



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 2158 OF 1999

IN THE MATTER OF THE ESTATE OF WAINAINA IMEKE (DECEASED)

RULING

1. Wainaina Imeke, the deceased herein died intestate in Lusegeti, Kiambu District on 27.3.99 at the age of 88 years. The circumstances of his death are tragic as it said that he was murdered and his body burned by an unknown person. The record shows that a grant of letters of administration in respect of his estate was on 23.11.99 issued to Serah Njoki Mubi (Serah) and Joseph Mbugua Gichuki (Joseph). In their application for the Grant, Serah and Joseph described themselves as the deceased's wife and son respectively. They also indicated that the deceased was survived by Peter Ngonde Gitau, a purchaser, his 2 wives Hannah Mugure Wainaina and Serah, and 3 sons, Joseph, Peter Kibutha Wainaina and George Kinyanjui Wainaina. The estate of the deceased comprised of a property known as Title No. Karai/Karai.119 (the suit property). The Grant was confirmed on 20.12.99 and certificate of confirmation of grant of even date indicates that the estate of the deceased was distributed amongst his listed survivors.

2. Martha Wanjiru Njuguna (Martha) filed a summons dated 30.3.16, seeking revocation of the Grant. She filed the summons on her own behalf and of that of her sisters Mary Mwihaki and Rachel Wanjiku and her brother Peter Kibutha Wainaina, all children of the deceased. Martha averred that Joseph is a nephew to the deceased while Serah is unknown to the family. The Grant was thus obtained by strangers to the estate of the deceased. The Grant was obtained fraudulently without the involvement of the children of the deceased and confirmed before the expiry of 6 months. Martha also averred that it was claimed that Peter Ngonde was a purchaser of 2 acres of land but there was no documentation to support the claim. In the application for confirmation, Joseph had indicated that Peter had purchased 0.215 without indicating the units but in the certificate of confirmation, he was given 0.809ha.

3. Martha further averred that one John Joseph Kinyanjui fraudulently had his name included in the deceased's title to the suit property, but in HCCC No. 36 of 1998, the Court declared that he had no right to the suit property. Also seeking to get half share of the suit is her maternal uncle Njenga Kibutha. Through a nonexistent Kiambu Case No. 129 of 1979, Njenga Kibutha caused his name to be registered as co-proprietor in equal shares, of the suit property on 7.9.99. Njenga Kibutha proceeded to partition the suit property into 2 parcels, namely Karai/Karai/2018 and 2019. The application for consent to partition was made on 6.7.99 after the demise of the deceased yet there was no administrator appointed in respect of the estate of the deceased.

4. In his replying affidavit sworn on 10.5.16, Peter averred that he is a friend and neighbor to the deceased. Prior to his demise, the deceased *vide* an agreement dated 21.6.98, sold to him a 1-acre portion of the suit property for Kshs. 150,000/=. The agreement was witnessed by Joseph. He paid a deposit of Kshs. 80,000/= and the balance of Kshs. 70,000/= was paid on 19.7.98. On the authority of the deceased, he took possession and built his matrimonial home and has since lived thereon uninterrupted. On 28.12.98, the deceased sold to Peter another ½ acre of the suit property for Kshs. 80,000/=. He paid a deposit of Kshs. 10,000/=. On 30.1.99, he paid Kshs. 35,000/= and the balance of Kshs. 35,000/= was paid on 27.2.99, which the deceased acknowledged. Following the demise of the deceased, his 2 sons Peter Kibutha Wainaina and George Kinyanjui Wainaina (now deceased) *vide* agreement dated 13.7.99 sold him a further ½ acre of the suit property for the sum of Kshs. 80,000/=. When Serah and Joseph Mbugua applied for the Grant, they named him a beneficiary and he was allocated 0.809 ha of the suit property.

5. Peter went on to state that on 1.2.15, Peter Kibutha lodged a complaint with the Kiambu DCIO accusing him and other people of invading the suit property. After investigations and forensic examination of the agreements produced by Peter, the DCIO sought legal advice from the Director of Public Prosecutions (DPP). The findings of the DPP were that the complaint was without basis and advised Peter Kibutha to seek civil remedy. Peter urged that the summons be dismissed with costs.

6. On his part, Joseph swore a replying affidavit on 5.7.16 denying all the allegations by Martha. He averred that he and Serah applied for the Grant with the full knowledge of the children of the deceased. He stated that Serah was the first wife of the deceased while his other wife Hannah Mugure Wainaina was mentally ill. He applied for the Grant because the sons of the deceased Peter Kibutha and George Wainaina informed him that it was the deceased's wish that he does so, and none of the deceased's children complained. He further stated that the mode of distribution of the estate was in accordance with what had been agreed upon by the sons of the deceased. He has endeavoured to protect the suit property from being wasted and grabbed and has never had any interest to have the same registered in his sole name.

7. Njenga Kibutha in his replying affidavit sworn on dated 12.4.16 dismissed Martha's allegations as dishonest and defamatory. He averred that he and the deceased entered into an agreement in which Njenga Kibutha would pay to the then Kiambu County Council, the processing fee for the title to the suit property in exchange for half portion of the suit property comprising 6 acres. The deceased reneged on the agreement prompting Njenga Kibutha to file a dispute before the Kikuyu Division Land Disputes Tribunal. The Tribunal's award in favour of Njenga Kibutha was on 23.3.99 entered as a judgment in Kiambu the SPMCC No. 129 of 1979. High Court Civil Appeal No. 429 of 2000 filed by the Administrators was dismissed. By an order of 8.4.03, Hon. Rimita, J ordered the Deputy Registrar to sign the transfer in Njenga Kibutha's favour, following refusal by the Administrators. Thereafter Njenga Kibutha and the deceased were registered as equal owners of the suit property. Upon subdivision of the suit property by the district surveyor, Njenga Kibutha's portion was allocated Title No. Karai/Karai/2018 while the remainder was allocated Title No. 2019. The green card went missing thereafter. Any claim by Martha against him should be made to the Environment and Land Court and not this Court. Njenga Kibutha stated that his interest in the suit property is just his 6 acres and no more.

8. In her answer to replying affidavit sworn on 17.8.16, Martha reiterated her averments in her supporting affidavit.

9. Parties filed written submissions which I have duly considered. The following are the issues that emerge for determination:

- i) Whether the Grant should be revoked.
- ii) Whether Peter Ngonde Gitau is a *bona fide* purchaser of 2 acres of the suit property
- iii) Whether Njenga Kibutha obtained half share of the suit property through fraud

Whether the Grant should be revoked

10. The grounds upon which a grant may be revoked are stipulated in Section 76 of the Law of Succession Act which 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 any 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 order or allow; 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

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

11. It is not disputed that Joseph is a nephew of the deceased. He admitted as much. Martha stated that Serah was not a wife to the deceased as stated but a stranger. This was not rebutted by Serah because at the time the Summons was filed, she was deceased. This fact came out in the submissions filed by Martha. At the time of applying for the Grant, Serah and Joseph were obligated to obtain the consent of all those entitled to the Grant in priority to them and to involve them in the proceedings to obtain the Grant. This is what is required by Rule 26 of the Probate and Administration Rules which provides in part:

(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.

12. I have carefully perused the record and I find no consent of Martha nor of her sisters Mary Mwihi and Rachel Wanjiku. Indeed, the 3 sisters were not listed as survivors or beneficiaries of the deceased. Further, in the petition for the Grant, Serah and Joseph described themselves respectively as wife and son of the deceased, a fact they both knew to be false. Additionally, Serah and Joseph proceeded to obtain the confirmation of the Grant before the expiry of 6 months and without involving of the family of the deceased or obtaining their consent. In his affidavit in support of the application for confirmation of the Grant, Joseph indicated *inter alia* that he and Serah were to get

0.607 ha and 0.405 ha respectively, of the suit property. This is what the certificate of confirmation dated 20.12.99 indicated. No provision was made for the daughters of the deceased.

13. The foregoing factors taken together demonstrate that the Grant was obtained fraudulently by the making of a false statement *to wit* that Serah and Joseph were respectively the wife and son of the deceased. Further there was concealment from the court of something material to the case, *to wit* that the deceased was also survived by 3 daughters. Had these facts been made known to the Court, the Grant would not have been issued to Serah and Joseph. In light of the foregoing, I am satisfied that the statutory grounds for revocation of the Grant have been established. The Grant can therefore not stand. In this regard, I am duly guided by the holding in the case of Keneth Litswa Asega v Alice Muhonja [2016] eKLR. the Court of Appeal while upholding the superior Court's decision to revoke the grant therein stated:

There is no doubt that under Section 76 of the Law of Succession Act, the court is empowered to revoke or annul a grant where it is satisfied that such grant was procured through fraud, concealment of material facts or misrepresentations.

Whether Peter Ngonde Gitau is a bona fide purchaser of 2 acres of the suit property and Whether Njenga Kibutha obtained half share of the suit property through fraud

14. These 2 issues will be considered together due to their conceptual similarities. It must be noted that in the summons, Martha made no claim against Peter Ngonde Gitau or Njenga Kibutha. Accordingly, the only order that this Court may competently consider is the order for revocation of the Grant as sought in the summons.

15. All the averments relating to Njenga Kibutha and Peter Ngonde Gitau regarding the suit property do not support the Applicants' prayer in her summons. That evidence goes to no issue and must be disregarded. This was well captured in the case of Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR where the Court of Appeal cited with approval the Supreme Court of Nigeria case ADETOUN OLADEJI (NIG) LTD Vs. NIGERIA BREWERIES PLC S.C. 91/2002, where Judge Pius Aderemi J.S.C. expressed himself thus:

"...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

16. To ask this Court to make a determination as to whether Njenga Kibutha is entitled to ½ share of the suit property is to ask the Court to exercise jurisdiction of which it was stripped by Article 165(5)(b) of the Constitution of Kenya, 2010 which provides:

The High Court shall not have jurisdiction in respect of matters—

(a) ...

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

17. Article 162(2) stipulates the matters outside the jurisdiction of this Court:

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

18. In the result I find that the Summons dated 30.3.16 as prayed is merited and make the following orders as are necessary for the ends of justice:

i) The grant of letters of administration issued to Serah Njoki Mubi and Joseph Mbugua Gichuki on 23.11.99 and confirmed on 20.12.99 is hereby revoked.

ii) All transactions made pursuant to the said Grant are hereby nullified.

iii) Serah Njoki Mubi and Joseph Mbugua Gichuki shall bear the costs of the summons.

DATED, SIGNED AND DELIVERED IN IN NAIROBI THIS 24TH DAY OF SEPTEMBER, 2021

M. THANDE

JUDGE

In the presence of: -

..... for the Applicant

..... for the Respondent

..... for the Respondent

.....Court Assistant