



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

SUCCESSION CAUSE NO. 470 OF 2011

IN THE MATTER OF THE ESTATE OF THE LATE WANJIRU KAGUMA alias WANJIRU KAGIMA (DECEASED)

DAVID MACHARIA MWANGI)

ESTHER WANJIRU MWANGI)

TERESA NYAMBURA MWANGI)

ANNETA WAMBUI WANJIRU).....APPLICANTS

VERSUS

DAVID KIMANI MWANGI..... RESPONDENT

RULING

1. The estate relates to the late **WanjiruKaguma alias WanjiruKagima (deceased)** who died on the 28th February, 2003;
2. The Grant in dispute was issued on the 23rd August, 2011 to the respondent herein one David Kimani Mwangi; who on the 2/02/2012 proceeded to apply for the Confirmation of the Grant and the Certificate of Confirmation was issued on the 20th July, 2012;
3. The applicants filed the application on the 2/12/2013 under the provisions of Section 76 (a) (b) and (c) of the Law of Succession Act and Rule 44(1) of the Probate and Administration Rules stating that the deceased was their grandmother and also the registered owner of Tetu/Muthiaini/1185 subject property; the respondent was their cousin and in the application they claim that the respondent had obtained the Grant to the deceased's estate without disclosing to the court that there were other beneficiaries who were occupants of the subject property; they sought the revocation/annulment of the Grant on the following grounds;
 - (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.
4. The applicants relied on the Supporting Affidavit made by one of the applicants one David Macharia Mwangi on the 2/12/2013 on behalf of the other co-applicants; the respondent filed his response to the application on the 28/02/2014;
5. Directions were taken on the 28/09/2012 that the matter proceed for hearing by way of '**viva voce**' evidence; at the close of the proceedings the parties were directed to file and exchange written submissions; hereunder is a summary of the applicant's case and the petitioner's response;

APPLICANT'S CASE

6. David Macharia Mwangi (**PW1**) testified on behalf of the applicants; his evidence was that one Kaguma Wathiai was polygamous and had three (x3) wives named;

(i) Wambui Kaguma-

(ii) Mumbi Kaguma; and

(iii) Wanjiru Kaguma

7. That he belonged to the third house of Wanjiru Kaguma who was his grandmother; she died on the 28/02/2003 and he produced a copy of her death certificate which was marked as 'PEXh.1'; the deceased was survived by David Macharia Mwangi, Esther Wanjiru Mwangi, Teresa Nyambura Mwangi and Anneta Wambui Wanjiru, the applicants;

8. His grand-mother being barren married his late mother Mary Muthoni under Kikuyu Customary law and raised the applicants as her surrogate children; that the applicants' mother was not a tenant nor was she ever employed as a worker; she took care of their grand-mother as none of her relatives used to look after her; before their mother passed on she had moved to Mweiga to look after their maternal grand-mother; that the reason for not having buried his mother on the subject property was due to the lack of finances needed to transport the body from Mweiga to the subject property; and he had sought permission from the elders for his mother to be buried in Mweiga and the elders were in attendance at the funeral held in Mweiga;

9. The deceased was the registered owner of her portion of the land known as Tetu/Muthiaini/1185; the original Certificate of Title was in his possession as he had paid off the deceased's loan with Nyeri Farmers Sacco Society; he produced the copy of the title and it was marked as 'PEXh.2'; his evidence was that they were the rightful heirs to the deceased's estate entered on the subject property in 1992 and resided thereon together with his siblings ever since; and that he had un-interrupted possession of the subject property for 23 years and there were developments erected thereon by himself and his siblings;

10. To buttress their claim the applicants called MwangiKaguma (PW2); whose evidence was that he was from the first house, he was also the clan elder and was aged 91 years; the deceased was his step-mother; he knew the applicants and the respondent who were all grandchildren of the deceased; the applicants are from the third house whereas the respondent was from the second house; the respondent's father was Elijah Mwangi Kaguma who was PW2's step-brother and was from the second house;

11. The larger shamba belonged to his father and that it was divided into three portions and that he (PW2) was the one who had caused the division of the land into three (3) portions; PW2 had his own portion that was registered in his own name, the respondent's father had a portion registered in his name and a portion went to Wanjiru Kaguma and it was registered in her name;

12. He confirmed that the deceased had married the applicants' mother under Kikuyu customary law and that he had been present with others escorted the bride price when it was taken; the applicants' mother had been recognized by the family as a wife; and the deceased had in turn adopted the applicants; his testimony was that the applicants were the rightful heirs to the deceased; under cross-examination PW2 admonished the respondent for having not involved the other beneficiaries when he undertook the processing of the petition and the title; that no objection was made to the grant as the respondent had done everything in secrecy;

13. He reiterated that the respondent's inheritance was in the second house and that he had no knowledge of Wanjiru having ever given the land to the respondent in her life time; that the applicants were not tenants on the land and that the respondent was the one who had encroached onto Wanjiru's estate;

14. Christopher Ndirangu (PW3) stated that he had known the family for over 60 years; there were three households; the first house was Wambui's, the second house was that of Mumbi and the third house was Elizabeth Wanjiru Kaguma's; he confirmed that he knew the applicants and the respondent; he recalled Elizabeth Wanjiru Kaguma the deceased did not have children and to salvage her marriage she married the applicants' mother; the applicants lived on deceased's property as their home;

15. The applicants prayed for the Grant to be revoked as the respondent had not involved the applicants in the process of obtaining the Grant nor had he disclosed to the court the existence of the dependants of the deceased;

16. Case law relied on **Re Estate of Mbondo Kata (deceased) [2018]eKLR; Samuel wafulaWasike vs Hudson SimiyuWafula CA Case No.253 of 1993.**

RESPONDENT'S CASE

17. The respondent, DW1, stated that the deceased was his grandmother on his father's side; the deceased had no children of her own; she was the third wife of his grandfather; because she was alone the respondent decided to be her helper together with his father; before she died in 2003 she had called family members and had given all her property to the respondent;

18. The respondent instituted succession proceeding on the deceased's estate in 2011; after getting the grant he realized that there was a restriction on the property filed by the applicants; he removed the restriction and got title in his name; he then asked the applicants to vacate the land because they were mere tenants; the applicants however teamed up with one of the respondent's uncle, Joshua Mwangi, and instituted the instant application for revocation of the grant;

19. DW2, Neli Gathoni Daniel, stated that she knew the deceased and that he had three wives; she knew the respondent who is a son of one Mwangi Kaguma (deceased); she also knew Wanjiru Kaguma (deceased) who was barren and therefore had no children of her own; she took the said Mwangi Kaguma as her own son; Mwangi Kaguma took care of Wanjiru Kaguma as his own mother; Wanjiru Kaguma declared that upon her death her property should be inherited taken by the respondent because of the support she used to get from Mwangi and his son; DW2 stated that the applicants were mere employees of the deceased and therefore have no basis of laying any claim to her estate;

20. Prayed for dismissal of the application.

21. The respondent prayed that the application for revocation of the Grant be dismissed and that he be awarded costs.

ISSUES FOR DETERMINATION

22. After hearing the evidence of the parties and upon reading their respective written submissions this court has framed the following issues for determination;

(i) Whether the respondent obtained the Grant through concealment of material facts; whether to revoke the Grant;

(ii) Distribution of the estate;

ANALYSIS

Whether the respondent obtained the Grant through concealment of material facts; whether to revoke the Grant;

23. Upon perusal of the court record it is noted that on petitioning for a grant of the letters of administration the respondent described himself therein as a grand-child; Section 66 of the Law of Succession Act (Act) sets out the hierarchy of the persons with rights to petitioning for the grant of the letters of administration; from the evidence adduced it is not disputed that **PW2** was the respondent's uncle and that he was alive and kicking; and that the respondent's mother was also still alive;

24. Under the provisions of Section 66 of the Act the uncle (**PW2**) being a step-son of the deceased has first priority over the respondent in petitioning for a Grant for letters of administration; the respondent's mother who can be described as a step-daughter in law also ranks in priority to the respondent; this means that the respondent has an inferior right to theirs and before he initiated the process of petitioning for the Grant he ought to have notified them and also sought their consent as required by Rule 26(2) of the Probate and Administration Rules (**P&A Rules**); in the event that either the mother and/or the uncle were un-co-operative then he could have moved the court for citations to be served upon them; the court record it is noted is devoid of any notices, consents and or citations having being lodged or filed by the respondent;

25. The rules 7-14 of the P&A Rules also requires that the person petitioning must provide the particulars of the names of the surviving children of the deceased and the names of the children of any pre-deceased child of the deceased;

26. A cursory look at the Form P&A5 reflects that the respondent only named himself therein; **PW2** when giving evidence even admonished the respondent for having initiated the process in secrecy and having not involved any of the beneficiaries when he lodged the petition;

27. It was incumbent upon the respondent when petitioning for the grant to have included the names of his uncle and mother who were step-children of the deceased;

28. With regard to the interest of the applicants, the respondent contends that the relationship the applicants had with the deceased was that of landlord and tenant in that their mother had rented one of the nine rooms on the subject property; he testified that **PW1** took advantage of his kindness when he allowed him to be in charge of collection of the rents for the nine rooms that belonged to the deceased; and he further testified that the fact that the applicants late mother was not buried on the subject property clearly demonstrated and proved his contention of the non-existence of any relationship between the applicants and the deceased;

29. Indeed, the respondent's claim would have been water tight had he been the one in possession of the subject property and the original certificate of title; **PW1** adduced evidence on having paid off the deceased's loan and having been given possession of the Original Certificate of Title by the deceased and he produced it in evidence as '**PExh.1**'; he also stated that he had been in un-interrupted possession of the subject property for a period of 23 years;

30. The applicants' case was supported by the evidence of **PW2** and **PW3** who confirmed that the deceased being unable to get children married the applicants' mother under Kikuyu customary law; from **PW2**'s testimony it can be discerned that this marriage was never dissolved as at the time of the deceased's death; bearing this in mind the interests of the applicants in the third house cannot be overlooked;

31. From the evidence adduced this court is satisfied that at all material times the respondent was aware of the interests of the uncle, his mother and the members of the third house in the deceased's estate and failed to place this crucial information before the court when he petitioned for the grant of letters of administration;

32. This court is satisfied that the respondent obtained the Grant of Letters of Administration through concealment of material facts; and on this ground alone this court finds that this is a good reason to revoke the Grant of Letters of Administration issued to the respondent.

Distribution of the estate

33. This court having revoked the Grant issued herein it is then tasked with issuing a fresh grant of letters of administration to the estate of the deceased;

34. The evidence of **PW2** was that he was responsible for the sub-division of his father's property; he proceeded to sub-divide the land into three portions; the portion for the first wife was distributed to himself and registered in his name; the portion distributed to the second house was registered in the name of the respondent's father **Elijah Mwangi Kagume**; and the third portion distributed to the third house was registered in the name of the third wife the deceased herein; and it is this third portion that is the subject matter herein;

35. The evidence of **PW2** and **PW3** was that the deceased being unable to get children; this fact was also admitted by the respondents witness **DW2**; the deceased then married the applicants' mother under Kikuyu customary law; and it is apparent from the evidence adduced that this marriage was never dissolved as at the time of the deceased's death; **PW1** testified to being in possession of the original title document for the subject property and that he had resided on deceased's property for a period of 23 years; the fact that the deceased accommodated the applicants on her parcel of land can be deemed that she had taken them into her family as her own children; the applicants' status is therefore supported by the provisions of Section 29 of the Act; and this court is satisfied that the applicants were the dependants of the deceased and that she was survived by the applicants;

36. The evidence of the respondent can safely be ignored as can be discerned from the evidence of **PW2** who was the clan elder whose evidence this court found to be credible; his evidence was that respondent's inheritance lay in the second house and that he had no knowledge of Wanjiru ever having given the land to the respondent in her life time; and that the respondent was the one who had encroached onto Wanjiru's estate;

37. This court has inherent powers donated to it by virtue of Rule 73 of the P&A Rules which empowers this court to make any order as may be expedient so as to ensure the ends of justice is met; with this in mind the Grant issued to the respondent shall be revoked and a fresh Grant of Letters of Administration to the estate of the deceased shall be issued to **DAVID MACHARIA MWANGI** and **MWANGI KAGUMA**; the new administrators to file an application for the distribution of the deceased's estate which comprises of Tetu/Muthiaini/1185;

FINDINGS & DETERMINATION

38. In the light of the forgoing this court makes the following findings and determination;

- (i) The Grant is found to have been obtained through concealment of material facts;
- (ii) The application for Revocation of the Grant is found to have merit and it is hereby allowed;
- (iii) The Grant issued to the respondent herein one David Kimani Mwangi on the 23rd August, 2011 and the Certificate of Confirmation issued on the 20th July, 2012 are hereby revoked;
- (iv) Any title issued to the respondent **DAVID KIMANI MWANGI** touching on Tetu/Muthiaini/1185 is hereby cancelled; and the title to revert back to the estate of the deceased;
- (v) A fresh Grant be issued in the names of the applicant **DAVID MACHARIA MWANGI and MWANGI KAGUMA**; and the administrators to file an application for the confirmation of the Grant;
- (vi) Parties are at liberty to apply for further directions;
- (vii) This being a family matter each party shall bear its own costs;

It is so ordered accordingly.

Dated, Signed and Delivered at Nyeri this 30th day of April, 2020.

HON. A. MSHILA

JUDGE