



**REPUBLIC OF KENYA**

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

**SUCCESSION CAUSE NO. 90 OF 2013**

**IN THE MATTER OF THE ESTATE OF MURIUKI GACHOKI (DECEASED)**

**AND**

**ELIJAH GACHOKI GITHINJI.....1<sup>ST</sup> APPLICANT**

**MURAGE KARIUKI.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**STANLEY MUGO KARIUKI.....1<sup>ST</sup> RESPONDENT**

**RAPHAEL KINYUA MUGO.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling relates to the Summons for Revocation of Grant taken out by **Elijah Gachoki Githinji** and **Murage Kariuki** the applicants herein and is in respect to the estate of the late **Muriuki Gachoki** (deceased) who died on unknown date in 1966 domiciled in Gitaku Sub-location, Kirinyaga. The grant sought to be revoked was granted to Stanley Mugo Muriuki (1<sup>st</sup> Respondent) on 6<sup>th</sup> November, 1996 and confirmed on 19<sup>th</sup> May, 1997.

2. The grounds upon which the applicants have for the revocation of grant are as follows namely:

***(i) That the grant was obtained fraudulently by making of a false statement.***

***(ii) Concealment from the court of something material to the cause.***

3. In his supporting affidavit, the 1<sup>st</sup> applicant deposed that he is a brother to the deceased and that the administrator filed the cause in Embu (Principal Magistrate's Court Succession Cause No. 147/96) without involving him. He contended that the property forming the estate herein **MWERUA/GITAKU/154** was registered in the name of the deceased Muriuki Gachoki in trust of their late father KARIUKI NJOGU. The 1<sup>st</sup> applicant has further deposed that it was on that basis that he filed Kerugoya Senior Principal Magistrate's Court Succession Cause No. 186 of 1996. He has however, not exhibited any evidence of the succession proceedings to show whether it related to the same estate and/or the same deceased person. He has nonetheless accused the administrator for being secretive about the administration of the estate of the late Muriuki Gachoki.

4. In their written submissions done through their learned counsel Wangechi Munene, the applicants have submitted that the estate herein was a land which belonged to their clan and that it was registered in the name of the deceased to hold it in trust on behalf of the other four siblings namely:

(i) Murage Gachoki (the applicant but now deceased).

(ii) Jecinta Wangechi Murage

(iii) Junita Muthoni Ngari (deceased)

(iv) Elijah Githinji Gachoki – the applicant herein.

It is further submitted that the applicants and their families were brought up in the property forming the estate and have been residing there with their respective families.

5. The 1<sup>st</sup> Applicant in his further affidavit has further deposed that the 2<sup>nd</sup> respondent is a stranger to the family as he is not a member of the family of the late Muriuki Gachoki and could not claim to have bought the part of the estate on 10<sup>th</sup> April, 1997 because the 1<sup>st</sup> applicant then had no authority or capacity to deal with the estate of the late Muriuki Gachoki. The 1<sup>st</sup> Applicant has further contended that the property forming the estate was registered in the name of their late father KARIUKI NJOGU who transferred the land to the late Muriuki Gachoki (deceased) as the other siblings were still children. He has exhibited a letter from the area chief dated 18<sup>th</sup> April, 2016 (Exhibit “EGG2”) and copy of the Green Card (exhibit “EGG2”) to buttress his contention.

6. The 1<sup>st</sup> Respondent did not file any affidavit to challenge the allegations made by the applicants. He nonetheless made written submissions through his Advocates Maina Kagio & Co. Advocate. It has been submitted that the applicants have not made any effort to prove any of the grounds relied on in the summons for revocation of grant. It is further submitted that the second respondent obtained part of the estate from the administrator and on that basis he enjoys protection by virtue of **Section 93 (1) of the Law of Succession Act**.

7. The 1<sup>st</sup> respondent has also submitted that the applicant is seeking to nullify the grant herein in order to operationalize the grant issued vide Kerugoya Senior Principal Magistrate’s Court Succession Cause No. 186 of 1999.

8. The 2<sup>nd</sup> respondent – Raphael Kinyua Mugo has opposed the application herein vide a replying affidavit sworn on 16<sup>th</sup> September, 2014. He has deposed that he assisted the administrator herein (Stanley Mugo Muriuki) with the finances to help him petition for letters of administration and that there was an arrangement made for him to purchase 2 acres of the property comprising the estate. He has deposed that he paid Kshs.200,000/= which was the agreed consideration for the two acres and exhibited the copy of the agreement (exhibit “RKM1”). He deposed that on the basis of the agreement, his name was included in the application for confirmation of grant and was confirmed as a beneficiary of two (2) acres.

9. The 2<sup>nd</sup> respondent has faulted the applicants for bringing this application when they are not children or dependants to the deceased. He contended the deceased did not hold the property in trust as no trust was registered against the title noting that this being a succession court, the claim based on trust could not be litigated here but in a land court which is seized with the jurisdiction to determine and declare if there was a trust or not.

10. The 2<sup>nd</sup> respondent has further contended that the grant cannot be revoked merely because there was a parallel succession and added that the succession was done openly and duly gazetted in the Kenya Gazette. It was submitted that no procedure was flouted and that the applicants had not made a case to revoke the grant.

11. I have considered this application and the response made and I must say that the application did raise some anxiety owing to the fact that both the advocate of the applicant and the 1<sup>st</sup> respondent did little in terms of placing sufficient evidence before this Court to assist me deal with all the issues with clarity of mind.

12. The applicants filed this application way back on 16<sup>th</sup> October, 1997 under **Section 76** of the **Law of succession Act**. Under that section a grant whether confirmed or not can be annulled on any of the following grounds namely:-

*(a) That the proceedings to obtain the grant were defective in substance.*

*(b) That the grant was obtained fraudulently by false statement or concealment from court of something material to the case.*

*(c) That the grant was obtained by means of untrue allegation of a fact notwithstanding the fact the allegation was made in ignorance or inadvertently.*

*(d) When the administrator has failed to diligently proceed with the administration of the estate.*

*(e) That the grant has become useless or inoperative through subsequent circumstances.*

The existence of any of the above grounds can be invoked by any party seeking to revoke a grant whether confirmed or not. The court can also on its own motion do so if it notices any of the above grounds. In this present application, the applicants cited fraud and concealment as the ground for revocation of grant. The big question is whether the applicants have demonstrated any of the above grounds in support of their application to have the grant in this cause revoked or annulled.

13. The applicants have stated on oath that they filed a parallel petition for letters of administration vide Kerugoya Senior Principal Magistrate's Court Succession Cause No. 186 of 1996 but inexplicably failed to show either the grant or the proceedings of that cause in the affidavit and further affidavit filed herein. How would this Court know that the cited petition was in regard to the deceased in this cause? One would have expected that the applicants being represented by counsel could have done better by availing evidence to this Court that there exists a parallel petition for letters of administration in respect to the estate of Muriuki Gachoki (deceased). This issue is compounded more by the fact that the 1<sup>st</sup> Applicant in his statement stated the deceased herein died on 15<sup>th</sup> July, 1984 while in the petition herein, the 1<sup>st</sup> Respondent stated that the deceased died on unknown date in 1966 and that no death certificate was ever issued. This shows that the two parties cannot possibly be talking about the same deceased person because a person can only die once. It is hard to determine with sufficient clarity whether applicants and the respondents are speaking about the same deceased person and whether Kerugoya Succession cause No. 186 of 1996 relates to the same estate. The 1<sup>st</sup> Respondent in his submissions talks of Kerugoya Succession Cause No. 186 of 1999 adding more to the confusion which as I have observed has not helped this Court in determining the above issues.

14. I have also noted from the 1<sup>st</sup> Respondent's further affidavit in the chief's letter dated 18<sup>th</sup> April, 2016, that the chief is talking about the late KARIUKI NJOGU (deceased) which clearly shows, that he is talking about a different deceased person. He has connected the 2<sup>nd</sup> respondent to the said Kariuki Njogu but one would have expected the applicant to adduce more evidence to demonstrate the connection. In this regard one is bound to ponder and to question the rationale of all counsels in this cause (particularly the applicant) saw in choosing to dispose of this matter through written submission rather than *viva voce* evidence. That, however, is now water under the bridge.

15. The applicants have alleged that there was an element of trust in the registration of the estate herein in the name of the deceased – Muriuki Gachoki. This is what the applicants claim was concealed from court. The element of trust is a question of fact and it is trite law that whoever alleges must prove. The applicants are relying on this fact of concealment in the application for revocation of grant. It is a fact the

alleged trust was not registered because no evidence was adduced about the same. The annexure EGG3 in the further affidavit of the respondent sworn on 3<sup>rd</sup> May, 2016 is totally ineligible and this court is unable to rely on it in establishing whether a trust existed or not. This Court finds that the applicants were under an obligation in law to prove that trust existed by adducing evidence. I find that the 1<sup>st</sup> Applicant has sworn a further affidavit sworn on 5<sup>th</sup> May, 2016 alleging that they have been staying on the estate but the further affidavit was filed without leave and I am not sure if it was served on all the parties in this cause. Though I have made reference to the same in this ruling, I do find that the same is not properly before court and cannot be competently relied upon by the 1<sup>st</sup> applicant. It was also submitted that the 2<sup>nd</sup> applicant is now deceased and no party took out letters of administration to take over these proceedings on his behalf within the prescribed time. A deceased person can only be heard through a personal representative and the 1<sup>st</sup> applicant is not.

16. This Court is also unable to find that there was implied trust because the applicants have not properly laid basis upon which such a presumption can be deduced.

17. The applicants' further claim is that they are brothers to the deceased and ought to have been notified about the succession cause pending. I have looked at the petition filed and noted from form P & A 5 that the survivors named are:

(i) Joseph Muthii Muriuki

(ii) Wangui Maina

(iii) Cicilia Wambere Muriuki (mother) (deceased).

In my view though the applicants were not disclosed by the 1<sup>st</sup> respondent when petitioning for letters of administration, I find no basis for the applicant to fault the 1<sup>st</sup> respondent because they have failed to establish that a trust existed showing that they were dependants to the late Muriuki Gachoki the deceased in this cause. It is also important to note that the **Law of Succession Act Cap. 160 Laws of Kenya** really deals with intestate and testamentary succession and administration of estates of deceased persons. The architectural design of the Act is not meant to deal with disputes related to land and in this regard I agree with the 2<sup>nd</sup> Respondent that such disputes whether based on trust or contractual obligations should be left to the Environment and Land Court which by law is seized with the jurisdiction and constitutionally mandated to deal with such disputes under **Article 162 (2) of the Constitution**.

18. The applicants have not alleged any dependency on the deceased herein and that in my considered view does not give them any basis to invoke **Section 76 of the Law of Succession Act**.

19. I have considered the sentiments made about the interests of the 2<sup>nd</sup> respondent which have raised a fundamental question of law. The 2<sup>nd</sup> respondent has enclosed a copy of an agreement that appears to have been entered on 10<sup>th</sup> April, 1997. The grant herein was confirmed on 19<sup>th</sup> May, 1997. The property of the deceased herein vested on the 1<sup>st</sup> Respondent as the administrator of the estate of the late Muriuki Gachoki (deceased) on 19<sup>th</sup> May, 1997 by virtue of **Section 79 of the Law of Succession Act. Section 82** of the Act gave the 1<sup>st</sup> Respondent power to deal with the property (estate) including but not limited to disposing it from 19<sup>th</sup> May, 1997. This Court finds that by virtue of **Section 79 of the Law of Succession Act** the said property at the time the 1<sup>st</sup> respondent purportedly sold to the 2<sup>nd</sup> respondent (10<sup>th</sup> April, 1997), had not vested in the 1<sup>st</sup> Respondent and therefore he was not at the material time a confirmed personal representative of the deceased and had no capacity whatsoever to exercise any of powers set out in **Section 82** of the Act and in particular to sell any part of the estate to the 2<sup>nd</sup> Respondent or anyone for that matter. **Section 82 (b) (ii)** clearly provides that a sale of immovable property can only be done after confirmation of grant. The transaction is not protected as protection provided under **Section 93 (1) of the Law of Succession Act** is only available to lawful transactions and the transaction that led to the 2<sup>nd</sup> respondent being given 2 acres was definitely unlawful and irregular. The same is not tenable and cannot

be sustained. The fact that the 1<sup>st</sup> Respondent had petitioned and had obtained a grant by the time of the transaction did not clothe him with any authority and I am afraid that they committed an offence under **Section 45 (2) of Law of Succession Act** and ought to be prosecuted rather than protected as they now seek.

It is only on this ground that this Court is forced to invoke its powers under **Section 76** of the Act and revoke the confirmed grant but only to the extent that the name of the 2<sup>nd</sup> Respondent was inadvertently included in the confirmed grant. The 1<sup>st</sup> Respondent grant issued on 6<sup>th</sup> November, 1996 shall stand and he is at liberty to properly move this Court for proper confirmation in accordance with the law. Save for this finding, this Court finds no merit in the Summons for Revocation of Grant dated 14<sup>th</sup> October, 1997. It is disallowed but I make no order as to costs.

*Dated and delivered at Kerugoya this 13<sup>th</sup> day of July, 2016.*

**R. K. LIMO**

**JUDGE**

13.7.2016

Before Hon. Justice R. Limo J.,

Court Assistant Willy Mwangi

Miano holding brief for Thungu for 2<sup>nd</sup> Respondent.

Ndegwa for Wangechi for applicants

Macharia holding brief for Maina for 1<sup>st</sup> Respondent.

**COURT:** Ruling signed, dated and delivered in the open court in presence of Ndegwa for Wangechi for applicants, Macharia holding brief for Maina for 1<sup>st</sup> Respondent and Miano holding brief for Anne Thungu for 2<sup>nd</sup> Respondent.

**R. K. LIMO**

**JUDGE**

13.7.2016