Case Number:	Miscellaneous Succession Cause 129 of 2001
Date Delivered:	29 Oct 2009
Case Class:	Civil
Court:	High Court at Nyeri
Case Action:	Ruling
Judge:	Milton Stephen Asike-Makhandia
Citation:	SIMON KARANJA CHEGE v HARRY ALEX WAITHAKA CHEGE [2009] eKLR
Advocates:	Mr. Karweru for the applicant & Mr. Njoroge for the respondent.
Case Summary:	-
Court Division:	-
History Magistrates:	-
County:	Nyeri
Docket Number:	-
History Docket Number:	-
Case Outcome:	Confirmed grant revoked.
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Miscellaneous Succession Cause 129 of 2001

SIMON KARANJA CHEGE.....APPLICANT

VERSUS

HARRY ALEX WAITHAKA CHEGE……..RESPONDENT

R U L I N G

On 13th August, 2001, **Simon Karanja Chege** hereinafter referred to as *"the applicant"* filed summons for Revocation and or annulment of grant pursuant to *section 76* of the Law of Succession Act and Rule 44 (1) of the Probate and Administration Rules. He claimed that **Harry Alex Waithaka Chege**, hereinafter referred to as *"the respondent"* never obtained his consent and from other members of the family when he petitioned for the grant, he also never issued a citation to the applicant and other members of the family, had only disclosed two other dependants of the deceased in the petition and failed to disclose that the deceased was survived by two widows and fifteen children, failed to disclose that the estate had been the subject of previous succession proceedings, failed to disclose all the assets of the deceased, proceeded to distribute the estate secretly and against the family wishes and in the process disinherited the applicant and other members of the family. The respondent did not also seek consent of the family when he sought the confirmation of the grant and deliberately undervalued the estate by pegging it at Ksh.100,000/=.

In support of the application the applicant deponed that the deceased was his father and the respondent was his younger brother. The deceased had two wives; **Wangechi Mwangi** and **Wanjiru Mwangi** a fact that the respondent failed to disclose to court when he petitioned for the grant. The deceased had in all fifteen children from the two houses;

1ST HOUSE

(a) Simon Karanja

(b) Gerald Gachahi

(c) Alex Waithaka

(d) John Kamau

(e) Grace Njoki

(f) Mary Nyambura

(g) Joyce Nyambura

(h) Marion Wangari and

(i) Nancy Mukami

2ND HOUSE

(a) Eliud Irungu

(b) Peter Gitau

(c) Muthoni Mwangi

(d) Munga Mwangi

(e) Njoki Mwangi

The applicant petitioned and obtained the grant without consent of the members and had it confirmed as well without such consent. In the process he disinherited some family members and in particular their younger brother, **John Kamau** who is mentally challenged. The respondent did not inform the court that the widows of the deceased had already petitioned for letters of administration. He also left out the following assets:- plot No.2 Tuso, KBC shares, shares in Kanyenya-ini flour mills and Bank accounts.

On 11th November, 2008, the respondent filed a replying affidavit to the application. Where relevant he deponed that he was the petitioner in Murang'a PM.SUCC. Cause No.109 of 1997 and that he had kept the applicant in the know throughout. The cause was indeed Gazetted on 20th June, 1997 and the applicant did not object. The deceased's estate consisted of **Loc.9/Kanyenyaini/**

1051/22, which is a commercial plot, henceforth referred to as *"the suit premises".* The applicant had renounced his right to the suit premises through a sale agreement signed between him and the respondent in 1997 when he sold and transferred his share to him at a consideration of 75,000/=. The requirements for a chief's letter was not a legal requirement but merely administrative. He conceded though that he had failed to disclose the other family members in the petition but hastened to add that he did so because they were not beneficiaries of the suit premises. He denied disinheriting his retarded brother and went on to claim that they had agreed as a family to be assisting him jointly. In any event because of his mental status he could not have participated in the proceedings. The value of the suit premises at the time was Kshs.100,000/=. All beneficiaries of the suit premises had been agreed upon before the filing the succession cause. Finally he deponed that there were no good grounds advanced to warrant the revocation of the grant.

The replying affidavit aforesaid received support from one, **Gerald Gachahi Chege**, a beneficiary of the estate. He confirmed that the applicant was duly informed of the succession cause. He also confirmed that the applicant had effectively renounced his rights in the suit premises by selling his share to the respondent. The grant should not thus be revoked as the same was obtained lawfully and full disclosure was made. If the grant was revoked it will effect his rights in the suit premises that he had substantially developed.

Further support for the respondent came vide **Grace Njoki Mwangi, Nancy Mukami, Joyce Nyambura Kiambuki** all daughters of the deceased. They all swore affidavits stating that the applicant was misleading the court by claiming that the succession cause was filed without his notice. They also confirmed that the applicant had relinquished his share in the suit premises to the respondent. The whole

family including the applicant had sat and agreed on the distribution of the suit premises.

In response to all these, the applicant filed a further affidavit with leave of court. He reiterated that he knew nothing as regards the filing of the succession cause. He never relinquished his interest in the suit premises and the sale agreement exhibited was not genuine.

On 10th May, 2005 the matter came before **Okwengu J**, for directions. Parties agreed that the same be heard by way of viva voce evidence. On 2nd December, 2008, the hearing commenced before **Kasango J.** The applicant took the stand. Midway through his testimony however, **Mr. Karweru,** learned counsel for the applicant experienced difficulties communicating with the applicant. The applicant had problems with his memory. After consultation with **Mr. Njoroge**, learned counsel for the respondent, they agreed to review the earlier directions as to the mode of hearing the application. They now agreed to have the matter proceed by way of written submissions. When the matter next came up for hearing it fell upon me to chart the way forward as by then **Kasango J** had been transferred from this station to take charge of the High Court of Kenya at Meru. Luckily parties agreed to have me take over the matter from where **Kasango J.** had left. In other words I was expected to go through the pleadings, the respective written submissions on the record and thereafter craft and deliver the ruling.

I have carefully considered the application, the response, the respective written submissions and the law. From the foregoing the issue for determination is basically whether the applicant had made out case for the revocation or annulment of the grant on the grounds advanced. The second issue will be one of costs. It is trite law that for revocation proceedings to succeed the applicant must prove any of the following:

- **That the proceedings to obtain the grant were defective in substance.**

- **That the grant was obtained by means of untrue allegation of a fact essential in point of law to justifying the grant.**

- **That the grant was obtained fraudulently by making of a false statement or by concealment from the court of something material to the cases.**

- **That the person to whom the grant was made has failed, after due notice and without reasonable cause to apply for confirmation of grant or to proceed diligently with the administration of the estate.**

- **That the grant has become useless or inoperative through subsequent circumstances.**

The above grounds are disjunctive and not conjunctive. Has the applicant been able to prove any of the above conditions in the instant application" I think he has in particular having regard to conditions 2 and 3 above.

The Law of Succession Act and the rules made thereunder require that all beneficiaries be informed of the commencement of the succession proceedings more so if the petitioner is not a person in order preference set out in section 66 of the Act. The beneficiaries have to be informed and their consent sought and obtained. In the event of a recalcitrant beneficiary, then he has to be cited. Rule 7(7) of the Probate and Administration Rules specifically provide:

“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-

(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."

Section 66 of the Law of Succession Act sets out the preferences to be given to persons to administer the deceased's estate where deceased dies intestate. In so far as it is relevant to this case, priority is given to the surviving spouse or spouses to petition. The respondent who was the petitioner in the subordinate court was not the deceased's spouse but a son. It is not in doubt that the deceased was survived by two (2) widows who had first priority in petitioning for the grant. Accordingly, the respondent ought to have strictly complied with the requirement of informing and or seeking the consent of all the beneficiaries and survivors about the filing of the petition and getting their consent failing which, cite them. Regrettably, the respondent did none of the above with regard to the applicant or any other member(s) of the family save for **Gerald Gachahi** and **Grace Wanjiku Mwangi** who in any event ended up being the sole beneficiaries with the respondent of the suit premises.

The applicant deponed in paragraph 6 of the affidavit in support of the application that the deceased was survived by two widows and fifteen children. He proceeded to give the names of the widows and the fifteen children. That information has not been challenged and or controverted at all by the respondent or by any other member of the family. It must therefore be true. However in the petition filed by the respondent in the SPM'S Court at Murang'a being Succession Cause number 109 of 1997 the respondent in the affidavit in support of the petition deponed that;

"…...The deceased died intestate and left the following surviving him:

- **Harry Alex Waithaka Chege – son**
- **Gerald Gachahi chege – son**
- **Grace Wanjiku Mwangi – daughter in law."**

This was false statement in the light of what I have already said hereinabove and the respondent knew it. The respondent again repeated the same falsehood in his affidavit in support of the summons for confirmation of grant. That falsehood was deliberately perpetuated by the respondent to ensure that other members of the family were perhaps locked out of the estate.

The respondent seems to suggest that the entire family agreed that he petitions for the grant in the manner aforesaid. However their can be no consent if its purport is to breach the law of the land. The law requires that the beneficiaries and survivors of the deceased be mentioned in the petition. That requirement is found in rule 7 (1) (e) (i) of the Probate and Administration Rules. It provides interlia:-

"(e) In cases of total or partial intestacy-

(i) the names, addresses, marital state and description of all surviving spouses and children

of the decease, 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"

From this rule it is clear that it is not only those having an interest in the assets of the estate who should be disclosed as the respondent wants this court to believe. Rather all surviving spouses and children have to be disclosed. The respondent failed to do so and the trial court must have proceeded to handle the cause perhaps in the mistaken belief that the deceased had only three children surviving him. If the respondent had disclosed that the deceased was survived by two widows and other children apart from the respondent and the two beneficiaries mentioned, the court I am certain would have required their consent to be given at the confirmation stage of the grant. Even assuming that indeed there was a family meeting to that effect, what was so difficult in the respondent mentioning all the beneficiaries in the petition and further what was difficult in getting them to court on the day of the confirmation of the grant so that they could endorse the scheme of distribution of the estate of the deceased as proposed by the respondent unless perhaps he did not want them to know.

The respondent has submitted that the applicant renounced his right presumably to apply for a grant when he sold his share in the suit premises to the respondent. In view of the decision I have reached on this matter and since the sale agreement might be the subject of subsequent proceedings I wish to say no more on the same. Suffice to state that such renunciation cannot replace the need to inform the beneficiaries and name them in the petition. It cannot also take the place of the need for citation.

The respondent too never sought and obtained a letter from the local Chief before he commenced the succession proceedings. His response is that a Chief's letter is not a legal but administrative requirement. I do not think that the respondent is right in that assertion. The central role that the Chief or indeed the provincial administration play in succession matters is to be found in section 46 of the Law of Succession Act. The need for the chief to provide information as regards the deceased, his estate and beneficiaries has almost become a mandatory requirement. As correctly submitted by **Mr. Macharia,** it has now acquired the status of an established custom or usage as no grant can be applied for without the letter which is meant to protect beneficiaries and the estate of the deceased from plunder. It is also calculated to avoid situations where other beneficiaries are short changed as it happened in this case.

In the end I have come to the unassailable conclusion that the grant in the magistrate's court was obtained by the respondent fraudulently by making of false statements and concealment from court of something material to the case and also by means of untrue allegation of a fact essential in point of law as I have endevoured to demonstrate in the body of this ruling. Accordingly, the confirmed grant issued to the respondent in Murang'a PM.SUCC. Cause No.109 of 1997 is hereby revoked. However since the parties involved in this dispute are siblings, I make no order as to costs.

Dated and delivered at Nyeri this 29th day of October, 2009.

M.S.A. MAKHANDIA

JUDGE