



REPUBLIC OF KENYA

High Court at Meru

Succession Cause 535 of 2004

PATRICK NG'OLUA M'MUNGANIA.....PETITIONER

VERSUS

FREDRICK KIMATHI NG'OLUA1ST APPLICANT

FRANCIS KIRIMI NTORUKIRI.....2ND APPLICANT

REBECCA CIORUI M'RUKIRI.....3RD APPLICANT

JOSHUA MUTUMA M'MUNGANIA.....4TH APPLICANT

KIURU MWITI KACIUKI.....5TH APPLICANT

GLADYS KATHUBARU.....6TH APPLICANT

JAMES GITONGA.....7TH APPLICANT

CYPRIANO KABERIA.....8TH APPLICANT

ELIUS GITONGA NTORUKIRI.....9TH APPLICANT

RULING.

The applicants/objectors through summons for revocation of Grants issued on 6th March 2006 filed this application dated 6/5/2011 under section 76 of the Law of Succession Act seeking the following orders:-

- 1. That this Honourable Court be pleased to issue an order of inhibition against land parcels No.NJIA CIA MWENDWA/2581 and NJIA CIA MWENDWA/763.**
- 2. That the grant issued on 6/3/2006 be revoked and or annulled as it was obtained secretly and fraudulently, without the applicant's being provided for.**
- 3. That this Honourable court be pleased to cancel to cancel titles No.Njia Cia Mwendwa/2581 and Njia Cia Mwendwa/763 issued in the names of the petitioner Patrick Ng'olua M'Mungania and they do revert to the name of the deceased M'Mungania M'Imaria Thariamua alias Mungania Imaria Thariamua.**

The application is based on the facts on the face of the application being as follows:-

- a) ***The respondent filed this cause without consulting other dependants of the deceased.***
- b) ***The respondent is the grandson of the deceased and his parents and other children live and else out their living in this estate but were never provided for in the grant.***
- c) ***That the respondent left out applicants the willfully with intent to defraud them of their rightful entitlement from the estate of the deceased.***
- d) ***The respondent is now threatening the applicant and other dependants with eviction from the estate herein.***
- e) ***The applicant and other dependants will suffer great loss as they will be turned to beggars if this court does not intervene since the respondent has caused the suit lands to be registered into his names.***

The application is supported by affidavit of Fredrick Kimathi Ngolua, the 1st Applicant/objector who has sworn an affidavit on his own behalf and of his co-applicants/objectors.

The application is opposed by the Petitioner/Respondent who swore replying affidavit dated 17th September 2012. When the application came up for hearing on 10th December 2012, Mr. Arimba, learned Advocate for the Petitioner sought directions to the effect that application be determined by way of written submission. The court granted the directions and ordered that the application be determined by way of written submissions, and set the matter for mention on 19th February 2013 to confirm compliance.

On 18th March both Mr. Arimba, learned advocate for the petitioner and Mr. Kirima, learned Advocate for the Applicants/Objectors appeared before court and made brief oral submission and relied on their written submissions. Mr. Kirima, Learned Advocate for Applicants/Objectors filed applicants/objectors submissions on 18th February 2013 whereas Mr. Arimba, learned Advocate for the Petitioner filed his written submissions on 19th March 2013.

The court has carefully considered the oral submissions and written submissions by the learned Advocates. It has also considered the pleadings, affidavits in support of the application and annexures thereto, and the petitioners replying affidavit and annexures thereto. It has also considered the parties opposing positions as well.

The issues for determination are whether the Applicants/Objectors have met the conditions for warranting granting of the application.

The brief facts of this application are that deceased whose estates is subject and this application is father to the first applicant/objector and grandfather to other applicants/objectors and the petitioner. The deceased was as per 1st applicant/objector survived by nine(9) dependants including the petitioner all of whom reside and derive their livelihood from the estate of the deceased to wit land parcel No Njia Cia Mwendwa/763 and 2581. The Applicants/objectors contend that the petitioner filed this cause secretly and without the 1st applicant/objector's knowledge and that of his co-objectors and that they had no chance of seeing the Kenya Gazette Notice as they come from the interior parts of Nyambene and only came to know of the petition when certificate for confirmed grant had already been issued and implemented. Applicants attached copy of confirmed grant as annexures "FKI" which was issued on 6th March 2006.

The 1st Applicant/Objector further contended that he had lodged a claim before the Land Disputes Tribunal which awarded him half of the Estate but the respondent/petitioner filed an appeal to the Provincial Appeal Committee, which decided the appeal in his favour. The Applicant contends that the said Tribunal had no jurisdiction to adjudicate over the suit land. The petitioner following confirmation of the grant the applicants contend he transferred the whole estate of the deceased to himself and left out all other dependants. The applicants attached copy of green card marked F.K 1, II & III. The petitioner is averred by the applicants is now threatening to evict all the applicants/objectors from the said parcels of

land and if he makes good his threats, the applicants contend they shall be rendered destitute and would have nowhere else to go and as such they prayed for inhibition to issue over the said parcels of land so as to preserve the same, pending hearing and determination of this application. The applicants aver that the petition had been filed secretly and fraudulently with intent to defraud the 1st applicant and his co-applicants of their rightful share from the deceased estate. It is further averred that the petitioner misled the court by giving misrepresentation of the facts upon which the court proceeded to issue the grant, and had the court been given true facts, it could not have issued the grant to the petitioner. The applicants averred that it is fair and just that the grant issued to the petitioner/respondent be annulled and titles issued in his name cancelled and the same revert back into the name of the deceased.

The petitioner on the other hand averred that the deceased was his father and that 1st applicant is his brother, while the 6th applicant is his mother whereas the other applicants are petitioner's distant relatives. He averred that all applicants had agreed and consented in the presence of one Chief Mr. George M. Akwalu that the petitioner petition for the grant and have all two(2) parcels of land in issue registered in his name. That none of the applicants raised or lodged any objection to the grant being made to the petitioner after filing this cause and having it gazetted. The petitioner further averred that save for himself and 6th applicant, the rest of the applicants live and work on the parcel No. Njia -Cia-Mwendwa 2581, while petitioner and 6th applicant live and work on the land parcel No. Njia-cia-Mwendwa/763. The petitioner denied that he filed the petition secretly. The petitioner averred that the application by the applicants is in bad faith and as a result of spite arising from various criminal and civil cases which have been brought by some of the applicants against the petitioner and petitioner annexed and marked "PM1 and "PM2" respectively being Photostat copies of the proceedings and rulings of Eastern Provincial Land Disputes Tribunal Embu, Appeal No.12 of 2009 and proceedings of 7.12.2010 in Maua SRMC L.D.T. Case No.57 of 2008. The petitioner averred that the said decisions subsist and this application is an afterthought on part of the applicants and an attempt to circumvent execution of the judgment thereto. The petitioner further argued that there is undue and inordinate delay on part of the applicants in bringing the application.

In the instant cause the petitioner petitioned for grant of letters of administration intestate. The petitioner attached to the petition Chief's letter dated 8th December, 2004 mentioning the petitioner as a sole heir and described the petitioner as son of the deceased. The petitioner in form P&A 5 averred that the deceased was survived by the petitioner alone. In form 9, affidavit in support of summons for confirmation of grant of Administration Intestate the petitioner once again averred the deceased was survived by petitioner alone. He described himself as son of the deceased. The 1st applicant in his affidavit stated that he was son of the deceased and was survived by nine(9) dependants. Significantly the petitioner in his replying affidavit admitted that the 1st applicant was his brother and 6th applicant his mother. He referred to other applicants as distant relatives. The petitioner lied to the court and made false document when he described himself as the sole surviving heir to the deceased estate. He deliberately lied about his brother and mother. He further failed to disclose that the applicants were dependants of the deceased and were residing and living on the deceased estate.

The petitioner cannot therefore be believed to be an honest person. The applicant have described the petitioner as not son of the deceased but a grandson of the deceased. I will believe the applicants as the petitioner lied in his affidavit and indeed conspired with Chief who described him as son and sole surviving heir to the deceased. There was an intention to deprive others by failing to disclose the truth to the court.

The petitioner in Form P&A 8 made a false statement that every person having an equal or prior right to grant of representation had consented or renounced such right or had been issued with citation to renounce their right to apply for a grant of representation.

Rule 7(1),(a), (b), (c),(d) and (e) of the Probate and Administration Rules provides:-

7. Application for grant: general provisions.

(1) Subject to the provisions of subrule (9), where an applicant seeks a grant of representation to the

estate of a deceased person to whose estate no grant or no grant other than one under section 49 or a limited grant under section 67 of [the Act](#) has been made, the application shall be by petition in the appropriate Form supported by an affidavit in one of Forms 3 to 6 as appropriate containing, so far as they may be within the knowledge of the applicant, the following particulars –

(a) the full names of the deceased;

(b) the date and place of his death, his last known place of residence, and his domicile at date of death;

(c) whether he died testate or intestate and, if testate, whether his last will was written or oral, and the place where and the date upon which it was made;

(d) a full inventory of all his assets and liabilities at the date of his death (including such, if any, as may have arisen or become known since that date) together with an estimate of the value of his assets movable and immovable and his liabilities;

(e) in cases of total or partial intestacy –

(i) the names, addresses, marital state and description of all surviving spouses and children of the deceased, or, where the deceased left no surviving spouse or child, like particulars of such person or persons who would succeed in accordance with section 39 (1) of [the Act](#);

(ii) whether any and if so which of those persons is under the age of eighteen years or is suffering from any mental disorder, and, if so, details of it;

(iii) for the purposes of determining the degree of consanguinity reference shall be made to the table set out in the Second Schedule;

(f) the relationship (if any) which the applicant bore to the deceased or the capacity in which he claims;

(g) if the deceased died testate leaving a written will, the names and present addresses of any executors named therein; and

(h) the postal and residential addresses of the applicant.

(2) There shall be exhibited in the affidavit a certificate or a photocopy of a certificate of the death of the deceased or such other written evidence of the death as may be available.

7) Where a person who is not a person in the order of preference set out in section 66 of [the Act](#) seeks a grant of administration intestate he shall before the making of the grant furnish to the court such information as the court may require to enable it to exercise its discretion under that section and shall also satisfy the court that every person having a prior preference to a grant by virtue of that section has

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(a) renounced his right generally to apply for a grant; or

(b) consented in writing to the making of the grant to the applicant; or

(c) been issued with a citation calling upon him either to renounce such right or to apply for a grant.

In the instant petition the petitioner did not give full names, address, marital state and description of all surviving spouses and children of the deceased or particulars of such person or persons who would succeed in accordance with Section 39(1) of the Law of Succession Act.

Further the petitioner breached Rule 7(7) of the Probate and Administration Rules by petitioning for grant

when he was a grandson to the deceased and when he was not a person in order of preference as set out under Section 66 of the Law of Succession Act which provides:-

66. 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.”

Further before a grant can issue to a party notice ought to be issued to any person entitled in the same decree or in priority. Rule 26(1) (2) and (3) of the Probate and Administration rules provides:-

“(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.”

Further on an application for confirmation of grant consent in writing in Form 37 of all dependants or other persons who may be beneficially entitled has to be filed if their attendance is to be dispensed with during the hearing of an application for confirmation of grant.

Rule 40(8) of the Probate and Administration Rules provides:-

“(8) Where no affidavit of protest has been filed the summons and affidavit 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 protester and to such other persons as the court thinks fit.”

In view of the foregoing I find that the petitioner deliberately with intention to defraud other dependants failed to seek their consent in petitioning for the grant and went ahead to lie that he is the only surviving heir and even referred to himself as son of the deceased when he knew he was not. He did not bother to give notice to every other person entitled in same degree or in priority to the petitioner such as his uncle, the 1st applicant and other applicants. He did not furnish court with true information that he was not the person in order of preference as set out in Section 66 of the Law of Succession Act.

In the instant application I am satisfied that the applicants have satisfied the conditions set out under Section 76 of the Law of Succession Act to warrant allowing of this application. I find that the proceedings to obtain the grant were defective in substance. That the grant was obtained by means of untrue allegations of facts essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently. That further the grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case.

The applicants explained to the court when they discovered the fraud and the fact that there may have been delay in filing this application for revocation of the grant cannot be a good ground to deny the applicants justice as submitted by the petitioner. The petitioner did not quote any law barring the applicants from being granted the prayers they are seeking simply because they delayed in filing this application for the revocation of the grant.

On the matter before the Land Disputes Tribunal, the attached documents are insufficient to enable court to know the nature of the claim, the parties involved and whether the matter was over the deceased estate as in the present case, but be as it may, as the Counsel in this matter submitted there is an appeal pending the outcome of the Senior Principal Magistrate Maua LDT 57 of 2002 and as this court is not at the moment concerned with the said appeal but the Succession matter over the deceased estate herein; I therefore opt not to be involved in the Land Disputes Tribunal Appeal and subsequent appeal which will be dealt with at the appropriate court at appropriate time.

Further the issue before this court was specific and limited to pleadings before this court as set out in the applicant's application dated 6th May, 2011.

In the circumstances of this case the applicant's application dated 6th May, 2011 is allowed and I proceed to make the following orders:-

1. ***That an order of inhibition be and is hereby issued against land parcel No. Njia Cia Mwendwa/2581 and Njia Cia Mwendwa/1763.***
2. ***That grant issued on 6/3/2006 be and is hereby revoked as it was obtained secretly and fraudulently without the applicant being involved and not being provided for.***
3. ***That land titles No. Njia Cia Mwendwa/763 issued in the names of the petitioner PATRICK NGOLUA M'MUNGANIA be and are hereby cancelled and reverted to the name of the deceased M'MUNGANIA M'IMARIA THARIAMA alias MUNGANIA IMARIA THARIAMU.***
4. ***As this is an old matter the parties are given two weeks to agree on three administrators who should be granted letters of administration and seek fresh confirmation of the grant in default of agreement on administrators matter be mentioned before court to appoint the administrators.***
5. ***costs of the application to the applicants.***

DATED, SIGNED AND DELIVERED AT MERU THIS 2ND DAY OF APRIL, 2013.

**J. A. MAKAU
JUDGE**

DELIVERED IN OPEN COURT IN THE PRESENCE OF:-

1. ***Mr. Kirima for applicant***
2. ***Mr. Arimba for the respondent(absent)***

J. A. MAKAU
JUDGE