



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 501 OF 2013

IN THE MATTER OF THE ESTATE KIRAGARA BIGIRI (DECEASED)

GRACE KAGWIRIAAPPLICANT/OBJECTOR

VERSUS

JAPHETH MBURUGU RINGERA.....1ST RESPONDENT/PETITIONER

JULIUS NDUBI RINGERA 2ND PETITIONER/RESPONDENT

J U D G M E N T

1. The Applicant/Objector GRACE KAGWIRIA through summons for revocation of grant dated 18th March 2014 sought an order to annul and/or revoke the grant issued to HENRY MUTHAMIA RINTAUGU on 12th November 2013 and confirmed on 10th February 2014 on grounds in the supporting affidavit dated 18th March 2014.
2. On 30th June 2014 parties sought direction that the application for annulment and/or revocation of the grant be determined by way of *viva voce* evidence. The Objector gave evidence and called one witness whereas the Petitioner gave evidence and called two witnesses.
3. The Applicant's case is that she is a wife to the late Joseph Muriuki Ringera, son to the deceased herein; thus she is daughter-in-law to the deceased by virtue of her marriage to the late Joseph Muriuki Ringera. She produced marriage certificate as exhibit "01" and death certificate of her late husband as exhibit "02". She seeks revocation of the grant because it was obtained secretly and that she was not asked to sign consent produced in Court. She further avers that the confirmed grant is not in accordance with the deceased wishes to which plot No. **Abothuguchi/Githongo/456** was to be shared as per the deceased wishes save for Charles Mugambi Festus who is not a member of the deceased's family but a purchaser of share for Julius Ndubi Ringera. In respect of plot No. **Abothuguchi/Githongo/416**, DW1 testified that the deceased wishes were for it to be shared between Japhet Mburungu Ringera and her late husband and that her husband is dead his share should go to her and her three children namely Nancy Nkatha Muriuki; Caroline Kendi Muriuki and Kelvin Mwenda Muriuki.
4. The Applicant/Objector testified that the name of Julius Ndubi Ringera should be replaced with hers as there was no time she agreed with him to hold her husband's share in trust for her and her other children nor did she ever authorize him to be registered on her behalf or her children. She averred that plot No.416 is 4 acres whereas plot No.459 is bigger. She testified that the deceased herein shared plot No.416, showed her the boundary which she planted her fence in 2002; that she has since been using her portion by harvesting tea leaves; however Julius Ndubi has stopped her from utilizing the whole land. She concluded by relying on Executive Officer's report dated 25th July 2014.

5. OW2, granddaughter to the deceased and a daughter of OW1 testified that her parents have not received any share of inheritance from her late grandfather's estate following the death of her father in 2007. She testified that the deceased wish was to have plot **Abathoguchi/Githongo/ 416** shared equally between her father and Japhet Mburungu whereas plot No.459 was to go to Julius Ndubi Ringera and others. She said that her parents were to get the portion with tea leaves trees and coffee as tea leaves trees had been planted by her father. However their grandmother has said as long as she is alive she will continue to use the coffee trees. She testified her parents are entitled to 2 acres on land parcel No.**Abathoguchi/Githongo/416**. She testified Julius Ndubi Ringera should get his share from **Abothuguchi/Gichongo/459**. She urged that his name on plot **Abothuguchi/Gichongo/416** be substituted with her mother's name.

6. The Petitioner gave evidence as PW1. He testified that he is brother to the deceased and the Objector is married by his Nephew. He testified that his brother the deceased had told him that Japhet Mburungu and Joseph Muriuki each to get 1 acre, Joyce Nduru 1 acre; that a boundary was put for them. He testified the plot is now occupied by Japhet Mburungu; Kagwiria and Joyce Nduru and Kaguririra harvests the tea trees. On cross-examination PW1 admitted that he had not given the deceased's wife a portion of plot No.459 or **416**. He admitted he did not disclose the Objector's name as one of the beneficiaries. He also admitted he did not give Joseph Muriuki's share to his family. He also admitted the confirmed grant did not indicate Julius Ndubi Ringera was holding any portion of land in trust for the family of Joseph Muriuki Ringera. He agreed Grace Nduru is entitled to 2 acres out of **Abathoguchi/Githongo/416**. On Form 38 he agreed he did not get Objector's consent; that during confirmation he did not involve her or get her consent. He further confirmed his application for confirmation of grant is different from the evidence he gave before the Court.

7. PW2 Joyce Nduru wife to the deceased herein testified that the Objector is her daughter-in-law. She testified that the deceased said plot No.**Abuthoguchi/Githongo/ 416** should be shared to Mburungu to get 2 acres; Joseph Muriuki (deceased) 1 acre and herself 1 acre adding that she does not understand why the Objector is complaining as she has her own land. On cross-examination she stated that she never gave her consent to petitioner for the grant adding her name did not appear in the confirmed grant; however she testified she is supporting the confirmed grant as it is notwithstanding her name did not appear.

8. I have carefully analysed the parties evidence in support and in opposition of the application for the revocation of the grant. I have considered the pleadings and the issue for consideration is whether the Objector has satisfied the conditions for the revocation of the grant?

1. **Section 76(a), (b) and (c) of the Law of Succession Act** provides:-

“76. 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 of inadvertently.

9. In the instant case and from the evidence adduced by the Objector and PW2 there is no dispute that the Petitioner proceeded to petition for the grant herein secretly. He did not seek and obtain consent of the Objector and also the wife of the deceased. Form 38 dated 6th July 2013 do not have the name of the Objector nor that of Joyce Nduru wife to the deceased.

10. Rule 26(1), (2) of the Probate and Administration Rules provides:-

“26. (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”.

11. The Petitioner did not give notice to the Objector who was in the same degree as or in priority to the Applicant. He acted contrary to the said Rule and grant should not have been issued to him in breach of the said Rule.

12. The Petitioner in filing information for the grant did not inform the Objector nor did he seek her consent in terms of **Rule 40(8)** of The Probate and Administration Rules. The said Rule provides;

“Rule 40(8) Where no affidavit of protest has been filed the summons and affidavits shall without delay be placed by the registrar before the Court by which the grant was issued which may, on receipt of the consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled, allow the application without the attendance of any person; but where an affidavit of protest has been filed or any of the persons beneficially entitled has not consented in writing the Court shall order that the matter be set down as soon as may be for directions in chambers on notice in Form 74 to the Applicant, the Protestor and to such other persons as the Court thinks fit”.

13. The Petitioner in his evidence in chief gave evidence contrary to his scheme of distribution. He testified how the deceased told him to distribute his estate yet in his application for confirmation of grant he omitted the Objector’s name and gave her share to her brother-in-law instead of her. He claimed he had been told to give the deceased’s wife a share yet he did not put her name in his scheme of distribution. The Petitioner struck this Court as an untruthful person whose evidence I have found to be not credible. The wife of the deceased claimed the deceased had said she be given one acre yet she said she was supporting the scheme of distribution as drawn and confirmed. I find her evidence unbelievable and not credible.

14. The upshot is that I have found that the Objector is entitled to share of plot No.**Abothuguchi/Githongo/ 416**; that Julius Ndubi Ringera share is on plot No.**Abothuguchi/Githongo/459** and not on plot No. **Abothuguchi/Githongo/416**. His purported trustship for family of the Objector has no basis and his name should be struck out forthwith and be substituted with that of the Objector. Joyce Nduru has not made any claim over the deceased estate and categorically stated on oaths that she supports the confirmed grant as drawn; consequently I leave the matter at that as regards her share as she did not move the Court appropriately or at all but in the interest of justice, I find it reasonable to have her interests considered in the distribution of the deceased estate as a wife of the deceased.

15. The upshot is that the Objector’s application succeeds. I therefore make the following orders;

- a. The confirmed grant dated 15th February 2014 and temporary grant issued on 12th November 2013 are revoked.
- b. The Petitioner and the Objector are appointed joint administrators; a fresh grant to issue to both parties forthwith.
- c. The Petitioner and the Objector as joint administrators to forthwith file mode of distribution of the estate jointly or separately within the next 30 days from today.
- d. Costs to the Objector.

DATED AND DELIVERED AT MERU THIS 4TH DAY OF JUNE, 2015

J.A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

Mr. Nyenyire for Objector

Mr. Wamache for Petitioner

C/clerk – Peninah/Mwenda

J.A. MAKAU

JUDGE