



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

**MISCELLANEOUS APPLICATION NO. 9 OF 2009**

**JOHN WAWERU NYAMU.....1<sup>ST</sup> APPLICANT**

**WANJIKU WANJOHI.....2<sup>ND</sup> APPLICANT**

**BERNARD GICHOBI NJIRA.....3<sup>RD</sup> APPLICANT**

**BERIS WAMBURA NDEGE.....4<sup>TH</sup> APPLICANT**

**VERSUS**

**LUCIA WANGIGE.....RESPONDENT**

*(Being appeal from the ruling and order of the Senior Principal Magistrate (S. N. Ndegwa)*

*delivered on 4<sup>th</sup> day of May, 2011 in Kerugoya Civil Case No. 3 of 2004)*

**RULING**

1. **JOHN WAWERU NYAMU, ANN WANJIKU WANJOHI, BENARD GICHOBI NJIRA** and **BERIS WAMBURA NDEGE** are the 1<sup>st</sup> to 4<sup>th</sup> applicants respectively, who took out Summons for Revocation of Grant dated 19<sup>th</sup> January, 2009. The grant sought to be annulled relates to the estate of the late **GACHOKI MITWE** who died on 6<sup>th</sup> December, 1979 domiciled at **KARIA** Village within Kirinyga County and it was issued to both **LUCIA WANGIGE KECIRO** (the respondent herein) and **BERIS WAMBURA NDEGE** (the 4<sup>th</sup> applicant herein) as joint administratrixes on 11<sup>th</sup> June, 2001. The same was confirmed on 18<sup>th</sup> November, 2002.

2. The applicants have sought for the annulment/revocation of the said grant under **Section 76 of Law of Succession Act** on the following grounds namely:-

*i. That the grant was obtained through fraud and concealment.*

*ii. That the proceedings to obtain the grant were defective in substance.*

*iii. That the applicants were kept in the dark concerning the petition for letters of administration in this cause.*

*iv. That the applicants have been deprived of their right to inherit the estate of the deceased.*

3. The Summons for Revocation of Grant was supported by the affidavit of the 1<sup>st</sup> applicant (John Waweru Nyamu) who deposed that he is a grandson to the deceased in this cause and that he was brought up in the said estate. He deposed that they were unaware of what was going on until an order of eviction vide Kerugoya Senior Resident Magistrate's Court Civil Case No. 340 of 2007 was served upon them. His contention was that the grant was issued on the basis of a concealment by the Respondent herein who failed to disclose their existence as dependants to the deceased.

4. In his further affidavit sworn on 30<sup>th</sup> November, 2009, the 1<sup>st</sup> applicant added that he is a son to the late Juliana Wanjira (deceased) who was the daughter of the deceased in this cause. He deposed that her late mother died on 12<sup>th</sup> September, 1985 and was buried in the estate where he has deposed that she stayed prior to her death. He faulted the respondent for not disclosing that she is married to one Keciro and that she does not reside in the estate.

5. The 1<sup>st</sup> applicant has also deposed that after the demise of their mother, JULIANA WANJIRA he and his siblings were brought up and taken care of by the deceased grandfather and that he has never known any other home or a father. He has further added that his sibling one Gabriel Gachoki was chased away from the estate through a court order in the above cited case. It is contended that **INOI/KAMONDO/2901-2904** are the outcome of the subdivision of L.R. **NO. INOI/KAMONDO/554** which the estate originally comprised.

6. In their written submissions made on their behalf by the firm of Igati Mwai Advocate, the applicants have submitted that the respondent proceeded in her own in the administration of the estate without the participation of the other beneficiaries and that they only learned that the estate had been distributed to their detriment when they visited the office of lands Registrar. It has been submitted that a fair distribution of the estate should have been done equally to the following:-

- a. John Waweru as son to deceased's daughter JULIANA WANJIRA.
- b. Ann Wanjiku Wanjohi – daughter to Juliana Wanjira (deceased).
- c. Benard Gichobi Njira son to JANET MICEERE (deceased) – a daughter to the deceased.
- d. Lucia Wangige Ndege – the respondent as a daughter to the deceased.
- e. Susan Miceere Ndege – deceased's daughter in law.

7. The applicants have submitted that the mode of distribution adopted during the confirmation of the grant herein was not fair as it took care of only three beneficiaries leaving out the applicants who are said to be living on a portion of land comprising the estate. The applicants have contended that there was no consent sought from all the dependants and beneficiaries prior to the confirmation of grant. It is further contended that the applicants had equal priority and right to the estate as children to the respondent's sister.

8. The application has been opposed by the respondent through a replying affidavit sworn on 4<sup>th</sup> February, 2009, supplementary affidavit sworn on 8<sup>th</sup> December, 2009 and written submissions made through her learned counsel M/S A. N. Ndambiri & Co. Advocate. The respondent has denied the allegations of fraud and concealment leveled against her in this application. She has deposed that the grant of letters of administration was issued to her jointly with Beris Wambura Ndege, the 4<sup>th</sup> applicant herein and that all dependants and beneficiaries to the estate of Gachoki Mitwe, the deceased herein, participated in the petition for letters of administration.

9. The respondent has denied that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> applicants were dependants to the estate deposing that the 1<sup>st</sup> and 2<sup>nd</sup> applicants are living with their father in their own land. The respondent has however, conceded that the two are children to JULIANA WANJIRA but that they have other siblings who are also living in other parts in Kirinyaga District and were brought up by their parents independently. She has

also conceded in her response that the 3<sup>rd</sup> applicant was a son to Janet Miceere Njira (deceased) who did not however, protest against the grant and confirmation because he – (the 3<sup>rd</sup> applicant) was not a dependant to the deceased. In her view all the legitimate dependants were catered for and involved in the confirmation of grant. She faulted the 1<sup>st</sup> applicant for staking claim on property forming part of the estate after distribution.

10. It is submitted the 3<sup>rd</sup> respondent's mother Janet Miceere (deceased) who was a daughter to the deceased participated fully in the proceedings leading to the confirmation of grant and even consented to the confirmation of grant and the proposed manner of distribution of the estate.

11. The respondent has submitted that the application before court is incompetent and unmerited. The respondent has pointed out that the first applicant as a co-administratrix of the estate could not afford to be passive in this application and should have sworn an affidavit in support of the summons to revoke the grant. It has been submitted that the 1<sup>st</sup> applicant cannot swear an affidavit on her behalf and especially on matters that are not within his knowledge like whether the fourth applicant consented to the confirmation of grant or not. The respondent has submitted that the 1<sup>st</sup> applicant's affidavit should be struck out for being scandalous and contravening **Order 19** of the **Civil Procedure Rules** under rules 3(1) and (6). The respondent has further submitted that the 4<sup>th</sup> applicant does not have any further claim on the estate because if she did she could have appealed to the decision to confirm the grant having fully participated in the proceedings to confirm the grant. It is contended that the 4<sup>th</sup> applicant is now the registered owner of that parcel of land known as **INOI/KAMONDE/2901** which was part of the estate in this cause.

12. The respondent has further submitted that the proceedings to obtain the grant and confirmed grant were regular and pointed out that the petition presented listed all the dependants to the estate. It has also been contended that the petition presented in Probate and Administration Cause No. 59 of 2000 was revoked on 15<sup>th</sup> November, 2009 and that gave room to the petition in Probate and Administration Cause No. 144 of 2000 to proceed to its logical end.

13. The respondent has submitted that no evidence have been adduced by the applicants to prove any allegation of dependency by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> that there were material facts concealed from the court.

14. I have considered the application and the submissions made. I have also considered the response and the comprehensive submissions made by the respondent's counsel M/S A. N. Ndambiri & Co. Advocate. I have also gone through the proceedings that led to the grant and the confirmation of grant which shows that the deceased in this cause died on 6<sup>th</sup> December, 1979 as indicated above. This indicates that he died before commencement of the **Law of Succession Act Cap. 160** which came into operation on 1<sup>st</sup> July, 1981. This is key especially where there are disputes such as the one now before this Court. In such situations it is important to note the law which that applies in order to be appraised on how a dispute can be resolved. In this cause the law applicable in the administration of the estate is the customs of the deceased at the time of his death. It is safely assumed that the deceased being a Kikuyu at the time of his death, the customs applicable were Kikuyu customary law. **Section 2 (2)** of the **Law of succession Act** provides as follows:-

***“The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”***

15. The petition filed in respect to this cause was commenced by the respondent. She listed the following as dependants surviving the deceased;

1. Lucia Wangige Keiro
2. Janet Miceere daughters to the deceased.

3. Nancy Miceere

4. Beris Wambura Ndege daughters-in-law to the deceased.

5. Susan Miceere Ndege

16. The petition also indicated that Janet Miceere and Nancy Miceere were both married. The record also shows that at the commencement of the petition, the respondent was concerned by lack of co-operation from the other beneficiaries in petition for letters of administration. This is reflected in her affidavit sworn on 30<sup>th</sup> June, 2000 where she expressed frustration over the reluctance of the other beneficiaries to cooperate in the petition for letters of administration. This led to citation of SUSAN MICEERE, JANET MICEERE and BERIS WAMBURA NDEGE. Later on the parties seemed to have agreed to have Lucia Wangige Keiro and Beris Wambura Ndege appointed as joint administratrixes of the estate of the late Gachoki Mitwe the deceased herein. A grant of letters of administration was issued on 11<sup>th</sup> June, 2001. The said grant was confirmed on 18<sup>th</sup> November, 2002 and on the basis of a consent filed on 18<sup>th</sup> November, 2002 dated 15<sup>th</sup> November, 2002. The distribution agreed upon was as follows:-

a. Lucia Wangige Keiro was to get 0.91 Ha out of the estate comprised in **INOI/KAMONDO/554** – the sole property comprising the estate in the said cause.

b. Beris Wambura Ndege and Susan Miceere Ndege were both to get 0.91 Ha out of **INOI/KAMONDO/554** and have the same owned jointly.

17. There is no doubt from the consent filed that Lucia Wangige Keiro, Janet Miceere, Nancy Miceere, Beris Wambura Ndege and Susan Miceere Ndege were involved in the proceedings to confirm the grant and distribute the estate as per the above mode of distribution. I am inclined to agree with the respondent that there was no concealment in the petition for letters of administration. I have pointed out the lengths at which the respondent went including the citations which I have noted in the proceedings plus numerous services were effected on the other beneficiaries including the 4<sup>th</sup> applicant herein about the pendency of a petition for letters of administration in this cause. The respondent's action in my view in the light of the above cannot be interpreted to be concealment or fraudulent by any stretch of description.

18. A grant whether confirmed or not can be revoked and **Section 76** of the **Law of Succession Act** clearly sets out the grounds upon which a grant can be revoked or annulled. It is true that the grounds cited by the applicants (largely concealment and fraud) are some of the grounds if established or proved can entitle a court of law to revoke a grant issued under such circumstances. I am not satisfied that either of the two grounds have been proved by the applicants. The applicants under the law were required to place evidence which prove(s) on balance of probability that there was concealment and/or fraud on the part of the petitioner or administratrixes.

19. I also find the involvement of the 4<sup>th</sup> applicant in this application a bit intriguing. This is because the record clearly shows that she was actively involved in the administration of the estate including the earlier petition at the Senior Resident Magistrate's court Succession Cause No. 59 of 2000 which was later revoked by Justice Mary A. Angawa (as she then was) on 15<sup>th</sup> November, 2000 due to its irregularity. She was appointed the joint administratrix of the estate of the late Gachoki Mitwe and **Section 79** and **82** of the **Law of succession Act** made her accountable and responsible in the administration of the estate in this cause. When there is any issue like the ones being raised in this application, the law gives her a duty and responsibility to answer or account for her action. It is therefore highly irregular and a misconception for her to turn around and take out summons for revocation of grant when the estate has been fully administered unless she is raising a ground to show that the grant has become useless or inoperative due to a subsequent event envisaged under **Section 76 (e)** of the Act. This is obviously not the case here and the fact that the 4<sup>th</sup> applicant has not sworn any affidavit in support of this application makes her involvement in this application suspect. I agree with the respondent that the 1<sup>st</sup> applicant cannot in law be allowed to swear an affidavit over facts that are not within his knowledge. **Rule 63** of **Probate and Administration Rules** provides that the provisions of the old civil procedure in regard to affidavits do

apply in succession matters. I therefore find and hold that **Order 19 Rule 3 (1)** of the **Civil Procedure Rules** do apply here. The 1<sup>st</sup> respondent cannot purport to swear an affidavit touching on involvement of the 4<sup>th</sup> respondent and other beneficiaries named in the consent filed. The facts relied upon by the applicant should have been supported by the affidavits of those parties who could vouch for those facts.

20. The 1<sup>st</sup> respondent has contended that he and the 2<sup>nd</sup> applicant were taken care of by the deceased prior to his demise and therefore qualify to be dependants or beneficiaries to his estate. This was contained in his affidavit sworn on 30<sup>th</sup> November, 2009 where it is claimed that after the demise of their mother JULIANA WANJIRA in 1985, their grandfather the deceased herein took care of them. This Court finds this misleading because in the first place in 1985 the deceased in this cause was long dead and secondly the 1<sup>st</sup> applicant has not adduced any evidence to show his age and that of his siblings in 1979 when the deceased died and if at all he took care of them.

21. This Court finds that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> applicant being grandchildren to the deceased have not laid evidence to show that under Kikuyu customary law the deceased in this cause was posthumously assumed to have maintained them to qualify to be referred to as dependants to the deceased. The respondent has deponed that JULIANA WANJIRA (deceased) and Nancy Miceere (deceased) were married at the time this petition was presented. This perhaps explains why the late Nancy Miceere consented to the mode of distribution that excluded her in the distribution. This Court also takes judicial notice of the fact that under Kikuyu customary law married daughters laid no claim in the estates of their late father. What is however, compelling is that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> applicants have not tendered any evidence to show that any of the circumstances envisaged under **Section 76** of the **Law of Succession Act** exists in the proceedings that led to the issuance and confirmation of the grant herein. The applicants' (1-3) position in this application is that their rights to inherit accrued from their said late mothers. If that is the case, I find that none of the applicants (1 to 3) took out letters of administration in respect of their late mother's estate to give them legal basis to lay claim or show that they are not just claiming for themselves but their named siblings if at all. The evidence before this Court does not show any indication that their said late mothers (JULIANA WANJIRA (Deceased) and JANET MICEERE (Deceased) laid any claim on any part of the estate herein. In the absence of evidence of such claims, this Court finds that the 1<sup>st</sup> to 3<sup>rd</sup> applicants' claim on the estate is incompetent and untenable in law.

The upshot of the above discourse is that I find no merit in the Summons for Revocation of Grant dated 19<sup>th</sup> January, 2009. The same is dismissed but I shall make no order as to costs as this is a family matter. Each party shall bear own costs.

***Dated and delivered at Kerugoya this 5<sup>th</sup> day of July, 2016.***

**R. K. LIMO**

**JUDGE**

15.7.2016

Before Hon. Justice R. Limo, J.,

Court Assistant Willy Mwangi

John Waweru Nyamu present

Ann Wanjiku Wanjohi present

Lucia Wangige absent.

**COURT:** Ruling signed dated and delivered in the open court in the presence of John Waweru Nyamu

and Ann Wanjiku Wanjohi.

**R. K. LIMO**

**JUDGE**

**15.7.2016**