



REPUBLIC OF KENYA



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**In re Estate of Kasia Mbuvi Kitiga (Deceased) (Succession Cause
839 of 2010) [2023] KEHC 23150 (KLR) (26 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23150 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 839 OF 2010**

MW MUIGAI, J

SEPTEMBER 26, 2023

**N THE MATTER OF THE ESTATE OF KASIA MBUVI
KITIGA (DECEASED)**

BETWEEN

KIMUYA MBUVI 1ST PETITIONER

NGULI MBUVI (DECEASED) 2ND PETITIONER

AND

KIMEU KIILU 1ST OBJECTOR

KATEVE KIILU 2ND OBJECTOR

MUTUNGA KIILU 3RD OBJECTOR

AND

ALFA MWANGANGI KIOKO APPLICANT

RULING

Court Record

1. The deceased Kasia Mbuvi Kitiga died intestate on 27th July, 1993 as per death certificate No.371776.
2. Kimuya Mbuvi and Nguli Mbuvi petitioned for letters of administration intestate on 23/11/2010 and annexed the following documents;-
 - a. Death certificate
 - b. Chief's letter dated 26/10/2010



3. The Chief's letter dated 27th May, 2010 from Watema Location indicated that the Deceased had no family and therefore his brothers would sub-divide his parcel of land among themselves namely –
 1. Kiilu Mbuvi – brother
 2. Nguli Mbuvi – brother
 3. Kimuya Mbuvi – brother
4. The deceased left behind the Plot No.799 Kasunguni Adjudication.
5. After gazettelement of 4th March, 2011 the Grant of letters of Administration was issued at Machakos on 2nd May, 2012 to Kimuya Mbuvi and Nguli Mbuvi.

Summons:

6. The Applicants filed summons dated 26th July, 2012 and sought the following:-
 - a. Spent
 - b. The Respondents be stopped from intermeddling with Parcel No.799 by trespassing into it and constructing building thereon and preparing a site for constructing a temporary church and using the land as church and excluding the Administrators access to the land to prepare the same for distribution and cutting down trees and also preparing gardens for planting.
7. The summons was supported by the Affidavit sworn by Kimuya Mbuvi one of the Administrators on even date deposing as follows; the Respondents have forcibly kept the Administrators out of the plot and they have made the land a church compound and started constructing, they are abusing the Administrators and threatening to have them killed by demons and using abusive slogans; the Respondents have prevented the Administrators from taking possession of the land and have threatened to injure whoever dares to step on the land; the Administrators are not able to distribute and fence the said parcel despite the fact that they are entitled to it.

Summons for Revocation

8. The Objectors/Applicants filed summons for revocation dated 9/10/2012 seeking the following orders:
 - a. Spent
 - b. The grant of letters of administration made to Kimuya Mbuvi & Nguli Mbuvi on 2/05/2012 be revoked.
 - c. Fresh grant of letters of administration of the deceased's estate do issue to the Applicants herein Kimeu Kiilu & Kateve Kiilu jointly.
 - d. The Petitioners/respondents, their relatives, servants/ agents be restrained from interfering with the applicants occupation and use of parcel No.799 situated at Kola.
 - e. Costs of the application be borne by the petitioners.
9. The summons is based on the grounds that the Applicants have been in occupation of parcel No. 799 for the last 33 years; the petitioner obtained the grant without knowledge and consent of the applicants yet they do not have any interest whatsoever in the said property.



Summons for Revocation/ Annulment of Grant

10. Alfa Mwangangi the Applicant herein filed summons for revocation or annulment dated 23rd August, 2021 and sought the following orders:
 - a. That the grant of letters of administration made to Kimuya Mbuvi and Nguli Mbuvi on the 2/05/2012 be recalled and revoked or annulled.
 - b. That this Court list Alfa Mwangangi Kioko as the sole beneficiary to the estate of Kasai Mbuvi Kisiga.
 - c. That this Court issue a fresh grant in the name of Kimuya Mbuvi and Alfa Mwangangi Kioko as Administrators.
 - d. That this Court order that the Objectors do vacate land parcel No. Makueni/Kasunguni/799 and to allow the Applicant to put up a house on the land pending the hearing and determination of this cause.
 - e. Costs of this application.
11. The summons is supported by the Affidavit in Support sworn by Alfa Mwangangi Kioko on even date deposing that;
 - a. The deceased herein was his father who separated with his mother when he was young.
 - b. After the separation he went to live with his mother in Athi River. He lost touch with the father's family till late 2020 when Kimuya Mbuvi (Petitioner) a brother to the deceased came looking for him.
 - c. Kimuya Mbuvi informed him that his father had since died which made him and his late brother Nguli Mbuvi (co-petitioner) to petition for letters of administration with the sole aim of protecting the Applicant father's estate which was being wasted by the Objectors.
 - d. On 16th January 2021 the deceased's clan (Amutei Clan Association) deliberated on the applicant's inheritance as the son of the deceased Kasai Mbuvi Kisiga and recognized him as his son and sole beneficiary of his estate and in particular land parcel Makueni/Kasunguni/799.
 - e. The grant issued on 2nd May, 2012 be revoked and a fresh grant be issued to his uncle Kimuya Mbuvi and the Applicant.
 - f. The objectors are not only wasting the deceased estate but are also trying to disinherit.

Replying Affidavit

12. The Objectors filed their Replying Affidavit sworn on 17th November, 2021 stating that the Applicant has admitted that it was the Petitioner and clan who looked for him to come and claim interest in the property.
13. The said applicant is a son of one Kioko and has his share of land in Yatta where he was born and there is no evidence placed before this Court either medical or otherwise to prove that the Applicant is a son to the deceased.
14. The Applicant cannot surface almost 50 years after he was born and claim interest in the estate.
15. The Petitioner Kimuya Mbuvi is a person has several frivolous cases ie. CMCC No.33 & 332 of 2015 and 2012 at Machakos.



Further Affidavit

16. Kimeu Kiilu one of the objectors filed his further affidavit sworn on 22/11/2021 stating that on 16/10/2021 he attended a funeral of a brother to Applicant herein one Dickson Kikwau Thuka and he confirmed that the Applicant comes from Mutulani and that he is a brother to the deceased Dickson Kikwau Thuka.
17. The Applicant herein introduced himself as a son to Lukas Matheka and Tabitha Mbuta and even in the eulogy the Applicant was listed as one of the deceased's brothers.

Court Proceedings

18. The hearing commenced on 22/02/2023. The Petitioner called 3 witnesses while the Objector called only one witness in support of their case.

Petitioner's case

19. Pw1 Kimuya Mbuvi told the Court that the deceased herein (Kasia Mbuvi) was his brother. The deceased had a child who left with the mother when he was young. The child later came to Kasunguni and schooled there. Later he went to his mother who lived at Athi River and got employed. When the deceased herein passed on he got the Title deed for the shamba of the deceased. He later on went looking for his deceased brother's son and gave him his father's land. The clan met and the son was given his father's shamba.
20. On cross – examination by Mr. Tamata he retaliated that the chief's letter of 26/10/2010 indicated that the deceased had no child. He did not have any document to show that the Applicant (son) was born of the deceased. The Applicant and the late Kikwau are step brothers.
21. Pw.2 Alfa Mwangangi Kioko told the court that his mother Mbuta Thoka was married to his father Kasia Mbuvi Kitiga. He was born on 21/05/1970 at Kasunguni. He left with his mother to Athi River. He later returned to Kasunguni and lived with his father. Due to lack of proper upkeep he asked his father to allow him go back to his mother and he agreed. My mother later got married at Mwala to one Kioko and he obtained the national ID card with the name of Kioko (his step father).
22. On cross examination by Mr. Tamata he reiterated that his late father died in the year 1993. He came to court to claim his right in 2021. He do not have any letter form the chief showing that he is a son of the deceased. Kimuya Mbuvi and Nguli Mbuvi brothers to the deceased are the administrator of his father's estate and they obtained the grant in 2012.
23. Pw3 Paul Molo Mbuvi told the Court that the Applicant's mother was his sister. The whole family knows that the applicant is a son of the deceased and his late sister.
24. On cross –examination by Mr. Tamata he stated that his sister was married to the deceased herein. About the Applicant's brother he does not know. He do not know the age of the Applicant. He had that the deceased died but he did not attend the funeral.

Objectors Evidence

25. Dw1 Kimeu Kiilu Festus told the Court that the deceased herein was his uncle. His father Kiilu Mbuvi was a brother to the deceased and the Chief's letter of 26/10/2010 indicated that the deceased had 3 brothers namely, Kiilu Mbuvi, Nguli Mbuvi and Kimuya Mbuvi. The applicant herein is not a son of any of the listed brothers. The deceased herein died in 1993 and he heard of the Applicant in 2021 when he claimed for the portion of the land. The said property is for the family of Kiilu and the Applicant



has never come to the land. His two brothers Nguli Mbuvi and Kimuya Mbuvi petitioned for grant of letters for administration.

26. On cross examination by Alfa/Applicant he told the court that the case started in 2012 and he did not attend as the matter is in court. The deceased was vulnerable and they took care of him and gave his a good send off and he left him on the land. Mutunga bought the land since he could not sell it to a stranger.

Written Submissions

Objector's Submissions

37. On the issue of whether the applicant was a son/beneficiary to the deceased it is submitted that the applicant in this matter did not stay with the deceased or has ever resided or utilized any part of the estate
38. The Chief's letter indicated that the deceased had no child and no other letter has been produced to contradict the earlier letter issued during the commencement of this succession. No clan member was called to confirm or support the evidence of the Applicant.
39. There is no document in form of birth certificate, baptismal card or identify card bearing names of the deceased.
40. A child as defined in Section 3(2) of *Law of Succession Act* as
- “References in this Act to “child” or “children” shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility”
40. In the case of *Re-estate Patrick Mwangi Wathiga (deceased)* 342 of 2005 [2015] eKLR the Court stated thus;
- “In my view, the practice of persons emerging after the demise of a deceased person purely to claim a share of properties of the deceased person should be discouraged unless the alleged claimant can demonstrate that there were attempts to have him or her recognized as a beneficiary/member of the family during the deceased's life time, or the deceased left clear instructions to that effect, or his claim can be reasonably inferred from the express or implied circumstances of the case including the conduct of the deceased or from such reasonable or probable circumstances that can be proved by way of evidence. Alternatively, such a claim can also be admitted if the claimant demonstrates that he was prevented from associating with the deceased during the deceased's life time by either infirmity of body or mind or both or any other reasonable circumstances. In my view, where someone remains delinked from a family or the person he claims to be a parent for 24 years and only emerges after his/her death, the burden lies on him/her to establish his claim to the deceased's estate and tender such evidence as may be necessary to establish his claim.”
41. It is finally submitted that all indication on Record shows that the applicant was brought up by one Kioko and has no connection with the deceased.
42. The Applicant did not file any submissions.



Determination

43. The Court considered the pleadings, oral evidence on record and submissions by the Respondent and finds the issue for determination is whether the Applicant, Alpha Mwangangi was/is son of the deceased herein Kimuya Mbuvi Kitiga who died on 27.7.1993.
44. For the Court to determine the legal question whether the Applicant Alpha is the son of the deceased and therefore as sole beneficiary he is entitled to the deceased's property Plot No 799 Kasunguni Adjudication Section, the Applicant and/or witness must/ shall adduce evidence.
45. Section 76 of the *Law of Succession Act* [1] provides as follows:-

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 notwithstanding that the allegation was made in ignorance or inadvertently;
46. The grounds upon which a grant may be revoked or annulled are thus statutory and it is incumbent upon any party making an application for revocation or annulment of grant to demonstrate the existence of any, some or all the above grounds.
 47. In *Lewis Karungu Waruiri vs Moses Muriuki Muchiri* HCC106 of 2012 case considered the following on the burden of proof.
 48. All cases are decided on the legal burden of proof being discharged (or not) as was held Lord Brandon in *Rhesa Shipping Co SA vs Edmunds* as follows;

“Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britstone Pte Ltd vs Smith & Associates Far East Ltd*[8] :-

The Court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

With the above observation in mind, the starting point is that whoever desires any court to give judgement as to any legal right or liability, dependent on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person.”

49. The dispute reining in the instant case on who the beneficiaries of the deceased's were/are can only be proved by evidence adduced from the party that seeks to be considered named and determined as beneficiary of the estate of the deceased herein, surviving spouse(s), child/children of the deceased and where they are deceased or the decease was alone remained single and/or had no family then the



beneficiaries of the estate are from the extended family in order of consanguinity, surviving parent(s), sibling(s) cousin(s) nephew(s) and/or nieces etc.

50. Therefore, the burden of establishing all the allegations or claims to the estate of the deceased herein Kasia Mbuvi Kisiga is on the Applicant Alfa Mwangangi Kioko who filed the instant applications seeking revocation of grant on 11/10/2012 & 8/9/2021 against the grant issued on 2/5/2012 to Kimuya Mbuvi & Nguli Mbuvi brothers of the deceased.
51. The burden and standard of proof which in civil cases is on a balance of probabilities rested on the Applicant and in law he was under an obligation to discharge the said burden. It's not enough to state that the deceased was his father. He ought to have supported the said allegation by adducing the necessary supporting evidence.
52. Applying the said legal principles on the facts/evidence in the instant case, PW1 brother to the deceased, PW2 the Applicant who claimed is son of the deceased and PW3 Uncle to the Applicant, brother to deceased's mother testified that the applicant is son to the Deceased.
53. However, apart from alluding to this fact; the evidence adduced did not have direct evidence from the Clan that heard and determined that the Applicant was the son of the deceased; Minutes/Report by the Clan is not sufficient without witness to test credibility of the witness and veracity of the evidence through cross- examination.
54. The Applicant did not produce Birth Certificate showing the deceased was his father, Identity Card with the deceased's name, Funeral photographs and/or Program that contain named family members of the deceased or evidence that the Applicant interacted with the Deceased as his father lived or visited him he paid school fees and expenses or took him to school or any other contact/interaction activity the Applicant took with the deceased during his lifetime.
55. On the other hand, the Respondent DW1 Kimeu Festus objected to the Applicant being son and beneficiary to the deceased's estate because, he and PW1 the other brother of the deceased, they took care of the deceased when he was sick and vulnerable and, on his death, gave him a befitting funeral and they were left the deceased's land and resided on since then to date. He never saw the Applicant or heard of him until 2012, when they filed for grant of letters of administration as the deceased died intestate. DW1 stated, the Applicant lived and was stepson to Dickson Kikwau Thuka and produced and annexed the Funeral Program of Dickson Kikwau Thuka where the Applicant Alfa Mwangangi was named as part of the family. He could belong to both families at the same time.
56. From the above summary of evidence on record, this Court finds that the Applicant's testimony and evidence falls way short of proof on a balance of probabilities that he was/is son of the deceased and beneficiary of the deceased. He appeared on the scene from 1993 when the deceased died in 2012, after PW1 sought him out and told him to come and take over the land and PW3 stated he was aware that his sister was married to the deceased and had a child the Applicant later they separated and they moved to Athi River where she lived with her son with Kioko. To appear after all the years and claim that he was son to the deceased without contact with the deceased, proof of paternity/DNA testing or any other evidence is farfetched and in the circumstances unreasonable to pounce on the deceased's brothers who have resided on the suit property LR Makueni/Kasunguni/799 over the years and inherit the same as son of the deceased without tangible and cogent proof.
57. The Applicant has not proved any of the grounds for revocation of grant under Section 76 of Succession Act to warrant revocation of Grant.



Disposition

58. The Application for revocation is dismissed.

RULING DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS THIS 26TH SEPTEMBER, 2023 (VIRTUAL/PHYSICAL CONFERENCE).

M.W.MUIGAI

JUDGE

