has been residing on the disputed suit property all this time to date.

The Court having reinstated the summons for revocation of grant application of 11th July 2012 and heard from both parties on 25th April 2017 finds as follows;

a) There is no evidence to confirm that the deceased left a written Will on distribution of his estate. The Applicants sought grant of letters of administration intestate and at no time did they disclose or attach the said Will. Secondly the alleged Will which copy was presented to Court raises various questions; it was not written by the deceased but by one Gicheha Nganga allegedly on 2nd December 1987 and the deceased died on 10th December 1987. The alleged Will contains names of members of the family who were present at the time the deceased wrote it. Clearly this is not a Will under section 5 and 11 of law of Succession Act Cap 160. Since it was not disclosed and attached to the petition for grant of letters of administration it cannot be relied on now. It is not clear who kept the Will, when and how it was read to all members of the family and there is no explanation why it was not the basis of obtaining the grant. It is therefore not the basis of distribution of the deceased's estate.

b) The members of 2 houses of the deceased were not all involved and obtain their consents in appointment of administrators contrary to Rule 26 of the Probate and Administration Rules; and in summons for confirmation of grant distribution of the deceased's estate by consents of all parties contrary to **Section 71 of Law of Succession Act Cap 160 Refer**

SUCCESSION CAUSE 761 OF 2007 (HCT KISUMU)

IN THE MATTER OF THE ESTATE OF HEZRON NYABOLA OYANGE

The court held there must be evidence that the proceedings to obtain the grant were defective in substance or the grant was obtained fraudulently by making a false statement or concealment of something material.

In the instant case the 2 houses of the deceased's family did not participate and consent to the obtaining and confirming the grant.

c) The Summons for confirmation of grant proceedings did not take into account and hear and determine the affidavit of protest filed by the Respondent Margaret Mwihi Wainaina as required under **Rule 40(6) & 41(1) of Probate & Administration Rules**. It is not clear was the basis of the confirmed grant without disposing first the protest. Secondly consents of all beneficiaries were not obtained on the mode of distribution of the estate.

Refer

SUCCESSION CAUSE 2933 OF 2008 IN THE MATTER OF THE ESTATE OF EVANS GICHURU MURIITHI

This Court revoked the confirmed grant as consent because the Applicant's consent was not obtained and the distribution of the estate was not agreed upon by all beneficiaries.

d) Therefore this Court finds that the grant of 17th February 1992 and confirmed grant of 12th February 2003 was irregularly and illegally obtained in contravention of **Section 76 (a) (b) (c) of**

the Act.

DISPOSITION:

From the above considered evidence; the Court finds as follows;

- 1) The Will of the deceased is not the basis of distribution as it is not a valid Will under Section 5 and 11 of Law of Succession Act Cap 160.**
- 2) The grant of 17th February 1992 and confirmed on 12th February 2003 are revoked a new grant is issued in the name of Eunice Muthoni Kihara 2nd widow of the deceased and Applicant/Respondent to represent the 2nd house and Margaret Mwihaki Kihara widow of Joseph Njuguna (deceased) only son of the deceased by the 1st wife Monica Njoki Kihara (deceased) to represent the 1st house.**
- 3) The new administrators to jointly propose the mode of distribution of the deceased's estate between the beneficiaries and seek their consent**
- 4) The new administrators to jointly file summons for confirmation of grant within requisite 6 months from today**
- 5) Any aggrieved party may file protest for determination by the Court**
- 6) Until then all subdivision, distribution and eviction is not valid until undertaken in consultation with the beneficiaries and approved and endorsed by Court.**

DATED SIGNED AND DELIVERED IN OPEN COURT ON 5TH MAY 2017.

M.W.MUIGAI

JUDGE