



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

MISC SUCCESSION CAUSE NO. 12 OF 2016

**(BEING AN APPLICATION FOR REVOCATION OF GRANT ISSUED IN CHUKA SENIOR
PRINCIPAL MAGISTRATE'S COURT SUCCESSION CAUSE NO. 322 OF 2011)**

AND

**IN THE MATTER OF THE ESTATE OF THE LATE SOSPETER MUTEGI NJAGI alias
NAIROBI NJAGI.....DECEASED**

BEATRICE CIAMUTUA RUGAMBA.....APPLICANT

VERSUS

FREDRICK NKARI MUTEGI.....1ST RESPONDENT

LINUS NJUE MUTEGI.....2ND RESPONDENT

ALEXANDER REGENDO MUTEGI.....3RD RESPONDENT

ADVIN NYAGA SOSPETER.....4TH RESPONDENT

VIRGINIA RUGURU MUTEGI.....5TH RESPONDENT

ELIAS NJOKA KARUME.....6TH RESPONDENT

J U D G M E N T

1. Sospeter Mutegi Nairobi Njagi alias Mairobi Njagi (hereinafter "*the deceased*"), died on 18th December, 2001 aged 80 years. On 25th October, 2011, Fredrick Nkari Mutegi (hereinafter "*1st Respondent*"), a son of the deceased Petitioned for letters of administration in Chuka SPM's Court Succession Cause No. 322 of 2011 whereby a grant thereof was issued on 13th December, 2011 which was confirmed on 26th February, 2014.

2. On 29th April, 2016, Beatrice Ciamutua Rugamba (hereinafter "*the Applicant*") took out a summons for the revocation and/or annulment of the said grant under Section 76 of the Law of Succession Act and Rule 44 (1) and (2) of the Probate and Administration Rules. The grounds for the application was that the 1st Respondent filed the Petition fraudulently by the making of a false statement or by concealment of something material. The 1st to 5th Respondents' opposed the application whilst the 6th Respondent supported the same. Directions were made to the effect that the application be heard through viva voce evidence. The parties filed their witnesses' Affidavit evidence on which they were cross-examined.

3. In her testimony, the Applicant told the court that she was the wife of the late Rugamba Ngechu also known as Ikomo; that the deceased had bequeathed to her a position of land measuring 1.00 acre in LR No. Magumoni/Mukuuni/281 (hereinafter "*plot No. 281*") which was her home; that she was a dependant of the deceased before he died; that this fact was never disclosed to the court at the time of either applying for the grant or confirmation thereof; that LR No. Magumoni/Mukuuni/281 had now been subdivided into six (6) portions and she was on the verge of being evicted. In cross-examination, she admitted that she was not the wife of the deceased; that her late husband had a property registered in his name being LR No. Magumoni/Mukuuni/582 which was yet to be administered; that the portion she was occupying in plot No. 281 had been distributed to Elias Njoka Karume, the 6th Respondent. That it is the latter who was her problem and not the 1st Respondent or any of his siblings. That her late husband had two wives and the deceased belonged to the first wife while she was the second wife. That the deceased had given her one (1) acre on plot NO. 281 which she has been living in to date. That it is in that portion that the remains of her late husband were buried. She was currently living on that portion with one of her daughters who is taking care of her.

4. Collins Micheni Mwenda (PW2) is the Senior Chief for Mukuuni location. He testified that the deceased and all the parties to these proceedings as well as plot No. 281 are within his area of jurisdiction; that no letter of introduction was issued by his offices for the 1st Respondent to have commenced the Subject succession cause; that he knew that the deceased was a step son of the Applicant. He clarified that plot No. Magumoni/Mukuuni/582 is occupied by one Gitonga. Eustace Mutegi (PW3) told the court that on 21st January 2016, the Kiringo na Buba clan to which the parties belong had met and distributed one (1) acre to the Applicant on plot 281. He denied in cross-examination that the 6th Respondent was taking care of the Applicant.

5. Elias Njoka Karume (R₆W₁), the 6th Respondent told the court that he is the eldest son of the deceased; that plot No. 281 was demarcated in 1965; that the deceased who was in charge of his family allocated plot 582 to a son of the Applicant and brought the Applicant to live on plot 261 because she could not go to Itugururu where there were other family properties. That he supported the Applicant's application as it is the deceased who had given her the portion she was occupying. That he was not involved in the succession cause yet the 1st Respondent had distributed to him the portion the Applicant was occupying. In cross-examination, he denied that the deceased had shown him to occupy the Applicant's portion. He also denied that he was behind these revocation proceedings.

6. Fredrick Nkari Mutegi (R₁W₁) is the administrator. He is the 4th son of the deceased. He denied that the Applicant is a heir to the deceased. He stated that the Applicant lives in the portion given to the 6th Respondent who should take care of her until her death. According to him, she has land in the name of LR No. 582. He denied that either he or any other of his brothers was intending to evict the Applicant. That the family had sold a portion of the estate to the 4th Respondent to raise funds for the succession cause and distribution. That whilst the deceased was alive, money had been contributed and plot No. 281 distributed in terms of the certificate of confirmation. That the Applicant aged over 100 years was senile and had her own plot No. 582. In cross-examination, he admitted that the Applicant was his step grandmother; that she had lived in the portion she occupies ever since the time the deceased was alive; that there was a road which divides portion which she occupied and the rest of plot 281. He admitted that the certificate of confirmation had not disclosed that the Applicant was to have a life interest on the portion she was occupying. He also admitted that he did not obtain a letter of introduction from the chief when commencing this succession cause.

7. Virginia Ruguru Mutegi (R₅W₁), the 5th Respondent, is the widow of the deceased. She stated that the Applicant was neither related to her or her late husband; that the present application is a war being waged by her eldest son, the 6th Respondent against her; that the properties had been divided on the ground during the lifetime of the deceased. In cross-examination, she told the court that the 6th Respondent had been allocated a bigger portion in order to take care of the Applicant; that the 6th Respondent lives in the same compound with the Applicant.

8. After the testimonies, the learned counsels and the 6th Respondent filed their respective submissions

which this court has considered together with the authorities. Having carefully considered the evidence on record, the submission of the parties and the authorities relied on, the issues, that fall for determination are:-

- a) Is the application by the Applicant competent?
- b) Is the Applicant a dependent of the deceased and entitled to a share?
- c) What orders should be made as to costs.

9. It was contended for the Respondents that the application was being made too late in the day when the estate has already been distributed. That the Applicant had not properly brought her case within the parameters of Section 76 of the Law of Succession Act, Cap 160 Laws of Kenya (hereinafter "*the Act*"). Counsel for the Applicant submitted otherwise. I have looked at the summons before court, the grounds upon which the same was brought was that the succession cause was lodged secretly and the grant was obtained fraudulently by making a false statement or by concealment from court of something material.

Section 76 of the Act provides that:-

"76. A grant of representation, whether or not confirmed, may at anytime be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

(a)

(b) 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."

10. From the foregoing, it is clear that an application for revocation can be made at anytime even after confirmation. All one needs to do is to allege any of the grounds set out in sub paragraphs (a) to (e) of that section to be able to bring the application within the four corners of Section 76 of the Act. To mind, the caveat in section 30 of the Act will apply where it is shown that an applicant knew of the proceedings but took no steps to intervene. In the present case, there was no evidence that the Applicant was either involved or notified of the succession cause. She has grounded her application under sub paragraph (b) of that section. To my mind therefore, the application was perfectly in order. Whether the allegations are proved is another question all together.

11. The second issue is whether the Applicant was a dependent of the deceased. Mr. Kijaru learned counsel for the Applicant submitted that the Applicant, having been a stepmother of the deceased, she was a dependent. He cited the holding in **Sarah Kanini Thigunku -vs- Elizaphan Njuki Thigunku Chuka H.C.A No. 151 of 2011 (UR)** in support of his said submission. On his part, Mr. Mutani learned counsel for the 1st to 5th Respondents submitted that, the Applicant had absolutely no relationship with the deceased and that she could not claim anything from the estate. To Mr. Mutani, the application was an attempt by the 6th Respondent to have a second attempt in getting a bigger share in plot 281. He further submitted that on the authority of **Geoffrey Ndungu Kinuthia & Anor .v. Mary Njoki Karanja CA No. 270 of 1997 (UR)** there was neither fraud nor concealment of material facts to warrant the revocation of the grant.

12. There were several issues in which the parties were in agreement. These were; that the late Rugamba Ngechu alias Ikomo was married to two wives, one Ciamunari the first wife, and the Applicant as the second wife; the deceased was a step son of the Applicant; that during his lifetime, the deceased brought his late father and the Applicant to plot No. 281 where he allowed them to settle on one (1) acre. That upon the demise of Rugamba Ngechu (the father of the deceased and husband to the Applicant) he was buried in that portion of one (1) acre where the Applicant has continued to reside todate. It was also agreed that during the lifetime of the deceased, the Applicant was not only occupying the said one (1) acre but was eking out a living therefrom. That the deceased caused the said one (1) acre to be completely separated from the rest of plot No. 281 occupied by him and the rest of the members of his immediate

family by a road passing between that portion and the rest. It was also not in dispute that when the 1st Respondent applied for the grant, he never involved or notified the Applicant of the same. It was also not in dispute that plot No. 582, is registered in the name of Rugamba Ngechu, the Applicant's husband. Finally, the parties were in agreement that on distribution, the 1.60 Acres portion distributed to the 6th Respondent included the portion occupied by the Applicant.

13. The question that arises is, with the foregoing, was the Applicant a dependent of the deceased. Section 29 of the Act provides, inter alia, that:-

"29. For the purposes of this part, "dependent" means-

a)

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

c)"

From the foregoing, a dependent under section 29 (b) and (c) must prove that he or she was being maintained by the deceased immediately prior to his demise. It is not the mere relationship that matters, but proof of dependency that counts.

14. In the present case, there was no dispute that the Applicant was a step mother of the deceased. The evidence on record show that the Applicant not only lived on the portion of one (1) acre given to her by the deceased, but she was utilizing it for her livelihood. She was planting sweet potatoes, bananas, maize and groundnuts for her use. She was in occupation thereof with her children and depended on it for their livelihood. My view is that, the Applicant was a dependent of the deceased since she depended on his one (1) acre that he had given her for her and her family's livelihood.

15. It was suggested by the Respondents that plot No. 582 was available for the Applicant to inherit. A simple answer to that is that, whilst the deceased was very well aware that the two (2) acre plot No. 582 was in the name of his father, the husband of the Applicant, he nevertheless allocated that to one Gitonga Rugamba while he invited the Applicant to come and settle on a one (1) acre property of his plot No. 281. During her testimony, the Applicant who appeared quite old and frail, kept on telling the court that what she wanted was to stay in the property given to her by the deceased. In her cross- examination, counsel for the 1st to 5th Respondent confused her to show that she was claiming plot No. 582. However, because of her age which she estimated to be over 100 years, she kept on saying she was claiming the property given to her by her step-son, the deceased which obviously is not plot No. 582.

16. It was alleged that the present application was made at the behest of the 6th Respondent. That may be so because his share of 1.60 acres in plot No. 281 covers the area occupied by the Applicant. That the deceased had made the Applicant settle on a clearly demarcated one (1) acre portion on plot No. 281 separated by a footpath, if not a road, with the rest of plot No. 281, the deceased clearly intended and indeed had bequeathed the Applicant the said one (1) acre which was not available for distribution. In allocating the 6th Respondent his share of 1.60 acres on that portion, the 1st to 5th Respondents were acting in bad faith. Indeed, it became clear at the hearing that the 1st and 5th Respondent have deep seated hatred of the 6th Respondent, the reason why they wanted him to face the problem of a "squatter" on his share of 1.60 Acres.

17. The 1st and 5th Respondent testified that the deceased had sub-divided and demarcated the shares before he died and that the 6th Respondent was allocated the portion occupied by the Applicant. This court saw the witnesses testify. It found the two to be dishonest and strangers to the truth. The 5th Respondent told the court that she did not know the Applicant. She later said she knows her only by

seeing her. She finally owned up that she was a step-mother of her husband. She and the 1st Respondent told the court that they had allocated the 6th Respondent a bigger share so that he takes care of the Applicant and that the Applicant has a life interest on the share of the 6th Respondent. To show how untruthful the 1st Respondent could be, he stated in paragraph 19 of his Affidavit sworn on 11th May, 2016 as follows:-

"19 THAT when the deceased was alive we contributed the money for Lands Surveyor to sub-divided (sic) the parcel, which was distributed as follows:-

LR MAGUMONI/MUKUUNI/281

- i. ELIAS NJOKA KARUME 1.60 ACRES**
- ii. FREDRICK NKARI MUTEGI 1.60 ACRES**
- iii. LINUS NJUE MUTEGI 1.60 ACRES**
- iv. ALEXANDER RUGENDO MUTEGI 1.19 ACRES**
- v. ADVIN NYAGA SOSPETER 2.18 ACRES**
- vi. VIRGINIA RUGURU MUTEGI 0.44 ACRES."**

18. If the money for the distribution was contributed and the sub-division of the land effected when the deceased was still alive, how and when then were the Respondents selling a portion of the estate to the 4th Respondent to raise Kshs.300,000/- for succession and transfer as he had stated in paragraph 15 of the same Affidavit? In that paragraph, he had sworn:-

"15. THAT it was agreed by all the family members that a portion of the estate be sold to the 4 Respondent for Kshs.300,000/- which was used for filing the succession suit and also used in transfer process and the balance was given to our mother. "

19. Further, a look at the certificate of confirmation issued on 26th February, 2014, the share of the 6th Respondent of 1.60 Acres is the same as that of the 1st Respondent and Linus Njue Mutegi. Further, the 1st Respondent took the lion's share of the estate. He took 3.21 Acres in Magumoni/Itugururu/864, 1.60 Acres in plot No. 281, and the entire portions of Magumoni/Itugururu/860 and 861. Since he did not file the official searches for all the properties one cannot tell the total acreage he had awarded himself But it is clear that whilst the 1st Respondent only got a total of 4.81 acres in both Magumoni/Itugururu/864 and plot No. 281, the 1st Respondent took the entire portions of Magumoni/Itugururu/860 and 861. Therefore, it is not true that the 6th Respondent was given a bigger share to look after the Applicant.

20. A further perusal of the certificate of confirmation will show that the alleged life interest of the Applicant was never noted in the share of the 6th Respondent. I think the 1st and 5th Respondent were but outrightly being dishonest.

21. Accordingly, having been in the knowledge of the 1st Respondent that the deceased had allocated the Applicant one (1) acre on plot No. 281; that the latter had not only buried her husband thereon; that she and her children had throughout their lives been eking their livelihoods therefrom; that the Applicant and one of her daughters who is looking after her are still in occupation of and are living thereon, it was incumbent upon the 1st Respondent to have not only notified the Applicant of the application, but to have disclosed these facts to the court. This he failed. In my view, that was outright concealment of material fact that warrants the revocation of the grant.

22. As regards the alleged participation of the 6th Respondent in the succession proceedings, I found no

evidence of participation. There was no consent executed by the 6th Respondent at the time of applying for the grant or for confirmation in order to allege that he had consented to the 1st and 5th Respondents' machinations. I find that the Succession Cause was applied for secretly and the grant was obtained by concealment of material fact.

23. Be that as it, may, I have considered that the only dispute is as regards distribution of the rest of the estate is agreed to. The plot No. 281 on the entitlement of the one (1) acre given to the Applicant. I therefore see no reason for upsetting the rest of the distribution of the estate. I have however taken into consideration what shares the parties got in the rest of the estate. Advin Nyaga Sospeter seems to have been given a bigger portion because he paid money to the estate to lodge the Succession Cause. Alexander Rugendo's share was already small and he got no share in Magumoni/Itugururu/864. I will only rectify the certificate of confirmation as relates distribution of LR Magumoni/Mukuuni/281 as follows:-

1. Beatrice Ciamutua Rugamba - 1 Acre
2. Linus Njue Mutegi - 1.40 Acres
3. Advin Nyaga Sospeter - 2.18 Acres
4. Alexander Rugendo Mutegi - 1.19 Acres
5. Fredrick Nkari Mutegi - 1 Acre
6. Virginia Ruguru Mutegi - 0.44 Acre
7. Elias Njoka Karume - 1.40 Acres

24. As regards costs, since it is the 1st Respondent who caused the problem, I direct that he bears the cost of the Application.

It is so decreed.

DATED and Delivered at Chuka this 14th day of July, 2016.

A. MABEYA

JUDGE

Judgment read and delivered in open court in the presence of all the parties.

A.MABEYA

JUDGE

14/7/2016