



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**SUCCESSION CAUSE NO. 221 OF 2015**

**IN THE MATTER OF THE ESTATE OF GATUMO NJIMUKO (DECEASED)**

**JONES NJURA GATUMU.....1<sup>ST</sup> APPLICANT/PETITIONER**

**KANYIVA GATUMU.....2<sup>ND</sup> APPLICANT/PETITIONER**

**FAUSTINE NDWIGA GATUMU.....3<sup>RD</sup> APPLICANT/PETITIONER**

**VERSUS**

**MARIGU GATGUMU.....RESPONDENT**

**PATRICK GATUMU.....BENEFICIARY**

**RULING**

**A. Introduction**

1. This ruling is for the application for revocation of grant dated 10/04/2017 on the grounds that some of the beneficiaries of the deceased were not been included in the distribution of the estate. At the time of confirmation of the grant on 25/05/2016.
2. The applicants state that they co-administrators of the deceased's estate and that some beneficiaries were left out in the distribution of the estate. The applicants further state that the respondent is opposed to the inclusion of the said beneficiaries in the grant. The respondents have proposed the mode of distribution of the deceased's estate in their supporting affidavit.
3. In rejoinder he respondent filed a replying affidavit on the 29/06/2017 in which she admits that indeed some beneficiaries of the deceased's estate were left out in the initial distribution. She is however against revocation/ annulment of the grant and proposes that the grant be rectified.
4. The respondent further deposes that the deceased had sold land parcel no. NTHAWA/GITIBURI/2559 to his son Robert Njeru Gatumu and as such the property should not form part of the deceased's estate. It was further deposed that the respondent was opposed to the mode of distribution as proposed by the applicants. She also deposes that the certificate of grant ought to be rectified not revoked as the applicants have failed to indicate the grounds under which the grant ought to be revoked as set out in **Section 76 of the Law of Succession Act**.
5. Both parties filed various statements in support of each of their case and also filed submissions to dispose of the matter.

**B. Applicants' Submission**

6. The applicants submitted that certificate of confirmation of grant did not include some beneficiaries of the deceased. It was further submitted that the applicants had applied for rectification of the grant but the respondent opposed it on the ground that it did not provide for her deceased's son share who had died before the deceased herein.

**C. Respondent's Submissions**

7. The respondent submitted that the applicants had clearly failed to prove on what grounds the confirmed grant should be revoked. She further submitted that it was clear that all parties were of the opinion that the grant ought to be rectified and not revoked.

8. She further submits that those left out in distribution of the deceased's estate each occupy  $\frac{3}{4}$  acres out of land parcel no GATURI/NEMBURE/94 and that Beth Wanja Murithi, Festus Ileri Gatumu and Lawrence Ndwiga Gatumu who occupy  $\frac{3}{4}$  acres out of land parcel no. GATURI/NEMBURE/93 were also left out of the distribution.

9. The respondent further submits that she is entitled to her late son's share of the estate out of land parcel No. GATURI/NEMBURE/93 and that the balance of this land be shared equally between the deceased's widows.

**D. Analysis & Determination**

10. The only issue for determination has been identified as whether the applicants have demonstrated sufficient grounds for revocation of the grant as provided for under **Section 76 of the Law of Succession Act**. The provision sets out the relevant grounds:

*"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 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 untrue allegation of a fact essential in point of law to justify the grant not withstanding that the allegation was made in ignorance or inadvertently;*

*d. .... " "*

11. The above provision was construed by the court of appeal in the case of **Matheka and Another vs Matheka [2005] 2KLR 455** where the court of appeal laid down the following guiding principles.

*"i. A grant may be revoked either by application by an interested party or by the court on its own motion.*

*ii. Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substance, or that the grant was obtained fraudulently by the making of a false statement or by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate."*

12. It is trite law that if a grant was obtained fraudulently by making of a false statement or by the concealment from the court of something material to the case; or that the grant was obtained by means of untrue allegation of fact essential in point of law to justify the grant not withstanding that the allegation was made in ignorance or inadvertently, such a grant can be revoked or annulled.

13. In the instant case both the applicants and the respondents were appointed as administrators over the deceased's estate. It is not in dispute that there were some beneficiaries who were not included in the distribution of the deceased's estate. The reason for this

is not explained especially given that those beneficiaries left out of the distribution of the deceased's estate. It is not in dispute that the deceased had sold some of his property however this was not disclosed to the court during the proceedings before the confirmation of the grant.

14. The deliberate failure by both the applicants and the respondent to involve all the beneficiaries at the time of filing these proceedings; failing to list them among the beneficiaries or seek their consent or renunciation was in my view in bad faith and amounts to concealment of material facts.

15. The act of the four administrators rendered the grant defective in substance and that material information was not disclosed to the court in that had the court been made aware that there were other beneficiaries who were interested in the deceased's estate, the court would have declined to issue the grant without compliance with the law.

16. No consent was obtained from the excluded beneficiaries at the time of filing the petition. To me the petition was filed contrary to **Rule 26 of the Probate and Administration Rules** which states: -

*“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”*

17. The petition ought to have been accompanied by consent as provided under Rule 26 of the Probate and Administration Rules signed by all the beneficiaries of the appropriate renunciation or in the alternative a renunciation duly signed as required.

18. The effect of failure to comply with Rule 26 of the Probate and Administration Rules was ably discussed by the court in **Al-Amin Abdulrehman Hatimy v Mohamed Abdulrehman Mohamed & another [2013] eKLR** where the court held that the law of succession by virtue of Rule 26 requires that any application for issue of a Grant must be accompanied by a consent duly signed by all persons entitled in the share in the same estate.

19. This is a case with very unique facts where some of the administrators seek revocation of grant against their co-administrator.

20. From the evidence presented by the applicants and the respondent, I find that the flaws in these proceedings leading to the confirmation of the grant as set out herein were not the fault of the respondent alone. The blame for failure to include all the beneficiaries of the estate and for failure to comply with Section 26 of the Act. All administrators signed the application for confirmation of the grant.

21. I am aware the provisions of Section 74 of the Act guide this court in rectification of grant.

22. The **Section 74 of the Law of Succession Act** provides: -

*Errors in names and descriptions, or in setting out the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.*

23. The provisions of Section 74 are limited to rectifying only errors in names and descriptions which will not aid the administrators in bringing on board the beneficiaries who were left out. The proposal of the respondent to rectify the grant instead of revoking makes sense but not supported by the law.

24. It was held **In the matter of the Estate of Muniu Karago (deceased) Nairobi High Court Succession Cause No. 2668 of 1997**

*Accordingly, I agree with counsel for Kezzy Wanjiru Muniu that the confirmed grant cannot be rectified as the confirmation was not a misdirection but a deliberate order made after parties provide material evidence on how the property should be distributed.*

25. The applicants have satisfied that the proceedings were defective in substance for failure to comply with Rule 26 and for the reason that some of the beneficiaries were excluded.

26. I have good reason to believe that when the deceased's family chose four (4) administrators, they had a good reason to do so. The court does not wish to disturb this status having found that the blame lies on the four administrators squarely.

27. I hereby grant the application dated 10/04/2017 in the following terms: -

*a) That the grant issued and confirmed on 23/05/2016 is hereby revoked.*

*b) That the following are hereby appointed co-administrators of the estate: -*

*i. Jones Njura Gatumu*

*ii. Marigu Gatumu*

*iii. Kanyiva Gatumu*

*iv. Faustine Ndwiga Gatimu*

*c) That the administrators jointly or separately file an application for confirmation of grant taking into account all the rightful beneficiaries within sixty (60) days.*

*d) Each party to meet their own costs.*

28. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 25<sup>TH</sup> DAY OF JULY, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Ms. Muthoni for Respondent**

**3<sup>rd</sup> Respondent present**



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