REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC. SUCCESSION APPEAL NO. 39 OF 2012

IN THE MATTER OF THE ESTATE OF MUGO NJAGI……DECEASED

ALICE MUTHONI MUGO alias **MUTHONI PAUL.....APPLICANTS**

GRACE WANJA MBURIA

-VERSUS

GRACE WARUGURU NJAGI (Sued as the administrator of the estate of the late NELSON NJAGI MUGO (DECEASED)**……RESPONDENT/APPLICANT**

RULING

1. The Summons for Revocation and/or Annulment of Grant before me is dated 17th December, 2012 and was taken out by **ALICE MUTHONI MUGO** Alias **MUTHONI PAUL** and **GRACE WANJA MBURIA**, the applicants herein against **GRACE WARUGURU NJAGI** cited as the administratrix of the estate of **NELSON NJAGI MUGO** (deceased) who was the appointed administrator to the estate of the late **MUGO NJAGI** (deceased) to which these proceedings relate.
2. The Applicants are seeking to revoke or annul a grant that was issued on 18th September, 1990 to **NELSON NJAGI MUGO** (now deceased) and confirmed on 19th March, 1991 in Kerugoya Principal Magistrate's Court **Succession cause No. 3 of 1990**. The Applicants have invoked the provisions of ***Section 76*** of the **Law of Succession Act** stating that the grant was defective in substance and obtained fraudulently through concealment of material facts in the cause. The other grounds cited are:

i. ***That the applicants are daughters to the late Mugo Njagi which fact was concealed from court.***

ii. ***That the subordinate court was misled that the deceased had only a son when there were other children alive.***

3. The Summons for Revocation and/or Annulment of Grant was canvassed vide affidavits and written submissions.
4. In an affidavit in support of their application, Grace Wanja Mburia deposed that the late Mugo Njagi had 5 children (2 sons and 3 daughters). She faulted her late brother Nelson Njagi Mugo who proceeded with succession without involving the other children of the deceased. As a result she complained that the daughters to the deceased (Mugo Njagi) were disinherited and chased away by the Respondent in 2009.
5. The Applicants further deposed that their attempt to get redress in Land Disputes Tribunal was in

vain and this led them to file a civil case in **Embu C.M.C.C. No. 24 of 2010** which is pending in court. It is through the case that they learned of **Kerugoya Succession Cause No. 3 of 1990** and the subsequent Kerugoya Principal Magistrate's Court **Succession Cause No. 133 of 2001** where the present respondent came in to administer the estate of the late Nelson Njagi Mugo which estate comprised the parcel of land known as **KABARE/NJIKU/119** which was inherited from the late MUGO NJAGI their late father.

6. The Applicants have further deponed in the affidavit sworn on 21st May, 2013 that the Respondent herein has been named as the administratrix of the estate of their late brother Nelson Njagi Mugo who in their submissions hold that he disinherited them of their right to benefit from their late father's estate and that they are properly before this Court to seek remedy against wrongs and impunities visited upon them in the succession proceedings in Kerugoya Principal Magistrate's Court Succession Cause No. 3 of 1990.

7. **Grace Waruguru Njagi**, the respondent in an affidavit sworn on 15th April, 2013 opposed the application for revocation of grant saying that the subject matter in dispute is that parcel of land known as **L.R. NO. KABARE/NJIKU/119** which belonged to NELSON NJAGI MUGO her late husband and which came into his possession upon completion of the administration of the estate of the late MUGO NJAGI.
8. The Respondent contends that she succeeded the estate of NELSON NJAGI MUGO and she cannot be made a respondent in a cause involving the estate of MUGO NJAGI. In her view the application for revocation of grant is belated and has been overtaken by events as the administrator of the estate of MUGO NJAGI (deceased) is now deceased and that the Applicants should have commenced the proceedings to annul or revoke the grant when Nelson Njagi Mugo was alive.
9. The Respondent has also contested the Summons for Revocation of Grant stating that the Applicants are on a fishing expedition to find a court that would rule in their favour as they have filed a civil suit No. **Kerugoya P.M.C.C. No. 24 of 2010** over the same subject **(KABARE/NJIKU/119).** The Respondent is therefore accusing the Applicants of acting in bad faith by taking out the summons to revoke a grant that was issued to her late husband.
10. The Respondent also filed written submissions through her advocate **Mr. Maina Kagio** where she argued that when the late Nelson Njagi Mugo was alive no one challenged the legality of the proceedings in Kerugoya Succession Cause No. 3 of 1990. Mr. Maina Kagio has also argued in his submissions that no application was made to substitute Nelson Njagi Mugo the administrator in Kerugoya Principal Magistrate's Succession Cause No. 3 of 1990 and that it is wrong for the Applicants to name the Respondent herein as she is not the administratrix in the estate of MUGO NJAGI (deceased). He submits that the Respondent cannot be accused of acts of commission or omission of the deceased administrator who during his lifetime distributed the estate without involving the Respondent herein. He relied on unreported cases of **CHARLES GATIMU KAMUTHI –VS- EVANS KABURU KAMUTHI (Embu H.C. Misc. Cause NO. 1 of 2001)** and **JULIUS KAMAU KITHAKA –VS- WARUGURU KITHAKA NYAGA & OTHERS (Embu H.C. Misc. Applc. No. 82 of 2007)** to buttress his arguments.
11. The Respondent has further submitted that she inherited the subject matter in this cause vide Kerugoya Principal Magistrate's Court **Succession Cause No. 133 of 2001** which has not been challenged. She holds that the grant was issued by a competent court and that succession cause No. Kerugoya Principal Magistrate's Court **Succession No. 3 of 1990** is different from **Succession Cause No. 133 of 2001** in the same court and that revoking the grant in Succession Cause No. 3 of 1990 will not affect the grant in succession cause No. 133 of 2001 and in effect, she submits that the orders sought are in vain and should be dismissed with costs.
12. I shall first consider the authorities quoted by both the Respondent and the response made by the Applicants in their submissions in support of their respective positions. The Respondent's contention is that the Applicants' Summons for Revocation of Grant is belated and overtaken by events. He has quoted the authority in the decision by Khamoni J., as he then was in deciding the case involving the estate of **KAMUTHI MUNYI** in the case of **CHARLES GATIMU KAMUTI –VS- EVANS KABURU KAMUTI** (SUPRA) where the judge held that it was improper for applicant to take out summons to revoke a grant issued to an administrator who is already dead as the **Law of Succession Act** has no provision allowing substitution of a deceased administrator who has completed administration of an estate of a deceased person. He further ruled that the

application for revocation of grant had been overtaken by events and ruled that the application was presented too late as/and amounted to proceeding against a deceased person which the law did not permit.

13. **Miss Anne thungu** for the Applicants, responded to the above position by quoting a decision in unreported case in **Kakamega Succession Cause No. 632 of 2008** in the estate of William Shambali where she submitted that the court held that a party could not be shut out simply because the property forming the estate had changed hands and that ***Section 76*** covered sufficiently fraudulent activities which empowered court to revoke a grant proved to have been obtained on the basis of such. Miss Thungu however, for reasons I do not quite understand failed to avail a copy of the ruling for consideration by this Court. She has however, enclosed the decision in **Nairobi High Court Succession No. 1684 of 1995** in the estate of James Muchiri Kabui where an administrator of the estate of a deceased person died before summons for revocation of grant was entertained. The administrator's wife applied for letters of administration in respect to her husband the administrator and was made a respondent in the main cause on the basis that the deceased estate took precedence over the estate of the administrator. However the scenario is different in this cause because no proceedings were commenced when the administrator was alive. The applicants brought the application after the demise of Nelson Njagi Kaburi whose exact date of death though not given to this Court must have been a date not later than the year 2001 when cause to his estate commenced.

14. What is however, important to note is that the court in Nairobi Succession Cause No. 684 of 1995 allowed the wife of the administrator to participate in the proceedings on behalf of the administrator as she had already taken out letters of administration. With respect to Justice Khamoni J., as he then was, I am not persuaded by the position taken that there is no provision under the Law of Succession allowing substitution of a deceased administrator. An administrator can be substituted at any stage upon his/her demise. I also add that substitution does not take away any obligation by an appointed administrator to account for the estate and the beneficiaries.
15. The Respondent has raised an issue concerning existence of another case involving the subject matter in another court and indicated a case No. **Embu H.C.C Misc. APPL. 82 of 2007**. Though no evidence was tendered to show or demonstrate to this court the nature of the dispute the important thing to consider which this Court does is the question of jurisdiction. This Court is properly seized with the jurisdiction to determine the cause or the matter that has been placed before it. I do not wish to comment on jurisdiction or anything on a matter that is pending before another court whose nature is unclear to this Court as doing so would unfairly prejudice the interests and the rights of parties in another court.
16. This Court is granted inherent powers and jurisdiction under ***Section 47*** of the **Law of Succession Act** to determine any dispute under the Act and pronounce such decrees and make such orders as may be just and expedient. When you further look at the powers granted to the Court under ***Rule 73*** of the **Probate and Administration Rules** you will realize that inherent powers are protected as it provides as follows:

> ***"Nothing in these rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."***

17. The court does have power to substitute a deceased administrator for whatever cause and that power cannot be limited by any act that the administrator may have done or omitted to have done.
18. I have considered the submissions made by the Applicants and the affidavits sworn by Grace Wanja Mburia swearing with the express written authority of her co-applicant. I have also considered the affidavits of the Respondents and oral submissions made in opposition to the summons for revocation of grant herein.
19. What is coming out clearly is that there is no denial that the Applicants were indeed the daughters of the late Mugo Njagi (deceased). It is also not contested that that property known as **KABARE/NJIKU/119** comprised the estate of the late MUGO NJAGI and that the same transmitted to his late son NELSON NJAGI MUGO vide Kerugoya Principal Magistrate's Court

Succession Cause No. 3 of 1990, a cause that excluded the Applicants herein.

20. The respondent's contention and opposition to the summons for revocation of grant is not based on whether the Applicants have a right to their late father's estate but rather on technical reasons that the application is belated and has been overtaken by events the events being the death of the administrator – Nelson Njagi Mugo and the fact that the property that comprised the estate is now in her hands and having played no role in impugned succession proceedings No. 3 of 1990 she had no obligation to cater for the Applicants herein. She has also faulted the application for being belated.
21. One of the main issues arising in the application before me , therefore is whether an application under ***Section 76*** of the **Law of Succession Act** is time bound. ***Section 76*** is explicit on this issue as it states that a grant of representation whether confirmed or not may at any time be revoked if it was obtained by fraud, concealment, misrepresentation among other grounds provided under that section. An application under *Section 76* is not time bound by law.
22. It is also important to note that an administrator or a petitioner is required under the law to notify all beneficiaries about a succession cause. The provisions of ***Rule 26 (1)*** of **Probate and Administration Rules** provides as follows:

> "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 that applicant."

If a petitioner fails to comply with this rule then the grant is liable for revocation. This is the position taken by Justice J.A. Makau J. in the case of **STEPHEN MARANGU M'ITIRAI –VS- SILVERIA NCEKE & 4 OTHERS [2015] eKLR** where the said court revoked a grant on the petitioner's refusal to get deceased's daughters consent on the ground of being married and chief's letter failure to include the daughters in the list of beneficiaries. The court made the following observation which I concur that;

> ***"in my view the law requires that all 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 dependant has a right to challenge the grant on such ground……"***

23. The proceedings in Succession Cause No. 3 of 1990 shows that the late administrator was put to explain why he had not included the daughters of the deceased in the distribution of the estate and it is not certain what answers he gave, he was ordered to bring a chief's letter which letter clearly misrepresented the facts by showing that he was the sole beneficiary to the estate of the late MUGO NJAGI. On the basis of the same letter, the court confirmed the grant and in effect locked out the daughters of the deceased from benefitting from the estate. There was no evidence that they were notified as required by ***Rule 26(1)*** **Probate & Administration Rules** and the big question that begs answers is whether the grant was obtained by false statement and concealment of something material to the cause. The answer obviously is in the positive. The chief's letter was false and the court acted on it inadvertently. The grant was confirmed by mistake because had the court been properly briefed and made aware of the existence of the interests by the daughters, the grant could not have been confirmed.
24. The other issue which I will address is the point raised by the Respondent herein that she had nothing to do with acts of commission or omission by the late administrator. ***Section 82*** of the **Law of succession Act** however, states that personal representatives have powers to enforce causes of action which by virtue of any law survives the deceased or arise out of his death for his estate. The Respondent has confirmed that he filed for and obtained letters of administration in respect to the administrator in Succession Cause No. 3 of 1990 which she filed in Succession Cause No. 133 of 2001. She cannot claim benefits or assets out of a cause and conveniently disregard obligations or liabilities arising therefrom. It is of course true and technically arguable that she may not be faulted for the acts of omission or commission by the late administrator in Succession Cause No. 3 of 1990. However, the property comprising the estate is the same in Succession Cause No. 3 of 1990 and 133 of 2001. The property now technically speaking does not belong to the late Mugo Njagi. However the property is the same and the manner in which it

changed hands has been brought into question. The process of succession was marked with irregularities, fraud and concealment. The eyes of the law cannot be shut by such reasons.

The provisions of ***Article 159 (2)*** of the Constitution

Demands justice to be administered without undue regard to technicalities. The Respondent has not defended the actions of the administrator in Succession Cause No. 3 of 1990 because they were blatantly unjust and wrong. She cannot expect to legally reap any benefit from such irregular and skewed process that benefitted one child and locked out the rest of the children.

25. This Court finds from the material placed before it that the grant in Principal Magistrate's Court Succession Cause No. 3 of 1990 was issued and confirmed on the basis of an inadvertent mistake by the subordinate court and as indicated above no legitimate benefit could accrue from such. The Applicants were entitled to be involved and informed of the succession cause involving the estate of their late father. It was wrong not to involve them and the end result was a miscarriage of justice. A wrong must surely have a remedy and that remedy resides in ***Section 76*** of the **Law of Succession Act**.

26. The Respondent has submitted that no one has challenged the proceedings in Principal Magistrate's Court Succession Cause No. 133 of 2001 but if the grant in Principal Magistrate's Court Succession Cause No. 3 of 1990 was a mistake or wrong, it follows naturally that the grant in 133 of 2001 cannot be right. The grant in Succession Cause No. 133 of 2001 did not and could not sanitize or legitimize an irregularly obtained grant in Succession Cause No. 3 of 1990. This Court must find on the basis of evidence tendered that both grants are based on material concealment of and misrepresentation of true facts in view of the fact that both grants relate to the same property though technically different estates. This Court in the letter and spirit of ***Articles 27(4),*** and ***159(2)*** of the Constitution must right past wrongs and deliver justice to parties without undue regard to technicalities. The Applicants are daughters to the late Mugo Njagi and without question they deserve to be given their rightful share in the estate of their late father without discrimination on account of their sex. Their rights are protected by the law and the Constitution and must be upheld.

27. In the light of the above this Court does find merit in the Summons for Revocation and/or Annulment of Grant dated 17th December, 2012. The same is allowed. This Court shall also for the reasons advanced proceed *suo moto* under ***Section 76*** to revoke and annul the grant confirmed on 22nd April, 2002 in Kerugoya Principal Magistrate's Court Succession Cause No. 133 of 2001. All transactions attendant to the confirmed grant are reversed. The Applicants herein being the daughters to the late Mugo Njagi are at liberty to file for fresh confirmation of grant and in default any of the beneficiaries can proceed to do so.

There shall be no order as to costs as the Applicants and the

Respondent are in laws. Those are the orders of this Court.

Dated and delivered at Kerugoya this 7th day of July, 2015.

R. K. LIMO

JUDGE

7.7.2015

Before Hon. Justice R. Limo

Court Assistant Willy Mwangi

Thungu for Respondent present

Maina for applicant present

COURT: Ruling signed, dated and delivered in the open court in the presence of Thungu advocate for Respondent and Maina advocate for the applicant.

R. K. LIMO

JUDGE

7.7.2015