



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 144 OF 2004

In the matter of the Estate of NJAGE GAKINDI (Deceased)

JAMES NYAGA KINYUA.....APPLICANT

VERSUS

PETER GITHAKA NJAGI.....1.ST ADMINSTRATOR/RESPONDENT

DEWIT NJERU SIMON.....2ND ADMINSTRATOR/RESPONDENT

R U L I N G

1. This is the application dated 9/5/2016 seeking for orders that the letters of administration dated 16/6/2015 granted to Peter Githaka Njagi and Dewitt Njeru Simon be revoked and fresh letters be granted to the objector together with the current administrators. The applicant also seeks that the administrators give an account of the estate since their appointment. The application is supported by the affidavit of James Nyaga Kinyua stating that the grant was obtained fraudulently by making false statement and by concealment from court of material facts.
2. The Applicant argued that in the application dated 2/3/2015 by the 2nd administrator for substitution, the 2nd administrator failed to disclose that the administrator Johnson Kinyua Njage who was to be substituted had a legal wife and four issues of marriage. The applicant is a son to the deceased Kinyua Njage and him together with his siblings have been denied their rightful share of their fathers estate.
3. The 2nd Administrator/respondent in the replying affidavit denied that the substituted grant was obtained fraudulently. He states that the substituted grant was in relation to the estate of Njagi Gakindi and not the estate of the objector's father Johnson Kinyua Njage. The objector is not a son of the deceased but a grandson.
4. Parties filed written submissions for disposal of the application.
5. The applicant submitted that the initial administrators of the estate of the deceased were Johnson Kinyua Njage (deceased) and Peter Githaka Njagi. At the time of Johnson Kinyua's death, the mode of distribution for the estate of Njagi Gakindi had been agreed. The 2nd administrator applied to substitute Johnson Kinyua vide the application dated 2/3/2015. After the substitution the mode of distribution was amended to exclude the beneficiaries of the late Johnson Kinyua and hence the applicant has been locked out from inheriting his late father's share in the estate of Njagi Gakindi.
6. The 2nd administrator submitted that it was not a requirement for the 2nd administrator to inform court that the late Johnson had a wife and kids when he did the application for substitution. He argued that the applicant does not have priority in the appointment of a substitute administrator over current 2nd administrator who is a son of the deceased.
7. The 1st administrator in his submissions stated that the grant should be revoked as the 2nd administrator never consulted him and obtained the grant by fraudulent means by misleading court that the 1st administrator allowed him to obtain the amended grant.
8. Section 66 of the Law of Succession provides that;

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters 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.

9. Section 26 of the Probate and Administration Rules provides that;

(1) 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.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.

(3) Unless the court otherwise directs for reasons to be recorded, administration shall be granted to a living person in his own right in preference to the personal representative of a deceased person who would, if living, have been entitled in the same degree, and to a person not under disability in preference to an infant entitled in the same degree.

10. Section 76 of the Law of Succession provides 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 order or allow; 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

(e) that the grant has become useless and inoperative through subsequent circumstances.

11. In the case of **COSIMO POLCINO VS TONY KENT [2014] eKLR** the court held that

‘Under the Law of Succession, the fact of such non-disclosure is sufficient to set aside a grant.’

12. Section 41 of the law of succession act provides that;

Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.

13. Section 29 of the Law of Succession Act provides:-

For the purposes of this Part, "dependant" means—

(a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;

(b) such of the deceased's parents, step-parents, grand-parents, 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.

14. The background of these cases is very important in this application. In this cause No. 144 of 2004 there were two original administrators Johnson Kinyua Njage and Peter Githaka Njagi appointed on 3/11/2015 in the estate of their father the late Njagi Gakindi. The grant was confirmed on 9/12/2010 and the estate distributed to the beneficiaries.

15. The 1st administrator Johnson Kinyua Njage died on 17/7/2014 before the grant was executed. He was the father of the applicant herein. Before his death he had complained of the 2nd administrator Peter Githaka Njagi for refusing to cooperate in the execution of the grant. He successfully brought an application for the Deputy Registrar to execute the necessary documents for the implementation of the grant.

16. The application was dated 20/3/2014 and was determined on 22/4/2014 by Ong'udi, J. The 1st administrator did not live to have the orders executed for the cruel hand of death took him away. The deceased administrator was substituted with one Dewitt Njeru Simon in his capacity as a son of the deceased and brother to the late Johnson Kinyua Njage.

17. The grant confirmed on 9/12/2010 distributed the estate to the beneficiaries with Johnson getting the following shares:-

(a) Part of proceeds in KCB a/c No.1010825276 in trust for Rudia and her six (6) sons

(b) L.R. Kagaari/Weru/4004

(c) L.R. Kagaari/Weru/5326

(d) a share out of Kagaari/Weru/3141

18. After the death of Johnson, the administrators applied for rectification of grant whereas the inheritance of Johnson was given to one Lucy Wambui Mbugua who was described in the supporting affidavit as his wife.

19. The said Lucy Mbugua was not initially named as a beneficiary of the estate of the deceased Njagi Gakindi and had not been mentioned in the proceedings preceding the filing of the application for rectification of the grant. This person is referred to by the applicant as a 3rd party and a stranger. It is noted that she does not use the name of the deceased Johnson Kinyua Njage as expected if she had been married to him. This is the person who was bequeathed all the properties which were to go to Johnson Kinyua Njage.

20. in Misc. Succession No. 41 of 2016 the administrator is Dewit Njeru Simon who is also a co-administrator in this cause. He filed a petition No. 41 of 2015 in his capacity as the brother of Johnson K. Njage petitioning for limited grant in this file which was issued to him on 3/3/2015. the grant was limited to prosecuting Succession Cause No. 144 of 2004.

21. The limited grant was used for substitution of the deceased co-administrator Johnson K. Njage in this succession cause. Dewit also applied for rectification of grant where he proposed that the shares of the deceased Johnson be given to his wife Lucy Wambui Mbugua. The orders were granted and an Amended Certificate of Grant issued capturing the amendments.

22. The grounds for revoking a grant are provided for under Section 76 of the Law of Succession Act. The main ground advanced by the applicant is that the grant was obtained fraudulently by making false statement and by concealment from court of material facts as the 2nd administrator never informed the court in the application dated 2/3/2015 that the deceased administrator had a wife and four children.

23. The objector is a grandson of the deceased while the administrators are sons of the deceased. For this reason, the sons have priority over the applicant when it comes to obtaining letters of administration in respect of the estate of Njagi Gakindi who was their father. The grant was properly obtained in the names of the two sons of the deceased. However, the problem arose after the death of one of the sons when Dewit came on board and applied for substitution of his deceased brother. The applicant herein is actually complaining about the substitution and not about the original grant.

24. It was not denied by the administrators/respondents that the applicant is the son of the deceased Johnson Kinyua Njage. The applicant said that the deceased had a wife and four grown up children. It is not in dispute that this family was not consulted or notified of the substitution of Johnson K. Njage. Although the applicant and his mother not rank higher in priority than the respondents, he and his family were entitled to information on the substitution and on the rectification of the grant which resulted in taking away the applicant's father's inheritance.

25. As for the share of Johnson in the estate, his family was supposed to decide on the mode of distribution or on who among the family members was to be bequeathed. The family members are the first heirs in priority of Johnson's property which had already been bequeathed to him in the grant confirmed on 9/12/2010.

26. The family of Johnson was not involved in the application for the limited grant in which Dewit was given authority for substitution of Johnson in the succession cause.

27. It follows that the applicant and the entire family of Johnson who were interested parties in the succession cause were not involved in the substitution and in the rectification of the grant after the death of Johnson. There was concealment of facts material to the case by the administrators in that it was not disclosed to the court that Johnson had a family save for the said Lucy Wambui Mbugua who is not known to the applicant.

28. As a result, the family was disinherited when their right was given to a stranger by the administrators and especially Dewit Njeru Simon who took over from Johnson without their knowledge. There was no good faith on the part of Dewitt Njeru Simon in the part he played in these proceedings.

29. It is my finding that the substitution of Dewit Njeru Simon was obtained by concealment of facts material to this cause. The applicant has therefore proved that Dewit Njeru Simon acted in bad faith in this case.

30. I find the application merited and allow it in the following terms:-

(i) That the orders for substitution issued on 15th June 2015 and the Amended Certificate of Confirmation dated 16th June 2015 are hereby nullified.

(ii) That the limited grant issued to Dewit Njeru Simon in Misc. Succession Cause No. 41 of 2016 on 27/6/2015 is hereby revoked.

(iii) That pending further orders, any titles issued in the name of Lucy Wambui Mugua in respect of L.R. Kagaari/Weru/5326; Kagaari/Weru/4004 are hereby cancelled and to revert to the name of the deceased.

(iv) That pending further orders, any title issued to Lucy Wambui Mbugua, Dewit Njeru Simon and Njiru Simon in respect of L.R. Kagaari/Weru/3141 is hereby cancelled and to revert to the name of the deceased.

(v) That pending further orders, any transfer of funds in KCB A/C No. 101082XXXX is hereby nullified and the funds to be returned to the bank in the original account in the name of the deceased.

(vi) That any transfer of ICDC shares Dewit Njeru Simon is hereby nullified and revert to the name of the deceased pending further orders.

(vii) That the Applicant James Nyaga Kinyua is substituted in place of Johnson Kinyua Njage as a co-administrator.

(viii) That the administrators or any of them to apply for rectification of the grant in consultation with the late Johnson Kinyua Njage's family for distribution of Johnson's inheritance.

31. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF NOVEMBER, 2016.

F. MUCHEMI

J U D G E

In the presence of:-

Mr. Anyona for Ms. Gitonga for Applicant

Ms. Ndorongo for Kamunyori for Administrator