



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & MARAGA, J.J.A)**

**CIVIL APPEAL NO. 15 OF 2013**

**BETWEEN**

**GRACE WACHUKA ..... APPELLANT**

**AND**

**JACKSON NJUGUNA GATHUNGU ..... 1<sup>ST</sup> RESPONDENT**

**JANE WAIRIMU GATHUNGU ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Nyeri (Sergon, J.) dated 25<sup>th</sup> February, 2011)*

**in**

**H.C Succession No. 929 of 2009)**

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**JUDGMENT OF THE COURT**

1. The respondents were issued with the letters of administration over the Estate of Keziah Njambi Gathungu (deceased) by the Senior Magistrate’s Court at Othaya. The deceased was survived by five children namely; the respondents, the appellant, Loise Wangui Kamunge and Ziporah Wanjiru Muraya who all were adults at the time of her death. The deceased’s Estate comprised of the piece of land known as **L.R No. Othaya/Kiandemi/ 174** (suit land) measuring 4 acres. The letters of administration were confirmed on 28<sup>th</sup> September, 2009 and the Estate distributed as follows:-

Beneficiary	Property	Shares
· 1 <sup>st</sup> respondent	Othaya/Kiandemi/174	2 acres
· 2 <sup>nd</sup> respondent	Othaya/Kiandemi/174	2 acres

2. The appellant, with the authority of her two sisters, Loise Wairimu Gathungu and Ziporah Wanjiru Muraya, filed Summons dated 14<sup>th</sup> October, 2009 in the High Court seeking *inter alia*:-

· ***The court be pleased to remove and bring before it Othaya Succession Cause No. 21 of 2008;***

· ***The grant issued and confirmed on 28<sup>th</sup> September, 2009 in the above succession cause be revoked/annulled.***

3. In support of the application the appellant argued that the grant was obtained and subsequently confirmed through fraud and misrepresentation. She deposed in the affidavit in support of that summons that although she and her sisters consented to the respondents applying for letters of administration over the Estate of the deceased, they never consented to the mode of distribution that was proposed in the summons for confirmation of grant. At all material times she and her sisters assumed that the mode of distribution would be as per the wishes of their late mother. Based on that assumption the appellant and her sisters on 28<sup>th</sup> September, 2009 orally indicated to the court that they had agreed on the mode of distribution during the confirmation of the grant. It is only when the Certificate of Confirmation was issued that they realized that the proposed mode of distribution in the application for confirmation was contrary to the parties' agreement and their mother's wishes. According to the appellant, during the deceased's lifetime she sought the consent of the Land Control Board to subdivide the suit land into three parcels; she engaged the services of a surveyor, Muritu & Associates to prepare a sketch of the proposed subdivisions; the surveyor prepared mutation forms indicating the proposed subdivisions; the deceased subsequently applied for consent to transfer the three parcels to the intended beneficiaries but died before the said transfers could be effected.

4. It was also the appellant's contention that the mode of distribution was unfair. It appears that the 2<sup>nd</sup> respondent at some point disagreed with the 1<sup>st</sup> respondent and consequently she supported the appellant's application. The 2<sup>nd</sup> respondent also refused to execute the requisite transfer forms to give effect to the confirmed grant.

5. In opposing the said application, the 1<sup>st</sup> respondent argued that the application had been brought in bad faith. At all material times the appellant consented to the letters of administration being granted to the respondents. By executing the Summons for Confirmation the 2<sup>nd</sup> respondent had consented to the proposed mode of distribution, and was therefore estopped from challenging the same. The 1<sup>st</sup> respondent maintained that the appellant and her sisters consented to the proposed mode of distribution by appending their signatures on the schedule of distribution. The appellant never filed any affidavit in protest to the proposed mode of distribution. Further, the appellant had deposed in her affidavit that she and her sisters had been present during the confirmation and never raised any objection. He urged the High Court to disallow the application for revocation.

6. After considering the evidence tendered, the learned Judge (Sergon, J.) in dismissing the application for revocation vide a judgment dated 25<sup>th</sup> February, 2011 held that the appellant had not established that the grant was confirmed through fraudulent means and that at all material times the appellant had consented to the mode of distribution that had been proposed in the Summons for Confirmation of the grant. It is that decision that has provoked this appeal based on the following grounds:-

· ***The learned Judge erred in law and fact in dismissing the application for revoking the grant issued by Othaya Magistrate's Court, when there were pertinent grounds for allowing the application.***

· ***The learned Judge erred in law and fact in coming to the conclusion that there was no proof of fraud, mistake or misrepresentation on the part of the petitioners when the said petitioners were in disagreement and thus wrongly dismissed the application for revoking the grant.***

· *The learned Judge erred in law and fact in failing to come to the conclusion that the distribution of the deceased's Estate was contrary to express provisions of the law of Succession Act and thus failed to allow the said application for revoking the grant.*

· *The learned Judge erred in law and in fact in stating that the objector had approved the schedule of distribution without regard to the affidavits and submissions before him and therefore came to the wrong conclusion that the application for revocation of grant had no merits.*

7. Mr. Ndirangu, learned counsel for the appellant, submitted that the 2<sup>nd</sup> respondent who was one of the administrators, refused to execute any document to effect transfer of the suit land as per the confirmed grant. During the application for revocation of grant, the same administrator agreed that the confirmed grant ought to be revoked. He argued that the appellant and her sisters consented to the respondents being appointed as administrators; the issue was not in respect of the appointed administrators but on the mode of distribution of the Estate. According to Mr. Ndirangu, there was no consent in respect of the mode of distribution and the only consent which existed is the one allowing the respondents to act as administrators. He submitted that the learned Judge did not properly evaluate the evidence because if he did so he would have found that the application for revocation had merit. He further submitted that the learned Judge did not consider that when the appellant agreed to distribution during confirmation of the grant, she was not aware of the mode of distribution. Mr. Ndirangu finally argued that the learned Judge ignored the provisions of **Section 38** of the **Law of Succession Act**. He urged us to allow the appeal.

8. Mr. Kimunya, learned counsel for the respondent, argued that the appellant and all the deceased's children had consented to the mode of distribution. They were present during the confirmation and none of them raised any objection. He submitted that the application for revocation was an afterthought and the learned Judge was correct in dismissing the same. He urged us to dismiss the appeal.

9. We have considered the record, the submissions by counsel and the law. The deceased died on 1<sup>st</sup> June, 2006 and therefore the **Law of Succession of Act**, Chapter 180, Laws of Kenya, is applicable in this case. **Section 76** of the **Law of Succession** 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 an 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 has ordered or allowed; 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***

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

10. It was the appellant's contention that she and her sisters did not consent to the mode of distribution as set out in the application for confirmation. On this issue, the learned Judge (Sergon, J.) found that the appellant and her sisters had appended their signatures on the schedule of distribution signifying their consent. We have perused the record and we cannot help but note that the appellant and her sisters only signed the consent in respect of the letters of administration being granted to the respondents. There is no consent signed by the appellant and her sisters in regard to the mode of distribution as set out in the application for confirmation. Further, contrary to the observations made by the learned Judge, the appellant and her sisters did not append their signatures on the schedule of distribution therein.

11. It was further the appellant's case that she and her sisters indicated to the court that they agreed with the mode of distribution under the mistaken belief that the mode of distribution was as per their late mother's wishes. We note that it is not clear whether during the confirmation the subordinate court explained the proposed mode of distribution in the application to the parties before seeking their views on the same. We believe that it was imperative for the subordinate court to have done so in order to be satisfied that every party/beneficiary was in agreement. We therefore find that the proceedings confirming the grant were defective in substance. Accordingly, we revoke only the certificate of confirmation.

12. Having expressed ourselves as above, we now turn to consider the issue of distribution of the Estate. We find that the appellant did not prove to the required standard what their late mother's wishes were in respect of the Estate. Therefore the deceased's Estate ought to be distributed in accordance with **Section 38** of the **law of Succession Act** which provides as follows:-

***“Where an intestate has left a surviving child or children but no spouse the net intestate estate shall, subject to the provisions of Section 41 & 42 devolve upon the surviving child, if there be only one, or be equally divided among the surviving children.” Emphasis Added.***

13. In this case the deceased was survived by five children as set out above. We find that all the children including the deceased's married daughters are entitled to equal shares in the deceased's Estate. Koome, J (as she then was) in **the Estate of Grace Nguhi Michobo (deceased) –H.C Succession No. 1978 of 2007**, expressed herself as follows:-

***“In my humble opinion, parliament must have made consideration to all the above matters and therefore found it necessary not to make any distinction between male and female child as regards inheritance. All children of the deceased are treated equally their gender notwithstanding. Accordingly, unless a married daughter has willingly renounced her rights, she cannot merely be left out of her parent's estate.”***

14. The upshot of the foregoing is that we revoke the certificate of confirmation and direct that the Estate which comprises of L.R No. Othaya/Kiandemi/ 174 (suit land) measuring 4 acres be distributed equally among the deceased's five children. We find that the appeal herein has merit is hereby allowed. This being a family dispute we make no orders as to costs.

***Dated and delivered at Nyeri this 13<sup>th</sup> day of May, 2014.***

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***MARTHA KOOME***

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***JUDGE OF APPEAL***

***D.K MARAGA***

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***JUDGE OF APPEAL***

I certify that this is a  
true copy of the original.

***DEPUTY REGISTRAR***