



**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI**

**FAMILY DIVISION-MILIMANI LAW COURTS**

**SUCCESSION CAUSE NO. 695 OF 2013**

**(CONSOLIDATED WITH SUCCESSION CAUSE NOS. 43 OF 2012 & 3458 OF 2004 & 63 OF 2012)**

**IN THE MATTER OF THE ESTATE OF FRANCIS MWAURA WARUINGI (DECEASED)**

**BETWEEN**

**HENRY NJOROGE KAMAU .....APPLICANT**

**AND**

**FRANCIS WARUINGI MWAURA AND 4 OTHERS.....RESPONDENT**

**RULING**

**INTRODUCTION**

Francis Mwaura Waruingi died on 30<sup>th</sup> March 1999 at the PCEA Kikuyu Hospital. The deceased died intestate.

The Summons Application for Revocation /Annulment of Grant dated 26<sup>th</sup> July, 2013 is the subject of the present Ruling. The Applicant, Henry Njoroge Kamau, (hereafter ‘the Applicant’) seeks for an order that the Grant of Letters of Administration made to Lucy Waceke Njuguna and Paul Muiro Nganga made on 9<sup>th</sup> July 2013, be revoked on the grounds that:

**(a) The proceedings to obtain the grant were defective as there was already another Succession Cause No. 43 of 2012 at the High Court in Nairobi involving the same Estate.**

**(b) The said Grant was obtained fraudulently by the concealment from this Court of a material fact that there was already pending in the High Court at Nairobi a case involving the same Estate, that the administrators had issued the Applicant with citations to accept or refuse consent and that they are not children of the deceased.**

**(c) The administrators have denied being the children of the deceased on oath in matters filed before the Kiambu Chief Magistrate’s Court and on making an application for a national Identification Card.**

**(d) The Administrators have caused fraud upon the Honourable Court.**

**LITIGATION HISTORY**

The Applicant had in Succession Cause No. 3458 of 2004, been granted Letters of Administration but the same was however annulled and the Court, Hon. Justice W. Karanja, in a Ruling delivered on 19<sup>th</sup> December, 2011, directed further that the parties were at liberty to file for fresh Grant of Letters of Administration. In that regard, the Applicant subsequently filed Succession Cause No. 63 of 2012 at the Kiambu Chief Magistrate's Court but the Respondents objected to the same on the basis that the Chief Magistrate's Court lacked the jurisdiction to entertain the matter and as a result of that, the Parties consented to having the suit transferred to Nairobi and it was thereby admitted as HCCC Succession Cause No. 43 of 2012. Subsequently, on 6<sup>th</sup> July, 2012, the Respondents, through their advocate, wrote to Court requesting for the consolidation of Succession Cause No. 3458 of 2004 with Succession Cause 63 of 2012 and the same was allowed.

**THE APPLICANT'S CASE**

In the Affidavit in support of the Application, the Applicant averred that on 7<sup>th</sup> November, 1995 he inherited property being, L.R Kiambaa/Waguthu/1213, from his father, Waruingi Gichure and that on 28<sup>th</sup> August 1996, through a brotherly agreement for a period of eight years, on 16<sup>th</sup> April 1996, he transferred his portion of the said land to his brother, Francis Mwaura Waruingi, to assist him to borrow money to develop his other piece of land measuring 5 acres in Ngoliba Phase IV. However, the brother died before the process was completed.

The Applicant deposed that after the lapse of eight years, while in the process of transferring the land back to himself, letters of Grant of Administration were issued. In that regard, he outlines the litigation history pertaining to the present suit and contends further that he heard of the existence of Succession Cause No. 695 of 2013 for the first time on 16<sup>th</sup> July 2013. Accordingly, it was his argument that the Respondents fraudulently and in duplicity applied for Letters for Grant of Administration while still attending and engaging the Court in Succession Cause No. 43 of 2012.

It was the Applicant's view that the intentional duplicity by the Respondents was meant to divert the attention of the Court and thereby occasion fraud in reference to the parcel of land, L.R Kiambaa/Waguthu/1213 and that the Affidavit sworn by Francis Waruingi Mwaura on 29<sup>th</sup> May, 2012 was served upon the Applicants in Succession Cause No. 695 of 2013 at the High Court in Milimani, prompted the Applicants therein to fraudulently apply for the said Grant and thereby concealing of the material facts. In that context, he asserted therefore that the Respondents ought to follow and respect court process in Succession Cause No. 43 of 2012 until its outcome.

In his Written Submissions dated 27<sup>th</sup> February 2014, the Applicant asserted further that the Respondents took over 23 years to challenge the Grant in question and no reason was whatsoever given as to such delay and as such, the challenge remains an afterthought. Additionally, that the Respondents should not be allowed to benefit from an illegality and that the Law of Succession Act is explicit in that everyone who has an interest in a matter can file for Letters of Administration and therefore, in the present case, it is imperative that the Court is informed of the facts of the present case so as to reach a decision justifiable to all the parties.

In his Affidavit dated 1<sup>st</sup> October, 2013, the Applicant further averred that the Applicants in Succession Cause No. 695 of 2013 did not issue a Citation to him as required and yet they were aware that he is an interested party. Accordingly, that in the Form P&A dated 22<sup>nd</sup> March, 2013, they lied before a Commissioner for Oaths that he had consented or renounced his rights of representation. Further, that the Applicants confirmed in their Affidavit dated 19<sup>th</sup> April, 2013, that they were aware of the existence of Succession Cause No. 43 of 2013 which was in progress in the High Court, and yet they proceeded with Succession Cause No. 695 of 2013.

Further, that the allegation that the Respondents were given direction by Hon. Mr. Justice Kimaru is baseless as a mention is not in any way a Ruling. Accordingly, that the deceased had not married Teresia Njeri Mukinya in accordance with Kikuyu traditional law. Therefore, the Applicants in Succession Cause No. 695 of 2013 are not the deceased's biological children and they lack capacity to institute the present proceedings which remain an abuse of the court process.

In his further Written Submissions dated 18<sup>th</sup> July, 2014, the Applicant reiterated his earlier assertions and urged the Court to revoke the Grant and pave way for Misc App. No. 43 of 2012 pending before this Court to be heard and determined.

For the foregoing reasons therefore, the Applicant urged the Court to allow the Application together with costs herein.

### **THE RESPONDENTS' CASE**

The Respondents opposed the present Application and filed Written Submissions dated 30<sup>th</sup> October, 2013. It was their submission that despite of the Court's orders granted in Succession Cause No. 3458 of 2004 made on 19<sup>th</sup> December, 2011, the Applicant has forcibly continued to occupy L.R Kiambaa/Waguthu/1213 against the wishes of the children of his late brother, Francis Mwaura Waruingi. That between April 1996 and March 1999, when the deceased died, no encumbrances of any nature had been registered against the title to the said property. In any event, the issue of claim to that property is not a matter to be litigated upon in the present suit. Further, that the validity and legality or otherwise of the purported Applicant's agreement with the deceased is moot in light of the provisions of **Sections 6 and 8** of the **Land Control Act, Cap 302 of the Laws of Kenya** and the present Application for the revocation of the grant.

It was the Respondents' further submission that the Applicant has neither bothered nor made concerted efforts to appraise himself of the scope and meaning of the directions given by Hon. Mr. Justice Kimaru on 19<sup>th</sup> March 2013, in Succession Cause No. 43 of 2012, or for whatever reason, is acting in ignorance of the same. Further, it was their position that there has been no wrongdoing on their part and the allegations in the present Application hold no water.

The Respondents maintained that they disclosed all the facts to the Court in regard to their Application for Letters of Grant and that in any event; the Applicant has not demonstrated or pointed out where they misled or submitted to the Court incorrect information. Further, they relied on the definition of the word 'child' as defined in *Macmillan's Advanced Learners (International Students Edition)* and expressed the view that the Applicant is by his own documents estopped from obfuscating the issue of the genetic composition of the deceased and that, the fact of the names of the deceased's children as they appear in their national Identity Cards does not necessarily and conclusively mean that they and their siblings are not the deceased's children by dint of **Section 38 and 66** of the **Law of Succession Act**. In that regard, it was their argument further that they have the requisite capacity and *locus standi* to institute proceedings for Grant of Letters of Administration.

The Respondents' other submission was that the deceased herein died intestate and as such, the provisions of **Sections 62 and 63** of the **Law of Succession Act** do not apply. Additionally, that following the directions by Hon. Mr. Justice Kimaru, they proceeded to file a petition for Grant of Letters of Administration in line with the provisions of **Section 51** of the **Law of Succession Act** and **Rules 7 and 8** of the **Probate and Administration Rules**.

On the allegations of fraud, the Respondents took the position that the Applicant has failed to prove the same or to provide any material facts in support of those assertions. Accordingly, that for him to establish fraud, he is under a duty to adduce evidence for instance, that they have either forged and/or uttered false documents, or they have in their Petition for Grant of Letters of Administration and in the Affidavits in support therein, perjured themselves or alternatively misrepresented a set of facts to be or to appear to the Court not to be what they are for their own gain. In addition, that the Applicant cannot merely allege that there was concealment of material facts, without annexing any proof in support of those contentions.

Additionally, in their further Written Submissions dated 4<sup>th</sup> April, 2014, they reiterated their earlier submissions and urged the Court to find the present Application unmerited and dismiss the same.

Finally, the Respondents asserted that the Applicant is not in any way a beneficiary to the Estate of the deceased in light of **Section 38** of the **Law of Succession** and he is as well not a person to whom **Section 66** of the **Law of Succession Act** would apply. For the foregoing reasons therefore, they urged the Court to dismiss the Summons for Revocation for Grant with costs and that they be allowed to proceed and administer the deceased's Estate as per the law.

### **DETERMINATION**

Based on the Parties' respective pleadings and submissions as I have reproduced above, the key question for determination is whether the Applicant has made out a case to warrant the revocation of the Grant of Letters of Administration as sought in the present Application.

In that regard, it should be noted that **Section 66** of the **Law of Succession Act** makes provisions in regard to the persons who are entitled to Grant of Letters of Administration. The section provides thus:

*“When a deceased has died intestate, the court shall, save as otherwise provided, have a final discretion as to the person or persons to whom a grant of letter of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-*

*(a) Surviving spouse or spouses, with or without association of other beneficiaries;*

*(b) Other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;*

*(c) The Public Trustee; and*

*(d) Creditors.*

*Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.”*

As to the procedure of obtaining a Grant of Letters of Administration, **Section 67** of the **Law of Succession Act** provides that:

*(1) No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for the grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.*

*(2) A notice under sub-section (1) shall be exhibited conspicuously in the court-house, and also published in such other manner as the court directs.*

**Section 76** of the **Law of Succession Act** provides for the alteration and revocation of Grants. It states that:

*“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.***

***(d) That the person to whom the grant was made has failed, after due notice and without reasonable cause either-***

***(i) To apply for confirmation of the grant within one year from the date thereof, or such longer period as the court has ordered or allowed; or***

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

***(iii) To produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular; or***

***(iv) That the grant has become useless and inoperative through subsequent circumstances.***

In the case of **JESSE KARAYA GATIMU VS MARY WANJIKU GITHINJI SUCCESSION CAUSE NO. 95 OF 2014**, it was pointed out that:

***“The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of grant to demonstrate the existence of any, some or all of these grounds, whatever the case may be.”***

In the present case, the key contention by the Applicant is that the Grant of Letters of Administration herein was fraudulently acquired and hence the same ought to be revoked. Was the grant obtained through fraud?

It is undisputed that the Applicant had in Succession Cause No. 3458 of 2004 applied for Grants for Letters of Administration and the same had been revoked in a Ruling delivered on by Hon. Justice W. Karanja. In answering the question whether the Grant had been obtained fraudulently and whether the Applicant had made untrue allegations of facts essential in point of law, the Learned Judge partly stated as follows at pages 5, 6 and 7, thus:

***“In my considered view, the answer to all these questions is one. It can only be ‘YES’. I say so because the Respondent herein, Henry Njoroge Kamau, has not denied that he is not the son of the deceased as he represented himself to be in his documents which the court relied on to issue him with a Grant of Letters of Administration...***

***The long and short of this is that even the Respondent has conceded that he was not the son of the deceased contrary to what his documents stipulated. He has conceded that Felister is his wife and not the deceased’s daughter. He has further conceded that the Applicant herein is the biological son of the deceased. He also conceded that the Applicant used to visit his father (whether agreed or not). The truth of the matter is that the Applicant, (Francis Waruingi Mwaura), is a biological son of the deceased and whether or not he is entitled to inherit any land from him should have been left to the court to determine after all the material relevant facts were presented to the court.*** (Emphasis added)

Additionally, in his Ruling delivered on 9<sup>th</sup> April, 2014, Hon. Justice Mr. L. Kimaru while addressing an Application for stay, filed by the Applicant, for the award of costs, the Learned Judge made the following observation:

***“As noted earlier in this Ruling, this Court found as a fact that the Respondent fraudulently misled this Court into issuing him with a grant of letters of administration when he knew that he was not a son of the deceased as he had declared in the Petition. To compound the mischief, the***

***Respondent listed his wife as a daughter of the deceased...***

The upshot of the above findings by the Learned Judges is that the Applicant herein is not the son of the deceased and that fact remains uncontested. In that regard, I note that he has submitted and deposed largely in regard to his claims to property namely, L.R Kiambaa/Wanguthu/1213 in support of the present Application. I must however in this instant, decline the invitation by the Applicant to investigate questions of title or the validity of the ownership in regard to that property through appointment as administrator of the late brother's estate.

Against that background, I now turn to examine whether the Grant in question was obtained fraudulently as the Applicant alleges. On that basis, I note that in their Petition for Letters of Grant of Administration dated 22<sup>nd</sup> March 2013, Lucy Waceke Njuguna and Paul Muiruri Nganga filed the Petition in their capacities as daughter and son of the deceased herein as confirmed by Chief's letter attached to the petition. In the Petition, they stated further that every person having an equal or prior right to representation had consented thereto, or had renounced such right, or had been issued with a citation to renounce such a right and apply for a grant of representation and had not done so.

The first question that I wish to address my mind to is whether the petitioning of the Letters of Grant while Succession Cause No. 43 of 2012 was still pending renders the Grant defective. In that regard, I am mindful to the fact that the present proceedings is a result of the consolidation of the various suits revolving around the question of the Estate of Francis Mwaura Waruingi (deceased), and at the time the impugned Letters of Grant were issued, various Court orders had been issued whose effect was that the parties were at liberty to apply for the Grant. In my view, following the consolidation of the various suits revolving around the Estate of Francis Mwaura Waruingi, the mere fact that Lucy Waceke Njuguna and Paul Muiru Nganga filed for the Grants in Succession Cause No. 695 of 2013 as opposed to Succession Cause No. 43 of 2012 does not in any way render the same a nullity, and as such, I decline the invitation by the Applicant to dismiss the same on that basis. The consolidation of these suits does not in any way, in my view, render each of them obsolete.

The other contention by the Applicant is that the two are not biological children of the deceased and hence they do not have a right to be granted Letters of Administration. In that regard and based on the material before this Court, Lucy Waruingi and Paul Muiruri in the Affidavit sworn by the former, asserted that they are the children of the deceased and that their mother, Teresia Njeri, was married to the deceased in 1957 under Kikuyu customary law but they however separated in 1980, following their mother's departure. That she subsequently got married to one Mr. Mukinya. The Applicant however challenges those assertions and the basis of his claim is that the records from the Registrar of Persons indicate that they are not in any way related to the deceased because their names in their respective identification documents. In that regard however, I am not satisfied that the Applicant has discharged the burden of proof in regard to those allegations.

In holding so, I am alive to the provisions of **Section 107** of the **Evidence Act** which is to the effect that:

***(1) Whoever desires any court to give judgment as to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.***

Additionally, **Section 109** thereof states that:

***The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie in a particular person.***

Based on the foregoing, it therefore follows that the Applicant has failed to prove his allegations that the two are not the biological children of the deceased. In my view, the mere fact that the Respondents have

not adopted the deceased's name in their respective identification cards is not sufficient evidence that the Respondents are not in any way related to the deceased. Furthermore, based on the material before me, I am unable to find any fraud or misrepresentation on any basis alleged by the Applicant to warrant the revocation of the Letters of Grant.

Secondly, there are valid Court orders which have not been set aside or appealed against that confirm the Applicant as one who is not entitled to administer the estate of the deceased his brother as his late brother's family exists. However, in light of his claim of proprietary interest in the suit property Kiambu/Waguthu/1213, the Applicant should not claim as a beneficiary of the deceased's estate as he is not a beneficiary. Instead he ought to consider filing objection or protest in this Cause against administrators of the deceased's estate in distributing the said suit property as an asset that comprises of the deceased's estate before his proprietary interest on the said property is heard and determined.

Alternatively, he may file his claim in the Land and Environmental Division of the High Court which is clothed with jurisdiction to investigate the use and occupation of and title to land by dint of **Article 162 2 (b) Constitution 2010** to enforce his proprietary right over the suit property Kiambu/Waguthu/1213.

In conclusion, I wish to remind litigants that the Grant of Letters of Administration is not in any way an entitlement to claim over any property or Estate of the deceased. The rationale is merely to have the Estate of the deceased taken care of and the beneficial interests therein protected. The mere fact that other Parties to the suit are not issued Letters of Administration does not mean that they shall be excluded to their entitlements to the deceased's Estate if confirmed and determined. Furthermore, the Law of Succession Act has in-built mechanisms to ensure that the deceased's Estate is well administered for instance; the Parties are at liberty to file Applications for such administrators to produce an inventory of an account of the administration of the Estate to the Court and other beneficiaries. Additionally, where such administrators act without due diligence, Parties may institute for the revocation of the said Grant of Letters of Administration and have them held accountable.

**DISPOSITION**

- 1) Based on the above consideration of law and evidence presented from pleadings and submissions filed, I am not satisfied that the Applicant has made out a case to warrant the revocation of the Letters of Grant of Administration in light of the provisions of Section 76 of the Law of Succession Act and it therefore follows that the Summons Application dated 26<sup>th</sup> July 2013 is hereby dismissed.**
- 2) The Applicant is at liberty to pursue his claim to the suit property Kiambu/Waguthu/1213 in any other capacity but not as administrator or beneficiary of the deceased's estate.**
- 3) Each Party shall bear their own costs.**

**DELIVERED SIGNED & DATED IN OPEN COURT ON THIS 5<sup>TH</sup> DAY OF SEPTEMBER, 2016**

**M.W. MUIGAI**

**JUDGE**

**In the presence of:**

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