



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

SUCCESSION CAUSE NO 109 OF 2016

**IN THE MATTER OF THE ESTATE OF ROBERT KARIUKI alias KARIUKI KIHANGU
(DECEASED)**

ALICE WAMBUI IGOGO

SARAH WAIRIMU IGOGO.....OBJECTOR/APPLICANTS

VERSUS

REUBEN GACHIBI KARIUKI.....ADMINISTRATOR/RESPONDENT

JUDGMENT

1. For determination is the Summons for Revocation or Annulment of Grant filed on 28th October, 2008 seeking that the Grant of Letters of Administration Intestate to REUBEN GACHIBI KARIUKI made on the 19th day of November, 2000 be revoked or annulled.

2. The summons is based on the grounds that the proceedings to obtain the grant were defective in substance and that the grant was obtained fraudulently by making of a false statement and concealment of material facts. The application is supported by the affidavit of ALICE WAMBUI IGOGO who deposed that together with her Co-Applicant, they are widows to the deceased's son one **Stephen Igogo**. She listed the deceased's children as Kibe Kariuki, Wangai Kigoto, Mbugua Kariuki, Igogo Kariuki, Mbugua Kariuki and Njoroge Kariuki. It was her contention that the consent of her husband and /or his wives to the petition for grant ought to have been obtained and that the Petitioner **Reuben Gachibi Kariuki** failed to disclose the existence of the deceased's written will. It was her contention that the deceased had by the alleged will distributed land parcel LR. No. KIAMBAA/RUAKA/71 whereby he excluded the Petitioner. Further, she deposed that as a result of this distribution a resultant portion LR. No. KIAMBAA/RUAKA/585 which is the asset listed in the petition for grant, was the portion granted to **Stephen Igogo** her late husband as a gift *inter vivos*. And which was therefore not available for distribution.

3. **Reuben Gachibi Kariuki** filed a replying affidavit on 19th December, 2008 in opposition. He deposed that the Applicants' husband gave his consent to his Petition for grant of letters of administration and for sharing of LR Kiambaa/Ruaka/585 where he has built permanent rental houses. It was his contention that the Applicants only objected to the mode of distribution after their husband's death alleging the existence of a will. He asserted that the grant of letters of administration was properly obtained and there was no fraud or concealment of material facts. The allegation that the suit property was a gift to the Applicants' husband was said to be false and misleading. He asserted that there is no basis for revocation of the grant.

In his further affidavit he stated that after the subdivision of the land parcel LR No. Kiambaa/Ruaka/71, his brothers held his share in trust as he was in prison at the time; and that upon his release he received his share of 0.75 acres from one of his brothers, Karomo on which he has developed permanent buildings. This according to him was as per the agreement dated 14/7/1986 between his brothers.

4. The court directed that the Summons be heard by way of viva voce evidence.

5. Sarah Wairimu Igogo adopted her affidavit and indicated that she was unaware of the Petition filed herein by the Petitioner herein and that the deceased herein gave her husband 2.5 acres of his land. She indicated during cross-examination that she is not aware whether her husband was involved in the filing of the Petition. She also admitted that the Reuben Gachibi Kariuki had developed permanent houses on the land parcel 585 during the lifetime of her husband who did not intervene. Questioned in regard to a subsequent succession cause filed in the subordinate court by herself and co-wife during the pendency of this matter, she claimed that they followed the normal process of succession.

6. Alice Wambui Igogo adopted her statement as evidence. In cross-examination, she contended that she was not aware that her husband had filed a succession cause together with the Petitioner. She admitted that the Petitioner had developed the land parcel no. 585 before her husband's death.

7. Reuben Gachibi Kariuki the Petitioner herein relied on his replying affidavit. It was his testimony that with the consent of his deceased brother **Stephen Igogo**, he filed the succession cause in respect of the deceased's estate comprising of land parcel number Kiambaa/ Ruaka/ 585. He denied the existence of a will in relation to that parcel of land. He indicated that he has developed his portion of land and none of his brothers ever disputed the said developments. During cross-examination, he stated that each wife from the three houses of his father, the deceased herein received five acres out of the original parcel no. 71 and that at the time, he was in prison and upon his release, found that part of his portion of land had been transferred to his brother Mbugua Karomo who agreed to share with him. He denied the allegation that the deceased had given parcel no. 585 to Stephen Igogo exclusively.

8. Eliud Kamau Kinyanjui, a former Assistant Chief in the deceased's location also adopted his statement. He stated in cross-examination that he was involved in the agreement between the Petitioner and his brothers regarding the sharing of the share of land due to their mother Wanjiku's household and that the land was apportioned by agreement.

9. JANE WAIRIMU GACHIBI adopted her statement. She testified that together with the Petitioner they have always lived on the land parcel no. 585 even during the lifetime of Stephen Igogo. She stated that she and her husband the Petitioner are claiming their share of the land given to the house of Wanjiku, the Petitioner's mother. Under cross-examination, she stated that deceased herein had shared his land equally among the three houses; that the Petitioner's brother Mbugua Karomo subsequently obtained a title deed in his name but in trust for the Petitioner as he was in prison.

10. Subsequently, parties were directed to file their written submissions. Only the Petitioner/Respondent filed his written submissions. He submitted that there is no material before the court to support the existence of a will and the same was not proved and that the Applicants have not tendered evidence before the court to warrant the revocation of the grant. In that regard, reliance was placed on the case **In Re Matheka & another vs Matheka Civil Appeal No. 304 of 2002**.

11. The court has considered the evidence tendered by the parties and submissions filed in 2011 pursuant to the directions of **Kimaru J** on 20/9/2010 and submissions filed upon the conclusion of the hearing before me. The court has also perused the record of the Kiambu SPM's Succession Cause No. 292 of 2000 wherein the impugned grant was issued to **Reuben Gachibi Kariuki** (the Respondent herein) in respect of the estate of **Robert Kariuki alias Kariuki Kihang'u** the deceased herein. From the material on record, there is no dispute that the deceased herein died on 10th May 1980. In his lifetime, the deceased had three wives with whom he had several sons. He owned a parcel of land described as **LR No. Kiambaa/Ruaka/71** measuring about 15.21 acres.

12. On or about 1979, the deceased subdivided the said land parcel into six portions, namely, Kiambaa/Ruaka/582 to 587. By the 1983 majority of these subdivisions which had apparently been gifted to the deceased's sons by his 3 wives were transferred to the sons' names pursuant to the deceased's wishes. Under that arrangement, the house of his wife Jane Wanjiku received a total of five acres. One son of Wanjiku, Mbugua Kariuki Karomo took parcel No. 586 (2.5 acres) and the balance parcel 585 measuring 2.5 acres though not transferred to his name, was held by **Stephen Igogo**, the second son of Wanjiku. The Respondent herein is the third son of Wanjiku and was incarcerated in prison during this period.

13. Upon his release, the Respondent had pursued his brother Mbugua Kariuki Karomo who ceded to him 0.75 acres of the land portion registered in his name being subdivision No. 586 measuring 2.5 acres. It appears that by the time the deceased died the parcel No. 585 had remained in his name, but according to Alice Wambui Igogo and Serah Wairimu Igogo, widows to the Respondent's brother **Stephen Igogo Kigoto** (now deceased) this was their husband's entitlement exclusively.

14. Upon the death of the Senior Robert Kariuki a petition for grant intestate was filed by the Respondent in respect of land parcel no. 585 a portion of which he asserts is his rightful entitlement. The only beneficiaries listed in the petition were the Respondent and Stephen Igogo Kigoto (Stephen) who apparently consented to the Petition. A grant was issued to the Respondent. However, Stephen died in 2001 before the grant to the Respondent could be confirmed and upon filing the summons to confirm the grant, was met with a protest filed by Stephen's widows on 25th March 2003. The widows claimed that their husband did not give consent to the grant issued to the Respondent and that the Respondent had no share in his father's estate as the subdivision No. 585 (hereafter the suit property) was bequeathed to their husband solely.

15. The protest had been heard almost fully when an application was filed for revocation of the grant. The application filed on 23rd August 2008 was later withdrawn and filed in the High Court on 28th October 2008. A new twist was introduced by the action by Stephen's widows, who during the pendency of the matter in the High Court, filed Kiambu CM's Succession Cause No.293 of 2012 and obtained a grant in respect of the estate of the deceased herein. By the confirmed grant issued on 30th November 2012 the two widows shared the suit property in equal shares. As expected, the Respondent applied to revoke the grant, and on 7th April 2014 the said grant was revoked, and all consequent transmissions cancelled.

16. The question now falling for determination is whether there are grounds to justify the revocation of the grant to the Respondent. The grounds stated in the summons filed on 28.10.2008 are the standard grounds for the revocation of a grant under Section 76 of the Law of Succession Act which provides that:

“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)....”

17. In support of the summons, the widows Alice Wambui Igogo and Sarah Wairimu Igogo (the Applicants) swore an affidavit which provides the flesh to the grounds on the face of the summons for revocation. They complain that:

- a) the grant was defective as it was issued to one rather than two administrators as required by Section 58 of the Law of Succession Act.
- b) the proceedings to obtain the grant were defective as they failed to disclose all the surviving children of the deceased and that their consent to the making of the grant was not obtained
- c) the Petitioner Respondent failed to disclose the existence of the deceased's will which did not include any bequests to the Respondent and that the suit property had been gifted *inter vivos* to Stephen by the deceased.
- d) the deceased Stephen did not consent to the grant, nor did the Applicants.

18. With regard to the first ground, the same can be dismissed right away as no continuing trust as anticipated by Section 58 of the Law of Succession Act was arising in this cause. On the second and last ground, there is no dispute that the deceased was survived by several children and that only Stephen and the Respondent were named in the Petition. On the face of it, Stephen consented to the making of a grant in favour of the Respondent. There is a signature besides his name in the relevant form which has not been disproved. The Applicants have not demonstrated that Stephen did not sign the consent form filed with the Petition. Section 107 of the Evidence Act provides that:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

19. The onus lay with the Applicants to demonstrate that their deceased husband did not participate in or consent to the making of the impugned grant. And as regards the non-inclusion of all the other persons who survived the deceased, it is evident that the suit property among other portions had already been gifted away. Indeed, the Applicants assert that it was a gift *inter vivos* for the sole benefit of their deceased husband. Seemingly, other beneficiaries having perfected their own gifts through transfer had no interest in the suit property and to date, none of them save the Respondent have laid any claim thereto in the period of over 20 years that the dispute has been in court. In my own view the failure to include the names of other persons surviving the deceased was not a deliberate attempt to conceal their existence but a product of the ignorance of the Petitioner and his brother who at the time were acting in person. The Applicants have not asserted that the inclusion of other beneficiaries would have had any bearing on the eventually sharing of the sole asset listed. There is no evidence of a fraudulent intention on the part of the Respondent in failing to include all the children/persons who survived the deceased. In my view therefore in the circumstances of this case, nothing turns on the failure.

20. The Applicants have stated before this court that the deceased died testate. The purported will of the deceased appears to be the same schedule of assets referred to in the Affidavit of protest filed on 25th March 2003 by the Applicants before the lower court. At paragraph 4 of that affidavit the Applicants had averred:

“THAT the deceased had Sub-divided his piece of land upon his wishes and the Administrator (Respondent) was denied as share as attached copy of his schedule of distribution duly signed by the deceased and other sons.”

21. It appears that it was only after the hearing of the protest got close to the end that the Applicants decided that the said schedule was a will (rather than a schedule of gifts), whose terms were seemingly executed in the deceased's life time as the beneficiaries except Stephen apparently took up their portions and transferred them into their names. In their affidavit supporting the withdrawn application to revoke

the grant, filed in the lower court on 13th August 2008, the Applicants having asserted the schedule to comprise a will, proceeded to state:

“THAT the deceased had on 15th September 1977 distributed his land namely KIAMBAA/RUAKA/71 to his sons then measuring 15.21 acres in the following manner:

- 1. Kibe Kariuki - 2.5 acres**
- 2. Wangai Kigoto - 2.5 acres**
- 3. Mbugua Kariuki - 2.5 acres**
- 4. Igogo Kariuki - 2.5 acres**
- 5. Mbugua Kariuki - 2.71 acres**
- 6. Njoroge Kariuki - 2.5 acres**

THAT all the sons of the deceased apart from our husband proceeded to extract their respective titles. Annexed hereto and marked “AW 12” are true copies of green cards/part B – proprietorship section of their respect titles subdivided out of the original parcel of land KIAMBAA/RUAKA/71”. (sic)

22. The withdrawn summons for revocation is an exact replica of the summons for revocation later filed before this court. Apart from the foregoing the Applicants have not attempted to bring this document within the provisions of Sections 5 and 11 of the Law of Succession Act. Indeed, while the document was always in their possession as the Protest was heard, at no time did the Applicants seek to assert it as a will of the deceased their position then being that it was a schedule of gifts *inter vivos* by the deceased to his sons. At the time the Applicants surreptitiously filed Kiambu CM’s Succession Cause No 293/2012 they asserted that the deceased had died intestate even after filing the present application asserting the contrary. The purported will in my considered view is at best a record of the gifts *inter vivos* given by the deceased to his children in their presence three years to his death or his wishes regarding the devolution of his estate upon his death. It is not a will and the Applicants themselves are not convinced that it is a will.

23. The deceased therefore died intestate, and clearly the wishes he had made excluded the Respondent who at the time was imprisoned. There is undisputed evidence that not only has the deceased resided on the suit land since the early 1960s, he also developed a home and commercial unit thereon during the lifetime of the deceased and also Stephen. The Applicants also admit that after the Respondent’s released from prison one of his surviving brothers Mbugua Kariuki Karomo ceded 0.75 acres of his gift to the Respondent. Through then area chief Ruaka, one Eliud Kamau Kinyanjui the Respondent adduced uncontroverted evidence that Jane Wanjiku Kariuki the mother to the Respondent, and to the late Stephen and Mbugua Kariuki Karomo (Karomo) had invited him to witness the agreement between the 3 surviving brothers to share their house’s share of their father’s land and that both the late Stephen and Karomo each ceded 0.75 acres to the Respondent from the subdivision parcels No.586 and 586 which measured 2.5 acres each. An agreement copy dated 14th July 1986 was attached to the Respondent’s further affidavit filed on 5th December 2011. The Applicants did not make any direct reference to the document but were hard pressed to explain the fact that the Respondent has continued to live on the suit land as an undisputed son of the deceased herein.

24. None of the widows was involved in the understanding between the Respondent and Stephen at the time of applying for the grant in this case. Evidently, as a son of the deceased who had died intestate, the Respondent was entitled to a share of the estate. The deceased had already allocated five acres to the house of Jane Wanjiku the mother of Stephen, Karomo and the Respondent. Under the law, all the sons were proper beneficiaries to that land and there could be no justification to exclude the Respondent from

benefitting therefrom. The admitted and proven actions by Stephen and Karomo in relation to the suit property signal a recognition of such entitlement by the Respondent.

25. By the time of the death of the deceased, the Respondent's mother Jane Wanjiku had already died. The sole property remaining in the deceased's name for the benefit of her house ought ideally to have been distributed in terms of Section 38 of the Law of Succession Act or as agreed by the children surviving the two parents. There is uncontroverted evidence that the latter was the case between the Respondent and the late Stephen in respect of the suit property. In the circumstances, the widows of Stephen cannot be heard to assert that the deceased herein had disinherited the Respondent in his lifetime.

26. Consequently, I find no merit at all in the application to revoke the grant herein and will dismiss it. This ruling effectively also disposes of the Protest in the lower court which was based on similar grounds as the revocation summons. In the circumstances and given that this dispute is already 20 years old, the court directs that a fresh grant issues in the joint names of the Respondent and Alice Wambui Igogo. Within 30 days of today's date a confirmed grant will issue in the joint names of the said administrators in the terms proposed in the summons to confirm grant filed on 21st February 2003 in the lower Court. Parties will bear own costs.

DELIVERED AND SIGNED ELECTRONICALLY THIS 23RD DAY OF JULY 2020

C. MEOLI

JUDGE