



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PROBATE AND ADMINISTRATION DIVISION

SUCCESSION CAUSE NO. 2319 OF 2009

IN THE MATTER OF THE ESTATE OF PHARIS MUIGAI MWANGI (DECEASED)

JANE WAMBUI WAHUGA

MARGARET WANJIRU GAITHO

GRACE WAIRIMU KAROBIA

IRENE NYAKAIRU MWANGI

ALICE NJERI GIKERA.....APPLICANTS

- VERSUS -

RUTH NJOKI MWANGI.....RESPONDENT

R U L I N G

[1] Jane Wambui Wahuga and four others (hereinafter referred to as the Applicants), filed in court summons for revocation/or annulment of the grant and confirmation of letters of Administration on 30th October, 2009. The said application was brought under the provisions of section 76 and 47 of the **Law of Succession Act (Cap160)**, and **Rules 44(1)** and **73** of the **Probate and Administration Rules**.

[2] Simultaneously with the taking out of the Summons for Revocation of grant, the Applicants filed by way of Summons, the application seeking the following interlocutory reliefs.

(i) All proceedings filed by the Respondent herein (Ruth Njoki Mwangi) being, Thika Chief Magistrate's Court Succession Cause No. 381 of 2008, in the matter of the Estate of James Mwangi Pharis (deceased) be stayed.

(ii) An order of injunction be issued restraining the Respondent whether by herself, agents, servants or otherwise from interfering with the Applicant's right of access and use of properties known as Loc.3/Githumu/153, Loc.3/Mungaria/364 and Loc.16/Ndunyu Chege/194, Githumu Plot 10A and Githumu Plot 658A (hereinafter "the immovable Properties").

(iii) An order of injunction be issued restraining the Respondent whether by herself, agents or otherwise howsoever from offering for sale, leasing, mortgaging, charging, transferring or assigning and/or otherwise dealing with the immovable Properties and shares held in Ikumbi Tea

Factory, Njune Tea Factory, Makomboki Tea Factory and Nduti-Ruchu Tea Factory (the deceased shares hereinafter called “the moveable Properties”) in any manner prejudicial to the Applicant’s interest and rights therein.

(iv) Pending the hearing and determination of the instant application and the summons for Revocation of Grant, the Respondent do furnish to the Court the full, accurate and true statements of accounts in respect of the income generated from the estate assets aforesaid.

[3] By consent of the parties orders for the maintenance of the status quo in respect of the deceased’s estate were granted on 14th October, 2010. The parties then took directions to dispose of the application for revocation of grant by way of viva voce evidence on the basis of affidavit to be filed within 21 days of that date.

[4] The applicants are persons interested as beneficiaries of the estate of Pharis Muigai Mwangi (deceased) who died in 1993. They sought orders that the grant of Letters of Administration made to James Mwangi Pharis (hereinafter referred to as the Petitioner) on 27th August, 1993 at Thika Resident Magistrate’s court, vide succession cause No.144 of 1993 and subsequently confirmed on the 3rd March, 1994 be revoked and/or annulled.

[5] The summons for revocation is premised on grounds that:

(1) The proceedings to obtain the grant and to procure confirmation thereof were defective in substance for being obtained without seeking the consent of the applicants notwithstanding their entitlement to the estate as the beneficiaries thereof, and for unlawfully disinheriting the Applicants who are lawful beneficiaries of the deceased’s estate.

(2) The grant of Letters of Administration was obtained and confirmed by means of untrue allegations of facts essential in point of law to justify the grant, namely that the applicants being persons of equal right to the grant had consented to the Petitioner taking out the grant which they had not.

(3) The Petitioner fraudulently transferred to himself various assets, namely, plots and shares in various tea processing factories, concealed from the court at the presentation of the petition, which assets have subsequently been transferred to one Ruth Njoki Mwangi (hereinafter the Respondent).

[6] Irene Nyakairu Mwangi swore a supporting affidavit on her own behalf and on behalf of the other Applicants with their authority. She listed the assets of the estate as follows:

(i) Loc.3/Githumu/153 – 7.6 acres

(ii) Loc.3/Mungaria/364 – 0.128 Ha.

(iii) Loc.16/Ndungu Chege/194 – 9.09 acres

(iv) Githumu Plot 10A

(v) Githumu Plot 658A

(vi) Shares in KTDA: 169 shares in Ikumbi Tea Factory 8654 shares in Njunu Tea Factory 751 shares in Makomboki Tea Factory 6940 shares in Nduti-Ruchu Tea Factory

(vii) Shares in Mugunda Self Help Group/Mbari ya Agaciku

[7] In support of the Application Grace Wairimu Karobia swore an affidavit dated 28th June, 2010 and filed in court on the same date. In the affidavit she deposed that the Applicants stand equal in rights to

the grant of representation in respect of the deceased's estate and had not consented to the taking out of the grant by the Petitioner.

[8] The Respondent opposed the application on the grounds set out in her replying affidavit dated 9th November, 2009, and her submissions dated 3rd May, 2010. In support of the Respondent's case were the affidavits of one Mugita Kiburi and Tilas Njoroge Mwangi, both sworn on 5th July, 2010.

[9] In sum the averments for the defence case are that all the properties named in paragraph 4 of the supporting affidavit sworn by Irene Nyakairu Mwangi belonged to the Respondent's husband, James Mwangi Pharis (deceased) and that the estate having been distributed it is unfair to reopen it 15 years after the death of the Respondent's husband.

[10] That all shares in Njunu Tea Factory, Makomboki Tea Factory and Nduti Ruchu Tea Factory belong exclusively to the Respondent, and did not belong to the deceased person, James Mwangi Pharis.

[11] It was also deposed that the Applicants were aware of the distribution of the estate and are withholding material facts from this court with the sole interest of disinheriting the Respondent and her children. Further that there is no proof of fraud in the process of obtaining grant of Letters of Administration by the Petitioner, and that the grant cannot be revoked or annulled after the Petitioner has died.

[12] Mr. Chege Njoroge learned counsel for the Applicants filed global submissions to cover both the application for revocation of grant and the application for injunction orders respectively.

[13] Counsel submitted that it is not disputed that the deceased owned the various properties listed above, although these properties are now registered in the name of the Petitioner (deceased). That the deceased Petitioner died on 17th June, 2005 and was survived by the Respondent and three other dependants, namely, Ann Wambui Mwangi, Phares Muigai Mwangi and Benson Kihungi Mwangi. Counsel also urged that it is not in dispute that the deceased Petitioner's ownership status of the properties aforesaid derives from transmission, pursuant to the Grant.

[14] Mr. Njoroge contended that none of the Applicants participated in the proceedings to obtain or procure confirmation of the Grant, which process was undertaken by the deceased Petitioner fraudulently and secretly. That the calculated motive of the secret process was to disinherit the Applicants and one Monica Wambui Pharis who were, together with the deceased Petitioner, the rightful beneficiaries in the estate of the deceased.

[15] Counsel stated that in the process of procuring the issuance and confirmation of the Grant, the Petitioner fraudulently failed to disclose to Court various material and substantial assets, comprising both immovable and movable assets some of which, were fraudulently transferred to him and subsequently to the Respondent.

[16] Counsel argued that the Respondent stands to suffer irreparable injury not capable of compensation by an award of damages since the Respondent has commenced succession proceedings in respect of the deceased Petitioner's estate at the Thika Chief Magistrate's Court namely, **Succession Cause No. 381 of 2008** in the matter of the Estate of **James Mwangi Pharis** (deceased). That those proceedings relate to and touch upon the very properties owed by the Deceased, which were fraudulently and without the knowledge of the Applicants, transferred and registered in the name of the deceased Petitioner.

[17] Counsel urged the court to note that the self-same properties which form the subject matter of the Summons for Revocation of Grant are the properties listed in Thika **Succession Cause No. 381 of 2008**, being succession proceedings taken out by the Respondent.

[18] Counsel asserted that if the court does not intervene by staying the said proceedings a grant of representation would be issued and confirmed in favour of the Respondent with resultant transmission of

the deceased's properties to the Respondent, the Applicants rights and interests in the estate would be irredeemably impaired. That the continuation of the proceedings by the Respondent would further the fraudulent acts committed by the deceased Petitioner to substantial detriment of the Applicant.

[19] Counsel submitted that contrary to the allegations made by the Respondent, the Applicants have neither the intention of locking out the Respondent and her children from the properties, nor that of frustrating and intimidating her, but are only asking to be given what is rightfully and lawfully theirs as by law entitled.

[20] Counsel urged that on the contrary, it is the Respondent who harbours the intention of disinheriting the Applicants as is manifest from the succession proceedings now pending before Thika Magistrate's Court and her bare-faced attempts to bar the Applicants from accessing and using the assets constituting the Deceased's estate. They cited cases in support of their submissions as follows:

(i) Succession Cause No. 1440 of 2000; the Estate of Sebastian Karanja Macharia (deceased) [2006] eKLR

(ii) Succession Cause No. 220 of 2000; the Estate of Samuel Kabui Mukora (deceased) [2004] eKLR

(iii) Succession Cause No. 2413 of 2003; the Estate of James Kiarie Muiruri (deceased)

(iv) Mary Chesang & Ano. Vs Taborusei Chesang Keter [2006] eKLR

(v) In the matter of Estate of Mwangi Mugwe alias Elizabeth Ngware (deceased) Nairobi Succession Cause No. 2018 of 2001.

(vi) In the matter of Estate of Elizabeth Wamaita Ngaruiya (deceased) Nairobi Succession Cause No. 2499 of 2001.

(vii) In the matter of Estate of Hemed Abdalla (deceased) Nairobi High Court Succession Cause No. 1831 of 1996.

(viii) In the matter of Estate of Elizabeth Kamene Ndolo, Civil Appeal No. 128 of 1995

[21] Mr. Musyoki, learned Counsel for the Respondent submitted that there is evidence from the Respondent and her witnesses that after the deceased passed on in 1993 a family meeting was called where her late husband was mandated to petition for grant of the letters of administration.

[22] Mr. Musyoki stated that after the grant was issued there was another meeting where the applicants renounced their rights and confirmed that their brother, the Respondent's husband could inherit their father's property since the Applicants were then married. Further that since that time the applicants did not show any interest in the property of the estate until the Respondent's husband passed on and she began the process of petitioning for Grant of letters to administer his estate.

[23] Mr. Musyoki contended that the affidavit of Tilus Njoroge Mwangi and Mugita Kiburi are evidence to show that there was a meeting where the applicant's step mother declared her intention to relinquish her interest in the estate. That Tilus Njoroge Mwangi was a brother to the deceased while Mugita Kiburi was a cousin and that both participated in the meeting in which the applicants, their husbands and their step mother renounced their rights to inherit.

[24] Mr. Musyoki stated that there is a consent duly executed in 1993 by one Monica Wambui who lived with the Respondent's husband in the same small compound for 12 years before the husband passed on. That Monica Wambui subsequently lived with the Respondent for another three years before she herself passed on.

[25] It is the Respondent's argument that it is therefore illogical, to say that for all the 15 years, Monica was not aware that there was a succession cause going on. She maintains that the Applicants were served with the replying affidavit in 2010 and they did not file any affidavit to refute the Respondent's witnesses averments that their husbands attended the meeting in which the issue of succession was discussed.

[26] Learned counsel argued that the court called all the applicants during the confirmation of grant and that they had no objection thereto. That the Respondent was not actively involved in the succession cause, an advantage the applicants have exploited and which should not be encouraged or accepted.

[27] He urged the court to find that the evidence of the Respondent and her witnesses point to the most probable determination that the applicants consented to the distribution and their coming to challenge it after 15 years is an afterthought meant to frustrate the Respondent and her children.

[28] Counsel contended that there were no material facts which were withheld from the court nor was there any misrepresentation or failure to disclose the full inventory of the deceased's assets or the names of all the beneficiaries. He urged that the Petitioner having disclosed all the beneficiaries he cannot be accused of having withheld material facts from the court. That the photographs annexed by the Applicant which they claim to be evidence of existence of plots omitted from the list of assets are not of any probative value.

[29] Counsel argued that what is indicated in the slips annexed by the Applicants is the name of the Respondent and there is no evidence that the shares were ever owned by the deceased or even the Respondent's husband. That the said letter does not state whether there are shares issued to members or whether this was a welfare group whose interest is to assist members as a need arose.

[30] Counsel cited two cases in support of his submissions being in the matter of the Estate of **Muthoni Waweru (deceased) Nairobi High Court Succession Cause No. 1618 of 1996** and in the matter of **the Estate of Henry Wande Indika (deceased) Kakamega High Court Succession Cause No. 51 of 1989**

[31] Upon perusing the pleadings and the submissions of the parties, I have condensed the following issues for determination:

- (i) Whether the grant was obtained and subsequently confirmed without notice to or consent of the Applicants.
- (ii) Whether the application for revocation of grant and confirmation of grant is time barred.
- (iii) Whether the grant ought to be revoked or annulled pursuant to the provisions of section 76, 38 and 66 of the Laws of Succession Act.

[32] On the question as to whether the Applicants had notice or consented to the issuance of the grant to the petitioner, the Respondent asserted that there was a family meeting called after the deceased passed on in 1993. Her assertion was supported by the affidavit of Mugita Kiburi sworn on 5th July 2010. The said Respondent's witness affirmed that he was personally present in the said meeting and that the meeting was also attended by the Applicants, their husbands, their step mother one Monica Wambui and the deceased's brother Tilus Njoroge Mwangi.

[33] The Respondent averred in her affidavit that the Applicants' step mother declared in the meeting that she would relinquish her interest in the estate. Further that the Applicants too while in the meeting, declared that they were not interested in the estate. That for that reason, the Petitioner (now deceased), was given permission by all in attendance at the meeting to proceed with the succession petition.

[34] I note however, that when the said witness, Mugita Kiburi was called to testify on the Respondent's behalf, his testimony was contrary to the depositions in paragraph 3,4,5 and 6 of the affidavit. Not only did the witness testify that he did not attend any meeting called to address any issue relating to the estate of the deceased but he also stated that the Applicants too did not attend any such meetings.

[35] Whether or not a meeting was held is not proof of consent having been given by the beneficiaries to the Petitioner to petition for grant of Letters of Administration, or to the mode of distribution of the estate. For there to be evidence of consent it was necessary that the Petitioner presents to the court written consents signed by all parties concerned emanating from that meeting or separately, being attached to the Summons for confirmation. The Respondent has failed to demonstrate to the court with relevant sufficient evidence, that the consents of the Applicants were obtained.

[36] I observe that all witnesses were unanimous in their testimonies that all the Applicants were daughters of the deceased Pharis Mungai Mwangi. They are therefore all beneficiaries of the deceased's estate and both parties, that is, the Applicants and the Petitioner, had equal right and stood on equal footing in priority to the grant of representation in respect to the deceased's estate and to share in the estate.

[37] The second decision of **in the matter of Estate of Henry Wande Indika (deceased) Kakamega High Court Succession Cause No. 51 of 1989** cited by Mr. Musyoki for the Respondent, is disguisable from cause before me. In the cited cause G.B.M. Kariuki J as he then was, dismissed the application because he found that the Petitioner had disclosed all the beneficiaries to the court.

[38] I have considered the depositions in support and in opposition of the application for revocation and note first, that the petitioner has admitted that he did not consult any of the objectors. Rule 26(1) of the Probate and Administration Rules required him to have given them notice before a grant of letters of administration was made to him. There is also no evidence that the petitioner issued notices to any of the Applicants and in Form P&A 5 he failed to disclose the objectors/applicants amongst the list of the people who survived the deceased.

[39] Similarly in Form P&A 80 he stated that every person having an equal or prior right to a grant of representation in the estate had consented, or had renounced such right, or had been issued with a citation to renounce such right, or apply for a grant of representation and had not done so. During the confirmation of grant the petitioner misrepresented to the court that he and his family were the beneficiaries of the estate of deceased.

[40] From the record the Petitioner did not give notice, or obtain consents of parties in the same degree or priority to the Petitioner for applying for the grant. The identities of the beneficiaries and their interests in the estate are material facts and once it is established that their interests were concealed, from the court, the grant of representation issued was flawed.

[41] In **Succession Cause No. 220 of 2000, in the Estate of Samuel Kabui Mukora** (deceased), which is of persuasive value and to which the Applicant referred this court, Koome J as she then was stated that the law is clear that before letters of administration are granted all persons entitled in the same degree or in priority with the applicant should be notified.

[42] **Section 51(1)(g)** of the Succession Act as read together with **Rule 26(1)** of the **Probate and Administration Rules**, provide that:

“Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.”

In the circumstances these would have been the Applicants.

[43] Accordingly, the defective nature of the proceedings to obtain and procure confirmation of the Grant by the deceased Petitioner is patently evident since no consents were sought or obtained from the Applicants, in spite of their incontestable interests and rights as lawful beneficiaries in the deceased's estate. No such consents have been exhibited by the Respondent and there is no evidence that the Applicants had at any time renounced their rights either to apply for the Grant or to their respective shares in the estate.

[44] The Applicants were on the foregoing ground, entitled to the grant of representation and to a share in the estate, on the same and equal footing with the deceased Petitioner. I therefore find and hold that the grant was obtained contrary to the provisions of the foregoing laws.

[45] The question as to whether there is time limitation with regard to the application for revocation or annulment of grant of Letters of Administration, has been provided for in **section 76 Law of Succession Act**. The said section states that a grant of representation, whether confirmed or not, may at any time be revoked by the court if it was obtained by fraud, or concealment. It may also be revoked if the proceedings were defective in substance and/or it was obtained by means of untrue allegation of facts essential in point of law to justify the grant.

[46] An application for revocation of grant cannot therefore be claimed to be time barred. Thus, the Applicants' grounds for revocation of grant as set out in the summons for the revocation or annulment of the grant cannot be dismissed based only on the ground of limitation. The court has an obligation to determine the application on the basis of the provisions of the law.

[47] In the matter of Estate of **Muthoni Waweru (deceased) Nairobi High Court Succession Cause No. 1618 of 1996** referred to by Mr. Musyoki for the Respondent Koome J as she then was, dismissed the application because the Applicant had waited for ten years to introduce the issue of a valid will. That matter is therefore distinguishable from cause now before court.

[48] The final and overarching issue for determination is whether the grant ought to be revoked or annulment for the foregoing reasons. It is imperative to note that the law gives this court wide discretion to revoke or annul a grant issued by the court, whether the said grant has been confirmed or not.

[49] The circumstances that can lead to the revocation of grant have been set out in **Section 76 Law of Succession**. For a grant to be revoked either on the application of an interested party or on the court's own motion there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by making of false statement, or by concealment of something material to the case, or that the grant was obtained by means of untrue allegations of facts essential in point of law.

[50] A grant may also be revoked if the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the Estate. See - **Matheka and anor v Matheka [2005] 1 KLR pg 456**. It may also be revoked if it can be shown to the Court that the person to whom the grant has been issued has failed to produce to the Court such inventory or account of administration as may be required.

[51] Following the above determinations and the strength of the evidence adduced in this court, it is clear that the Petitioner did not seek the consent of the Applicants herein, nor did he disclose their names and interest in the estate to the court, during the process of petitioning for the grant vide Succession cause No. 114 of 1993 and which was confirmed on 3rd March, 1994.

[52] Having considered the rival submissions and taking into account the evidence of both parties, it is my conclusion that, indeed, the Petitioner obtained the grant of Letters of Administration by means of untrue allegation of facts essential in point of law to justify issuing of the grant. I have deliberately left out the question of properties said to have been omitted from the list of distribution as an issue that can be interrogated during the hearing of the Summons for confirmation of grant.

[53] The Petitioner did fraudulently obtain the said grant bearing in mind that there are other beneficiaries in the estate who were not included in the list of beneficiaries and whose names were not disclosed to the court. By so doing the Petitioner withheld material facts which were very important as far as grant and confirmation of Letters of Administration is concerned.

[54] The court made reference to **Civil Appeal No. 2 of 2014, Musa Nyaribari Gekone and 2 others vs Peter Miyianda and Another** in which the Court of Appeal upheld the ruling and the orders of the High

Court stating that:

“We think that the learned Judge was right to hold as he did that the 1st appellant should have disclosed when applying for the grant of letters of administration or when seeking its confirmation.”

[55] In my view the law requires that all the deceased children whether alive or dead, whether male or female, married or unmarried be listed in an application for grant of letters of administration failure whereof, any omitted dependent has a right to challenge the grant on such a ground. See **Stephen Marangu M’itirai vs Silveria Nceke & 4 others [2015] eKLR**. In the matter of the estate of the late **M’itirai Kamakia Alias Ithirai Kamakia**.

[56] From the foregoing, and since the administrator has since died, it is my final determination accordingly, that there is sufficient justification for this court to revoke the grant that was issued on the 27th August, 1993 to the petitioner, James Mwangi Pharis (deceased) and subsequently confirmed on the 3rd March, 1994, vide Succession Cause No. 114 of 1993 at Thika Resident Magistrate’s court. In the premise the court grants orders as set out below:

(i) The grant of Letters of Administration issued on 27th August, 1993 to the Petitioner, James Mwangi Pharis and the certificate of confirmation of grant on 3rd March, 1994 are hereby revoked.

(ii) Any transfer processes undertaken with regard to the estate pursuant to the issuance and confirmation of grant are hereby annulled and cancelled.

(iii) The proceedings filed by the Respondent herein (Ruth Njoki Mwangi) being, Thika Chief Magistrate’s Court Succession Cause No. 381 of 2008, in the matter of the Estate of James Mwangi Pharis (deceased) are stayed pending confirmation of grant herein.

(iv) An order of injunction is hereby issued restraining the Respondent whether by herself, agents or otherwise howsoever from offering for sale, leasing, mortgaging, charging, transferring or assigning properties known as Loc.3/Githumu/153, Loc.3/Mungaria/364 and Loc.16/Ndunyu Chege/194, Githumu Plot 10A and Githumu Plot 658A (hereinafter “the immovable Properties”).

and/or otherwise dealing with the immovable Properties and shares held in Ikumbi Tea Factory, Njune Tea Factory, Makomboki Tea Factory and Nduti-Ruchu Tea Factory (the deceased shares hereinafter called “the moveable Properties”) in any manner prejudicial to the Applicant’s interest and rights therein.

The parties are hereby directed to agree on the names of Administrator(s) within the next fourteen (14) days, for purposes of distribution of the estate.

SIGNED DATED and DELIVERED in open court this 15th day of September 2016.

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L. A. ACHODE

JUDGE