



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

SUCCESSION CAUSE NO. 141 OF 2013

IN THE MATTER OF THE ESTATE OF GICHANGI MUMAI (DECEASED)

PATRICK MURIUKI KAUGI.....APPLICANT

VERSUS

SAMUEL MWANGI WAMAI.....RESPONDENT

RULING

This matter relates to the estate of **GICHANGI MUMAI** (deceased) who died intestate on 20th May 1970. A grant of letters of administration was issued to **SAMUEL MWANGI WAMAI** on 11th July 2006 in the Senior Resident Magistrate's Court at Kerugoya.

Patrick Muriuki filed a caveat. The magistrate proceeded to hear the dispute between the Petitioner and the Caveator. In a Judgment delivered on 23rd March 2007 the learned magistrate ordered that the estate of the deceased comprised in Land Parcel No. Kiine/Nyangio/587 be shared equally between the Petitioner and the Caveator.

1. The Petitioner was dissatisfied with the Judgment and filed an appeal in the **High Court of Kenya at Embu Civil Appeal No.31/2007**. Lady **Justice Okwengu** (as she then was) set aside the Judgment of the trial magistrate and ordered a new trial. The petitioner moved to High Court Embu and filed **Succession Cause No.251/2012**. The matter was then transferred to this court. The Petitioner moved the Court vide a summons for confirmation of grant dated 19th February 2012.

In his Supporting Affidavit he proposed that the estate of the deceased be distributed to him as the sole beneficiary on 20th May 2014.

2. A summons for revocation of grant was filed by Patrick Muriuki Kaugi who was the Caveator and Protestor in the Magistrate's Court. The summons was brought under **Section 76 (a) (b) (c) (iii)** of the **Law of Succession Act (Cap 160 Laws of Kenya)** to be referred to as the **Act** and **Rule 44** of the **Probate and Administration Rules**. The summons was based on the following grounds:-

- a) The proceedings to obtain grant were defective in substance*
- b) The grant was obtained fraudulently by making of false statement by concealment from court something material to the case*
- c) 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) The persons to whom the grant was made has failed to proceed diligently with the administration of the estate.*

The Petitioner opposed the application and filed a Replying Affidavit sworn on 30th July 2014. His contention is that the applicant is not related to the deceased and is therefore not entitled to a share of the estate. He contends that in the year 2006 the Chief Kariti Location issued him with a letter to file a Succession Cause in the estate of the deceased and did not include the applicant. He filed Succession Cause No.91/2006 and the Appellant learnt about it. That, the cause was heard but he was dissatisfied and filed an appeal. That the appeal was determined in his favour and he filed another succession cause and was given a letter by the Sub-Chief of Nyangio Sub-Location. The Chief did not include the applicant as he was not related to the deceased. The respondent maintains that the applicant is not related to him and is not related to the deceased.

3. The court gave direction that the application be heard by way of *viva voce* evidence. The applicant gave evidence and told the court that **Justice Okwengu** had directed that case be a retrial. The respondent did not comply with the Judgment. He filed another case in the lower court which was then transferred to this court. The respondent obtained the grant without informing him. He further testified that the respondent has been charged with a criminal offence in the Chief Magistrate's Court Kerugoya.

In cross-examination the applicant testified that the deceased Gichangi Momai died in 1970. That he had sworn an affidavit stating that himself and the respondent were nephews of the deceased. He stated that what he told the court that he is a nephew of the deceased is a mistake. That is as per his affidavit sworn in **Succession Cause No.91/2006**. He admitted that he had told the court that the respondent was a nephew of the deceased that it was a mistake. He further told the court that he was allowed to use the land and if the owner returns he vacates it. He also stated that the respondent entered the land as ordered by the clan. The applicant testified that he has no blood relationship with the respondent. The applicant further testified that the court had ordered that the land be shared equally and he was satisfied. The respondent appealed and the Judgment was set aside. The appellant admitted that he did not file any suit or cause to comply with the order for retrial. The applicant called PW2- Appolo Njuki Kinyoni who testified that he is sixty seven years old and that in his lifetime he never met the deceased Gichangi. The witness testified that the applicant has siblings and none of them is claiming the land. He further testified that the respondent, Mwangi has been using the land since the year 2002. The witness further told the court that the applicant and the respondent have no blood relationship.

4. The respondent filed a Replying Affidavit sworn on 30th July 2014 which he adopted as his evidence. His contention is that the applicant did not tell the truth. He avers that he obtained the Chief's letter in 2006 and the Chief did not include the applicant as one of the relatives of the deceased. He filed the Succession which was heard and determined but he was dissatisfied with the Judgment and filed appeal in the High Court. The appeal was allowed and he was ordered to file a fresh cause which he did. He again obtained a letter from the assistant Chief and again the applicant was not included as a beneficiary since he was not related to the deceased. He deposes that the cause was gazetted in the usual way but the applicant did not file an objection or a protest. He further deposes that the applicant had lied that he is a nephew of the deceased which was not the case. The applicant is not related to the deceased and is not from his clan.

5. The respondent contends that the applicants has not established any ground to warrant the court to order revocation of grant. The deceased was his uncle and his siblings and his mother have agreed that he inherits the land, affidavit sworn on 19th February 2013. He also relied on his witness statement dated 4th June 2015.

6. The respondent called DW2 Jane Wanguru Kamugo who corroborated the evidence of the Applicant he also called DW3 and 4 to support his evidence.

7. The parties filed submissions. The applicant submits that he has proved his case on a balance of probabilities as required under the law. He submits that,

The background of this matter is that the same commenced vide a petition filed in the **Resident Magistrate Court Succession Cause Number 91 of 2006, Kerugoya** wherein the trial magistrate in his Judgment on 23rd March, 2007 concluded that the applicant and the respondent were cousins and ordered that title Kiine/Nyangio/587 be shared as hereunder:-

KIINE/NYANGIO/587

Samuel Mwangi Wamai Equal shares

Patrick Muriuki Kanyi

That being aggrieved by the aforesaid Lower Court judgment of 23rd March, 2007, the respondent herein appealed to the High Court at Embu vide Civil Appeal No.31 f 2007 and upon hearing of both parties **Justice H.M Okwengu** ordered the following on 7th June, 2011:-

“.....accordingly, I allow this appeal and set aside the judgment of the trial magistrate delivered on 23rd March 2007. I direct the Succession Cause Number 91 of 2006 shall be referred back to the Lower Court for new trial.....” (emphasise mine).

That subsequent thereto the respondent herein filed the summons (General) dated 1st September, 2011, praying that the grant be confirmed as per paragraph 4 of the supporting affidavit, see **applicant's annexures “PMK2' a”** and on the other hand the applicant filed the affidavit of protest sworn on the 1st November, 2011, see **applicant's annexure “ PMK 2'b”**.

That, when the matter came up for hearing in the lower court on 18th May, 2012 before Honourable Ochenja S.P.M, Mr. Ngigi, counsel for the protestor then Patrick Muriuki Kaugi, raised an objection in view of the fact that the value of the deceased's estate exceeded Kshs.100,000 as provided for under the old **Section 48 of the Law of Succession Act** and the court directed as follows:-

“...this court lacks jurisdiction to hear this matter, file returned to the registry.”

That subsequent thereto, the respondent instead of moving the High Court for the transfer of **Senior Resident Magistrate Succession Cause No.91 of 2006, Kerugoya**, went forward to file afresh and/or a new petition in High Court at Kerugoya vide **Succession Cause Number 141 of 2013, Kerugoya**, where in the grant of letters of administration intestate was issued on 2nd May, 2013, see **applicant's annexure “PMK' 1a”** and confirmed on 18th May 2014, see **applicant's annexure “PMK1b”**.

He submits that the applicant was not involved in **Succession Cause 141/2013**, he was not informed or notified of the filing of the new cause and was not cited. He was not served with the Petition, had not renounced the rights over the suit property. That the grant was obtained fraudulently by concealing from court the fact that the applicant had an interest in the estate. He contends that the order by **Justice Okwengu** was not complied with. He submits that he has adduced sufficient grounds to warrant the court to order that the grant be revoked.

8. The respondent filed submissions. In his submissions dated 10.12.2019 he submitted that the applicant never met the deceased, and he was not sure whether the deceased had died, yet in his affidavit in support of the summons for revocation, he states that the deceased passed on 20.5.1970. The position of the respondent is that the deceased died in Nakuru at Kaptembwa, and they attended his funeral in Nakuru, he admitted he had no burial records.

He claimed that the evidence on cross examination of the applicant indicated that the applicant lied he was related to the respondent as cousins. The respondent claimed that they were from different clans the applicant was from Mumbui clan while the respondent was from Mungari Gachomo mbari ya Mangethe. He stated that the deceased obtained the suit land from clan land of Ungari, and the applicant was not rightful heir as he could not inherit land if he was not from the same clan according to Kikuyu customs.

The respondent claimed that the family was in agreement that he should inherit the land of the deceased, as per testimony of Jane Wangungu Mugo. As regards occupation of the suit land, the respondent claimed he occupies the land.

He admitted he did not involve the applicant in the succession because he was not a beneficiary to the estate. He challenged the allegation that he committed fraud, as he obtained details of the identity card of the deceased from his late sister Wambui, and he swore an affidavit to that effect before the registrar of births and death. The cause followed normal procedure thus there were no valid grounds for revocation.

He claimed that Kikuyu customs are patrilineal thus the applicant cannot claim land from his mother's clan, he challenged his claim on grounds of degree of consanguinity. The applicant's maternal grandfather Githae Kihia was an uncle to the deceased, while the respondent's father was the brother to the deceased his claim was therefore that he was closer in terms of affinity and consanguinity to the deceased. They relied on the case of Nyeri HC Succ No 46 of 2015 Estate of Hillary Wambugu.

In viva voce evidence the respondent brought two witnesses DW1 himself, DW2 Jane Wangungu Mugo cousin to the respondent, daughter of Wanjiru sister to the deceased, she testified that the clan members had agreed that the respondent to inherit the land. DW3 Mwangi Njunguna, whose father was the step-uncle of the deceased, he testified that he knew the deceased and his brother who was the father to the respondent herein.

I have considered the application. The evidence adduced at the trial and the submissions. The issues which arise for determination are:-

(i) Revocation of grant

Who is the rightful beneficiary

(ii) Revocation of grant

Section 76 of the Law of Succession Act sets out the grounds upon which a grant may be revoked they are as follows:

(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.

In the case of Mwathi v Mwathi and another [1995-1998] 1 EA 229 (CAK) where the court considered the devolution of the estate of an unmarried deceased survived by brother and sisters. It was held that:

"The Kikuyu customary law on devolution of land is notorious and courts can take judicial notice of it, thereby dispensing with the need to prove it by evidence. In the RESTATEMENT OF AFRICAN LAW: 2 (The Law of Succession) by Eugene Cotran, the relevant Kikuyu customary law is stated at p.14 as follows: -

"4. Estate of an unmarried man the property of an unmarried man, whether land, livestock or movables, is inherited as follows:

(a) by his father, if alive; or, in his absence

(b) shared equally among his full brothers; or, in their absence,

(c) shared among his half-brothers; or, in their absence, and so on.”

In this case the law applicable is the Customary Law. **Section 2(2)** of the **Law of Succession Act** provides as follows:-

“The estates of persons dying before the commencement of this Act are subject to the written laws and customs applying at the date of death, but nevertheless the administration of their estates shall commence or proceed so far as possible in accordance with this Act.”

In this case the applicable law is African Customary and in particular Kikuyu Customary Law. The custom is that the deceased rightful heirs where he has no surviving sons or unmarried daughters his father is the rightful heir then brothers inherit the property and in their absence brothers and then half brothers.

The applicant claims that he is related to the deceased through his mother. The evidence of the applicant is not convincing. Though claiming that he is related to the deceased through his mother, he has admitted that he is not related to the respondent. He also admits that he does not belong to the same clan with the respondent. The law requires that a party establishes the degree of consanguinity which is close to the deceased. The applicant admitted that he never met the deceased whose estate he wants to inherit in his lifetime. He came to court and swore an affidavit claiming to be a nephew of the deceased. See affidavit of protest sworn on 23rd January 2007 paragraph 3 where he swore an oath before a Commissioner of Oaths stating that **“we are both nephews to the deceased herein.”**

When confronted with this affidavit during cross-examination he stated that-

“What I said that I am a nephew is a misstate.” The long and short of this is that he lied on oath. A person who openly admits in court that he lied on oath has diminished his credibility. This false swearing was done with a sole intention of reaping where he has not sown. His claim is based on allegation that he is a nephew of the deceased. Having admitted that it was a mistake for him to claim he is a nephew his claim must collapse on all fours. I find that his claim to the estate is not convincing. This is a classic case of a person who has prolonged this litigation without any legitimate claim to the estate.

The applicant has to prove any of the grounds under **Section 76 of the Law of Succession Act**. The grounds which a party must establish are-

- The proceeding to obtain the grant are defective in substance.
- Fraud which under the section entails:-
 - (i) Making a false statement
 - (ii) Concealment from the court of something material to the case.
- The grant was obtained by means of untrue allegation of fact essential on a point of law to justify the grant notwithstanding that the allegation was made in ignorance or in advertently.
- That the person to whom the grant was made has failed to proceed delinently with the administration of the estate.

It is trite that he who alleges must prove and he who alleges bears the burden of proof of the allegation. **Section 107 & 108 of the Evidence Act (Cap 80) Laws of Kenya.**

“ 107 Burden of proof

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.

108. Incidence of burden

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.”

I find that the applicant has failed to prove any procedural defects in the proceedings or that the respondent made false statements. The claim that the applicant has been charged are machinations to derail justice. The respondent made the complaint during the pendency of this matter. It is trite that a person charged enjoys the right to be presumed innocent until the contrary is proved. That the respondent has been charged cannot form a ground for revocation of grant. I find that the applicant has not discharged the burden of proof. I find that there are no grounds established to warrant the court to order revocation of the grant.

(iii) **Who is the rightful beneficiary**

The Law of Succession Act provides in Section 39.

“Where intestate has left no surviving spouse or children

(1) 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.”

The respondent gave a clear ‘**geneology**’ of their family tree. They gave consistent evidence that Gichangi Mumai was a son of Gitu Kanyi and one Wanguru Mumai. They were consistent that the deceased herein had one brother and two sisters. His only brother was Wamai the respondent’s father. The applicant admitted that the respondent was a son of Wamai and a nephew to the deceased. He had alleged in the magistrate’s court that the deceased disappears in 1950s. But later swore an affidavit stating that the deceased died in 1970. The applicant is a stranger of the deceased. This can only be the reason why he is not certain about most facts touching on the deceased. Although claiming to be a beneficiary, he has never moved the court to get his share. It is the respondent who filed the initial succession cause; the applicant hanged on to it and filed a Caveat and a protest. After High Court Embu allowed the appeal, it is the respondent who filed another cause as ordered by the High Court **Justice Okwengu** as she then was. That cause was abandoned after the Magistrate’s Court said it had no jurisdiction. It is then the respondent filed this cause and the applicant has come to seek revocation. This background shows that the applicant has no claim to the estate.

I find that the respondent has tendered credible evidence to prove that he is the rightful beneficiary of the estate. The respondent was identified in the Chief’s letters as the rightful beneficiary of the deceased. The respondent tendered evidence to prove that the family had consented that he inherits the estate of the deceased **Kiine/Nyangio/587**. The matters which **Justice Okwengu**, as she then was, raised in her Judgment have been addressed by the evidence tendered in this cause. The respondent has been using the land a fact admitted by the applicant. The applicant lied that he is in occupation and was not even able to demonstrate when or how he entered the land. The testimony was not reliable. The respondent has demonstrated that he is a close relative of the deceased. The parents of the Respondent are deceased. The respondent is in 3rd degree of consanguinity under **Section 39 of the Act**. It is therefore the respondent who is a rightful beneficiary of the estate in the circumstances of this case under Kikuyu Customary Law.

In conclusion I find that the applicant is a stranger to the estate of the deceased who has not come to court with clean hands. There are no valid grounds proved as provided under **Section 76 of the Law of Succession Act** to warrant the revocation of grant.

The application is without merits and is dismissed. I will award costs to the Respondent in view of what I have observed above that the applicant has been a hinderance to the conclusion of this matter without any just cause.

Dated, signed and delivered at Kerugoya this 17th day of November 2020.

L.W. GITARI

JUDGE