



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

SUCCESSION CAUSE NUMBER 245 OF 2004

IN THE MATTER OF THE ESTATE OF MUTURI WAWERU (DECEASED)

KINGORI KAHANGI.....APPLICANT

-VERSUS-

JOHANAH NDIRANGU GITHU..... RESPONDENT

SAMUEL KARIUKI KINGORI..... INTERESTED PARTY

JUDGMENT

The respondent petitioned for and was granted letters of administration intestate in respect of the estate of Muturi Waweru who died on 9 July 1999 at Mau Narok in Narok County, his last known place of residence. In the affidavit in support of the petition, he described himself as the deceased's stepson and the deceased's only survivor.

The grant was eventually confirmed on 1 March 2007. According to the schedule to the certificate of confirmation of Grant of the same date, the deceased's parcel of land referred to as Title No. Othaya/Thuti/200, measuring approximately 0.6 hectares and which comprise the only asset in estate devolved upon the respondent absolutely. He eventually sold it to Samuel Kariuki Kingori, the interested party.

By a summons for revocation or annulment of Grant dated 10 February 2011, the applicant has sought to have the Grant made to the respondent revoked or annulled on the grounds that it was obtained fraudulently by making of a false statement or by concealment from the court of something material to the case; that it was made by means of an untrue allegation of fact essential in point of law to justify the Grant; and that the Grant has become useless and inoperative due to subsequent circumstances. The summons is anchored on section 76 of the Law of Succession Act, cap 160 and Rule 44 of the Probate and Administration Rules.

According to the affidavit in support of the summons sworn by the applicant himself on 10 February 2011, the deceased was his uncle in the sense that he was a brother to his mother. He was neither married nor had any children and after the death of his sister, the deceased's closest kin alive is the applicant.

The applicant swore further that the respondent was not related to the deceased in any way and deliberately misled the court to believe that he was the deceased's step son.

As far as the deceased's estate is concerned, the applicant swore that he had been leasing this parcel of land to the interested party since the year 2002. However, on 28 May 2010 he received a letter from the interested party telling him that he was the registered proprietor of the deceased's land. He conducted a search at the lands registry and indeed confirmed that the interested party had been registered as the proprietor of the land. He later discovered from the court that the deceased's estate had been transmitted to the respondent through the present cause which he was not aware of.

The respondent opposed the application and in that regard swore and filed a replying affidavit on 17 October 2017. He admitted that the applicant was a son to the deceased's sister but denied that she was the deceased's only sibling; besides her, so he swore, the deceased also had a brother called Gathu, whom the respondent claimed to be his father. According to him, as much as the deceased did not have his own family the respondent was his closest kin because he was his nephew.

He also swore that according to the customs to which they subscribed, neither the applicant's mother nor her child could inherit the deceased's estate. He further claimed that the deceased bequeathed his estate to him.

The interested party also swore a replying affidavit in response to the summons for revocation or annulment of Grant. He deposed that he is

in occupation of what used to be the deceased's land having purchased it from the respondent. He swore further that he was a purchaser for value without notice of any dispute on ownership of the land. It is his case that he purchased the land on the basis of the documents shown to him by the respondent which included the certificate of death of the deceased, the Grant of letters of administration and the certificate of confirmation of the grant. He also swore that at all material times the applicant was aware of the transaction between him and the respondent; however, he admitted that the applicant had been collecting rent from him apparently for leasing the same land. He conceded, as stated by the applicant, that he initially leased the land but it was his position that he eventually purchased the land from the respondent and now he holds a better title to it than either the respondent himself or the applicant.

At the hearing of the summons, the applicant reiterated his depositions in the affidavit in support of his summons and added that his mother was the elder of the two children; that is, his mother and the deceased. He denied knowing the respondent. He testified further that apart from leasing this particular land to the respondent, he had also been leasing to him another parcel of land which belonged to the deceased known as L.R. No. Mutukanio/Mau Narok/100 but that he was not aware that the deceased had given this particular land to Hannah Njeri, the respondent's sister. He denied that the respondent was a relative of the deceased and also denied knowing him. As far as the interested party is concerned he testified that he had been leasing him this particular land for the past 17 years; the last time he received rent from him was in 2004.

Joseph Muchiri Muthui testified in support of the applicant's case and stated that he knew the deceased and that he neither had a wife nor a child. His only sibling was the applicant's mother; the two of them never had any other brother. He was emphatic that the respondent was not related to the deceased in anyway. He denied knowing one Githu Waweru; he also did not know the respondent.

On his part the respondent testified that he could not recall when he was born; the court noted that he was quite aged. It was his evidence that the deceased was his 'younger father' and that his father was called Githu Waweru. Githu Waweru and Muturi Waweru were brothers. The two of them had a sister called Wathuti, the applicant's mother. He regarded her as his aunt.

Githu was the eldest son, he was followed by Wathuti and the last born was the deceased in this cause. He testified further that their father was Waweru Kimenchu. Githu lived in Turi in Molo while Muturi lived in Eldama Ravine. Wathuti was married to Kahangi. He was able to point out the applicant in court as Wathuti's son and acknowledged him as the deceased's nephew. Like the applicant, the respondent admitted that the deceased did not have any child. It was his evidence that he had a wife at one time but she died.

He testified also that he met the applicant at the office of the chief of Karima location in Nyeri County although the applicant denied knowing him. He recalled that when he was released from prison during the colonial period, it was the applicant who came for him and took him to his (applicant's) home in Othaya; he lived there for a while and he even married from there. As a matter of fact, it was the applicant who insisted that he should marry. According to him, "it is fine if he (the applicant) says he does not know me". He was aware that the deceased died in Narok and that his sister, Hannah Njeri, whom he regarded as the deceased's 'daughter' lives in his land in Narok. Finally, he admitted selling what used to be the deceased's land to the interested party.

Hannah Njeri testified that she knew the deceased and like her brother, she described the deceased as her 'younger father'. Her father was Bethwell Githu Kimenchu. Bethwell Githu Kimenchu and Muturi Waweru were brothers. They had a sister called Wathuti who was also called Wanjiku. Wathuti was the applicant's mother. Both Muturi and Kimenchu lived in Eldama Ravine. She confirmed in her testimony that she was the respondent's sister. It was also her evidence that when her mother married their father Kimenchu, she already had three children and these were the respondent, Muthoni (deceased) and herself. The other children who were born after their mother got married to their father were Nyakio, Wanjiku, Kimenchu and Wambui. She insisted that the applicant and herself are cousins. As far as the deceased's land that now comprises his estate is concerned, she testified that the deceased had given it to the respondent while she was given the land in Narok. As matter of fact her two children are now living on that land.

Elijah Muriuki Ritho testified that he knew the respondent because he had married from their family. He was aware that the respondent's father was Githu Waweru and that Muturi Waweru, the deceased, was his brother. Wathuti Kahangi was their sister. He shared the same sub location with all these people.

On his part, the interested party testified that he used to lease the deceased's land from the applicant. He later informed the applicant that the land was being sold and also that he had seen its title in the respondent's name. Initially, the applicant told him to ignore the information but he later told him that he could buy the land if he had the money. He then directed him to Kimenchu, the respondent's younger brother. He eventually bought the land from the respondent at Kshs. 4000/=. The agreement according to him was oral.

That is as far as the evidence went.

Section 76 under which the summons was filed is the law that governs questions regarding revocation or annulment of grants; it states as follows:

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 has ordered or allowed; 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.

Looking at the applicant's summons, the applicant relies on grounds (b) (c) and (e) to question the validity of the grant in issue. As far as I understand the evidence he has presented in support of these grounds, his major bone of contention is that the respondent did not mention in the petition that the applicant is the closest surviving relative of the deceased and that the respondent himself is not related to the deceased in any way. If this was correct, this evidence would cover grounds (b) and (c). There is, however, nothing in evidence that would support ground(e) and neither is this ground covered in the applicant's submissions. In any case, if the court finds that the grant was validly obtained, there is nothing that suggests that, somehow, it has become useless and inoperative through subsequent circumstances.

Going back to ground (b) and (c) the evidence that applicant is related to the deceased in a way that he has suggested is not controverted. If anything, no one came out clearer on how the applicant is related to the deceased than the respondent and his sister Hannah Njeri. In my assessment of the respondent, I found him to have been quite candid and honest in his evidence even at the risk of weakening his own case. As I noted in my record he was quite elderly and was either in his late eighties or early nineties. In my humble view, he did not have any reason or motivation to mislead the court and was the kind of witness that would properly be described as a candid and credible witness.

As far as the applicant's relationship with the deceased is concerned, he agreed with the applicant that indeed the applicant's mother was a sister to the deceased; in other words, the deceased was the applicant's uncle. His point of departure was that, contrary to the applicant's allegations, the applicant's mother was not the only sibling of the deceased; the deceased had a brother as well who he identified as Githu. Of the three siblings, Githu whom the respondent testified was his father was the eldest. The applicant's mother was the second born and the deceased in this cause was the last born. He regarded the applicant's mother as his aunt while the deceased was his "younger father"; in truth he was his uncle. He went further to explain that their father was one Waweru Kimenchi. He recalled that the deceased and his father settled in the Rift valley and that he was imprisoned at one time by the colonial government. The applicant's family hosted him after he was released from prison and even married from their home; in his words, he married at the insistence of the applicant. He sounded surprised to hear the applicant denying that he knew him effectively disowning him. As far as the estate of the deceased is concerned, he was clear that that the deceased had given him the land at Othaya which now comprises the estate in question. Like the applicant, he testified that the deceased had land in Narok which he had given to his sister, Hannah Njeri. The latter corroborated the respondent's evidence.

It is worth noting that, as much as the applicant disowned the respondent, he was ready and willing to have the deceased's estate shared equally between himself and the respondent; in the submissions filed in his behalf, his learned counsel stated as follows:

"Secondly, it is noteworthy that the respondent herein during examination in chief acknowledged that the applicant is related to the deceased and that they are in the same degree of consanguinity as the children of the deceased brothers and sisters (sic) and which section 39 (1) of the Law of Succession Act provides for subdivision of properties in equal shares."

In concluding his remarks, the learned counsel stated:

"We therefore humbly submit that the grant issued to the respondent herein be revoked and the properties belonging to the deceased herein be equally distributed between the applicant and the respondent in view of section 39(1) (c) of the Law of Succession Act, Cap. 160."

It can only be that the applicant was prepared to share the deceased's estate with the respondent because the respondent was not only related to the deceased but also that he was related to him in the manner suggested by the respondent.

Worth of note also is the applicants evidence that he was aware that besides Title No. Othaya/Thuti/200, the deceased was also the proprietor of LR No. Mutukanio/Mau Narok/100. Yet the applicant never laid any claim on this latter property. I suppose his lack of interest in this particular property was informed by the awareness that the deceased had, during his lifetime, gifted this land to Hannah Njeri as Njeri herself and the respondent so testified.

When this evidence is considered in its entirety, it is more probable than not that the applicant was not truthful in his evidence as far as the relationship between the deceased and the respondent is concerned. The truth is he was as much related to the deceased as were the respondent and his sister Njeri. It follows that the allegation that the respondent was not the deceased's relative cannot be a reason to fault the grant on the grounds that it was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case; or that it was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant.

Being sons of the deceased's sister and brother respectively, the applicant and the respondent ranked in the same degree of consanguinity.

This then takes me to the next question as to whether the respondent was under obligation to list the applicant in the petition as one of the deceased's survivors; of relevance to the question is section 51 of the Act; it prescribes not only the manner and form in which a petition for grant of letters of administration may be made but it also prescribes the particulars to be included in such an application including the particulars of the survivors; it is a detailed provision but for present purposes, section 51.(1) (2)(g) would be relevant: it states as follows:

51. (1) An application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.

(2) An application shall include information as to -

(g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased;

None of the people whose information should be included in the petition include the category of persons that the applicant falls into; this is so because the applicant is not a surviving spouse, child, parent, brother or sister of the deceased; neither is he a child of the deceased's child for it is common knowledge that the deceased never had any child. Going by this provision, the omission of information regarding the applicant in the petition for grant of letters of administration intestate would not be fatal to the grant thereby obtained.

Section 51 (2) (g) of the Act is replicated in Rule 7 (1) (e)(i) of the Probate and Administration Rules which goes a step further to say that the survivors whose information is to be included in the petition would include such a person or persons who would ordinarily succeed the deceased in accordance with section 39(1) of the Act. It states as follows:

Part III-applications for Grants of Representation

7. (1) Subject to the provisions of subrule (9), where an applicant seeks a grant of representation to the estate of a deceased person to whose estate no grant or no grant other than one under section 49 or a limited grant under section 67 of the Act has been made, the application shall be by petition in the appropriate Form supported by an affidavit in one of Forms 3 to 6 as appropriate containing, so far as they may be within the knowledge of the applicant, the following particulars -

(e) in cases of total or partial intestacy -

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

However, the rule being subsidiary legislation is subject to Section 51(2)(g) of the Act and a grant would not, in these circumstances, be invalidated when it is proved that the petition from which it was made is consistent with the parent Act though it may be inconsistent with a Rule made thereunder.

In any event Rule 7 (4) provides a window for such omissions; it states as follows:

(4) No omission of any information from an application shall affect the power of the court to entertain the application.

In my humble view, this implies that there are omissions such as the one alleged in the present application that may not be necessarily fatal to the grant of letters of administration intestate particularly where it has been demonstrated as it has been in the present case that the omission was innocent and was not deliberate or intended to disinherit any survivor who would be entitled to an intestate estate.

Thus then leads me to the conclusion that just as the grant made to the respondent could not be faulted on the now controverted ground that the respondent was not related to the deceased, it cannot also be impugned on the ground that the respondent did not provide any information in the petition concerning the applicant.

According to section 66 as read with section 39 of the Act both the applicant and the respondent were entitled to the grant in the same degree; their relationship to the deceased is in equal terms and none of them would be more preferred to obtain the grant than the other. Section 66 of the Act reads as follows:

66. Preference to be given to certain persons to administer where deceased died intestate

When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

(a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

Of particular note is section 66. (b). The relevant provision in Part V to which reference has been made in section 66. (b) is, of course, section 39 and for present purposes, section 39 (c); however, for better understanding it is necessary that I reproduce the entire section here; it reads as follows:

39. Where intestate has left no surviving spouse or children

(1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority —

(a) father; or if dead

(b) mother; or if dead

(c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none

(d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none

(e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.

(2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.

As earlier noted, the applicant and the respondent are children of the deceased's sister and brother respectively and therefore they would fall into the category of survivors prescribed in section 39(c) which, in turn, has been referred to in section 66 (b) of the Act.

It follows that since the respondent was entitled to the grant as much as the applicant, the grant cannot be vitiated merely because of the mistaken notion applicant and not the respondent ought to have been the administrator of the deceased's estate. According to Rule 26 (1) of the Probate and Administration Rules, all that the respondent was bound to do was to prove that the requisite notice had been issued to all and sundry that he had petitioned for grant of letters of administration intestate for the administration of the deceased's estate. That Rule reads as follows:

26. (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.

Even then Rule 27 of the same rules says that a grant may still be made to any person eligible for such a grant notwithstanding the provisions of Rule 26; it states as follows:

27. Nothing in rule 26 shall operate to prevent a grant being made to any person to whom a grant may be made, or may be required to be made, under the Act.

In short, I do not find any valid reason why I should allow the applicant's summons and revoke or annul the grant made to the respondent; on the contrary, there is every reason to sustain it.

But that does not in way mean that the applicant was not entitled to a share of the deceased's estate; of course he was so entitled if section 39 (c) of the Act is anything to go by. However, the fact that he was effectively disinherited cannot be a reason to revoke the grant; certainly, it is not one of the statutory grounds upon which a grant may be revoked or annulled under section 76 of the Act.

I note that in his submissions, the learned counsel for the applicant dwelt substantially on the question of distribution of the deceased's estate between the applicant and the respondent and even went further to invite this honourable court to divide the estate between his client and the respondent in equal shares.

As much as the sharing of the estate between the contesting parties is a valid concern, it cannot be addressed in the context of the applicant's application in its present form; to be precise, the application before court is a summons for revocation or annulment of grant and not one for distribution of the deceased's estate.

For the reasons I have given I do not find any merit in the applicant's summons dated 10 February 2011 and it is hereby dismissed. Parties will bear their respective costs.

Signed, dated and delivered this 22 July 2020

Ngaah Jairus

JUDGE