



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 431 OF 2005**

**IN THE MATTER OF THE ESTATE OF MUKUHA GATHANG'ARA ALIAS DANIEL  
MUKUHA GATHANG'ARA (DECEASED)**

**BETWEEN**

**DANIEL MUKUHA WANJOHI.....APPLICANT**

**AND**

**SCOLASTICA NJOKI MUKUHA.....RESPONDENT**

**RULING**

1. The application is premised under the provisions of Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules; the applicant seeks a revocation of the grant made to the respondent on the grounds that;

(a) The Grant was obtained by means of an untrue allegation of a fact essential in a point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.

(b) The Grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case;

2. Directions were given on the 24/2/2016 that the matter was ready for hearing and that viva voce evidence be tendered; the rival parties testified and hereunder is a summary of their respective evidence;

**THE APPLICANTS CASE**

3. The estate relates to Daniel Mukuha Gathang'ara (deceased) who died on the 5<sup>th</sup> November, 1978; the deceased had two (2) wives namely Scholastica Njoki Mukuha who was appointed as the administrator and is the respondent herein and the other wife was Rose Njanju Mukuha; the deceased died intestate and the persons listed in the P&A5 Form as having been left surviving him are namely;

(i) Scholastica Njoki Mukuha

(ii) Rosemary Ngunju Mukuha

(iii) Jeremano Wanjohi Mukuha

(iv) Charles Mutahi Mukuha

4. The applicant herein is the grandson of the deceased;

5. The identifiable properties of the estate comprise of the following;

(i) Muhito/Muyu/488

(ii) Plot No.1 Kahara Market

(iii) Plot No.2 Kahara Market

(iv) Plot No.7 Kahara Market

(v) Plot No.15 Kahara Market

(vi) Shares within Muyu General Transport Company Ltd

6. The respondent had petitioned for letters of administration in respect to the estate of the deceased and was issued with a Grant dated 8/03/2007; the Grant was confirmed on the 27/10/2009 and a Certificate of Confirmation was issued; the applicants contention was that the respondent failed to inform the court that before his demise the deceased had already subdivided his land **MUHUTO/MUYU/488** into four (4) equal portions and had allocated the portions to the following persons;

(i) Scholastica Njoki Mukuha

(ii) Rosemary Njanju Mukuha (herein-after referred to as Rosemary)

(iii) Jeremano Wanjohi Mukuha

(iv) Charles Mutahi Mukuha

7. Rosemary shared her portion with her youngest son, Michael Ruheni Mukuha; this son was the applicant's uncle; in 2004 he had invited the applicant to stay with them so that he could assist Rosemary who was aged to manage her farm and to also help her with household chores;

8. Michael Ruheni Mukuha predeceased Rosemary and she therefore needed the applicant to be nearer to her to enable him attend to her and her farm so she requested that he move closer and that he builds a house on Ruheni's portion of land; he stated that before her death Rosemary made her wishes expressly known in writing before witnesses that she wanted the applicant to inherit the portion of land belonging to her late son Michael Ruheni Mukuha; the applicant produced a copy of the documented statement in support and it was marked as '**PExb.I**';

9. The applicant contends that he had no knowledge of the Grant being confirmed; that the respondent had left out his name from the list of beneficiaries; and instead wrongfully allocated the portion that the applicant occupied to Richard Mwaniki Mukuha (also an uncle of the applicant) who had also been given his own portion;

10. That he was still in possession and occupation of the portion of land with his entire family and had even constructed a house thereon; that he had nowhere else to go and that he and his family were exposed to destitution as they didn't have any other property;

11. In the circumstances the applicant prayed that the grant be revoked on the grounds that Rosemary and Michael Ruheni's wishes had been concealed from the court.

12. The applicant called **Naftali Mutahi Kairo (PW2)** as his witness; he stated that he was a retired teacher; his evidence was that Rosemary called him together with elders to a meeting; he was the secretary at the meeting and kept the minutes; and that he also wrote the letter which was executed by

Rosemary by the affixing of her left hand thumbprint; the letter was also signed by the sub-chief;

13. He told the court that Rosemary had told him that the applicant had been brought by her son Michael Ruheni to look after her; that both Michaels wishes and his mother Rosemary were contained in the letter which was that the applicant be given Michaels portion;

14. The applicant closed his case after this witness had testified;

### **THE PETITIONERS RESPONSE**

15. The respondent stated that she was a widow and was also the second wife of the deceased; and that Rosemary was her co-wife; that she didn't know whether there was land written in Rosemary's name; the applicant was a grandson to her co-wife;

16. The above notwithstanding the respondent conceded that the land was divided into four (4) portions by the deceased and was to be given to the following;

(i) The Petitioner

(ii) Rosemary Njanju Mwaniki

(iii) Charles Mutahi Mukuha

(iv) Richard Mwaniki

17. Under cross-examination the respondent confirmed that both Rosemary and her son are both deceased; that the applicants mother resided on this portion of land courtesy of Rosemary for having looked after her and that the applicant had built a house on the land; and that she (the respondent) had distributed Rosemary's portion to her son Richard Mwaniki;

18. That the summons for the revocation of the grant lacked merit and prayed for it to be dismissed with costs.

### **ISSUES FOR DETERMINATION**

19. After the close of the proceedings the Counsels filed and exchanged written submissions and narrowed down the issues; from the evidence tendered and upon perusal of the written submissions these are the issues framed for consideration;

(i) Whether the applicant was a dependant of the deceased herein;

(ii) What constitutes the interest of the late Rosemary in the deceased's estate;

(iii) Whether the Grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case;

### **ANALYSIS**

#### ***What constitutes the interest of the late Rosemary in the deceased's estate;***

20. From the evidence tendered the late Daniel to whom this cause relates passed on in the year 5/11/1978; the petitioner herein took out letters of administration on the 26/09/2006 and confirmation was on the 27/10/2009; the document the applicant seeks to rely on was made on the 12/11/2004 which means that at the time it was being drawn the property still belonged to the estate of the deceased herein and that the disputed portion had not yet vested in Rosemary; therefore whatever Rosemary was purportedly bequeathing to the applicant did not at that point in time belong to either herself or her son Michael;

21. It is trite law that one cannot bequeath that which does not belong to him/her; in this instance this court finds that even though the land may have been divided into the portions described by the applicant it is apparent that the portion had not vested in Rosemary and she thus had no interest in the land that she had could bequeath to the applicant as set out in the document marked as 'PEXh.1'.

**Whether the applicant was a dependant of the deceased herein;**

22. Section 29 of the Law of Succession Act defines a dependant as follows;

**'Section 29. Meaning of a dependant**

**For the purposes of this part, "dependant" means-**

**(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;**

**(b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sister, and were being maintained by the deceased immediately prior to his death;**

23. There is need to reiterate the fact that the estate belongs to the deceased herein and that at the time of the making of the purported Will that the property had not devolved to any of the beneficiaries;

24. From the onset it is clear that the applicant was a grandchild of Rosemary which would also make him a grandchild of the deceased herein; all his evidence revolved around the estate/interest of his grandmother Rosemary; that as a token of goodwill she had given him a portion of the land that she would have given her son Michael who had predeceased her; that it was not Rosemary who had summoned him to look after her but that it was his uncle Michael Ruheni Mukuha who had called on him to look after the aging grandmother, Rosemary;

25. Nowhere in his evidence did he state that he was dependant on his grandmother; he was simply sourced to look after this aging grandmother; neither is there an iota of evidence to demonstrate dependency on his grandfather, the deceased herein;

26. This court finds that the applicant does not qualify as a dependant of either the deceased herein nor of Rosemary as set out in the afore-going Section 29 of the Law of Succession; but the applicant being a son of the said Jeremano Wanjohi Mukuha, may derive an interest in his grandfathers' estate only through his father, Jeremano Wanjohi Mukuha; who is a son of both the deceased and Rosemary.

**Whether the Grant was obtained fraudulently by concealment from the court of something material to the case;**

27. Section 76 of the Law of Succession Act sets out the grounds upon which a Grant can be revoked; and reads as follows;

**"Section76**

**(a) The proceedings to obtain the grant were defective on substance.**

**(b) The grant was obtained fraudulently by the making of false statements or concealment of something material the case.**

**(c) The grant was obtained by means of untrue allegations of fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently.**

**(d) The persons to whom the grant was made have failed after due notice and without reasonable cause either;**

**(i) To apply for confirmation within one year of such longer time as the court may allow,**

**(ii) To proceed diligently with the administration of the estate,**

**(iii) To produce to the court such inventory or account of Administration as required under section 83(e) and 83(g) of the act or has produced false accounts.**

**(e) The grant has become useless and inoperative through subsequent circumstances.**

28. The applicants contention is that the respondent concealed from the court at the time of taking out the Letter of Administration that the parcel of land the subject matter of this application namely **MUHITO/MUYU/488** had already been sub-divided by the deceased into four portions and given out to the respective beneficiaries; and that the respondent misled the court by including Rosemary's assets as forming part of the deceased's estate; therefore the Grant was obtained fraudulently;

29. This court reiterates that even though the will may have been valid and the intentions of Rosemary noble, at the time that it was drawn Rosemary's portion still belonged to the deceased herein; and therefore Rosemary did not have the capacity to bequeath that which that did not belong to her;

#### **FINDINGS AND DETERMINATION**

30. From the afore-going reasons this court makes the following findings that;

(i) This court finds that at the time of making the Will, Rosemary had no interest in the portion of deceased estate that she could bequeath to the applicant;

(ii) The applicant is found not to be a dependant of the deceased and is not entitled to directly benefit from the deceased's estate;

(iii) The Grant was not obtained fraudulently by concealment from the court of something material to the case;

(iv) The application is found to be lacking in merit and is hereby dismissed.

(v) Each party shall bear their own costs.

Orders accordingly.

**Dated, Signed and Delivered at Nyeri this 13<sup>th</sup> day of July, 2017.**

**HON.A.MSHILA**

**JUDGE**