



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 595B OF 2009

In the Matter Of the Estate of the Late Japhet N'thuranira M'ringera A.K.A M'thuranira M'ringera (Deceased)

DAVID THURANIRA.....PETITIONER

Versus

LUCY MAKENA.....OBJECTOR

JUDGMENT

[1] **JAPHET N'THURANIRA M'RINGERA** alias **M'THURANIRA M'RINGERA** ("the deceased) to whom this Succession Cause relates died on 17th October 1979. The Chief's letter of introduction dated 30th March 2009 he stated that the deceased was survived by:

1. Phyllis Nkatha - Wife (deceased)
2. Eunice Gauku - Wife (deceased)
3. Ngera Thuraniir - Son (deceased)
4. David Mwiti - Son

[2] The petitioner petitioned for letters of administration and stated therein that the deceased's asset comprises of **L.R. Kibirichia/182**. The grant of letters of administration intestate was made to him on 25th February 2014. The said grant was confirmed and certificate of confirmation of grant dated 26th February 2014 was issued stating that the entire estate was distributed to the petitioner.

Application for revocation

[3] The objector filed summons for revocation or annulment of the grant dated 21st July 2015 which was supported by her supporting affidavit sworn on 21st July 2015. The grounds upon which the application is grounded are set out in the application and her said affidavit. The major averments are:

(1) That the grant was obtained fraudulently by making false statements or by the concealment from the court of other beneficiaries.

(2) The grant was obtained by means of untrue allegations of facts as the petitioner filed the petition secretly and omitted to disclose full particulars of the beneficiaries of the estate. The beneficiaries of the deceased are:

1. First House

- a) **Phyllis Nkatha - Wife**
- b) **Alice Karimi - Daughter married**
- c) **David Mwiti - Son**

2. Second House

- a.) **Eunice Gauku - Wife**

b.) Jane Gakii - Daughter unmarried

c.) Ngera Thurania - Son (deceased)

d.) Lucy Makena - Daughter unmarried

3. Esther Nkatha - Daughter unmarried born prior to the marriages

[4] According to the Objector, prior to the demise of the deceased he had given his two wives their respective pieces of land in land parcel No. Kibirichia/Kibirichia/182. But, the petitioner has reduced their portion to 1 acre and sandwiched them in the middle of the land without providing access road in or out of the estate.

[5] It was stated further that, sometime in June 2015 the petitioner came to their home and gave them an ultimatum of two months to vacate their home. She carried out a search and realized that the petitioner had secretly filed this cause.

I am not related to them

[6] The petitioner in his replying affidavit sworn on 3rd August 2015 deposed that his known relatives are dead and that he is ready to go for a DNA test to prove that those referred to as children of his father have no relation with him either by blood or any type of relationship. That the claimant is not a dependant of the deceased as her father is Paul Mugambi, who is his uncle, and demands to be shown her birth certificate.

[8] The petitioner continued; that his cousin asked him to get her a place to cultivate and he gave her a small portion where she constructed a slab house but she now wants to grab his land.

[9] He said more. Before the deceased died he called clan elders and stated that he and his late brother were the only beneficiaries of his estate. When his brother died he became the sole beneficiary of the estate. .

Objector: I will undergo DNA

[10] The applicant in her further supporting affidavit sworn on 22nd September 2015 denied allegations by the petitioner. She averred more specifically that she has blood relations to the deceased and so she is ready to undertake a DNA test on condition that the Petitioner shall cater for the costs thereof. She affirmed that she has the full support of her two sisters Esther Nkatha and Jane Gakii Japhet both of whom filed their supporting affidavit sworn on 22nd September 2013. She declared that the Petitioner holds the mentality that women have no right to inherit land from their fathers. Yet, he knows that they are not married and have no place to go.

ANALYSIS AND DETERMINATION

Issues

[11] The issue for determination is whether or not to revoke or annul the grant issued on 25th February 2014.

Revocation

[12] **Section 76 of the Law of Succession Act** sets out the grounds for revocation or annulment of a grant of representation. The objector seeks to have the grant revoked on the basis that:

(a) The proceedings to obtain the grant were defective in substance;

(b) 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) 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; ...”

[13] When he filed the petition, the petitioner stated that the deceased had two wives and two sons but all were deceased apart from him. The objector refuted this claim and confirmed that the deceased had other children. In total the deceased had six children but one is deceased. I note also that the petitioner's mother, Phyllis Nkatha is not deceased as indicated in the chief's letter. This fact was not disputed by the petitioner. The Objector's sisters and statements made by the deceased's brothers, that is, M'Ruukaria M'Ringeria and Kenneth Gitonga support the above. They confirmed that the beneficiaries of the deceased is as stated by the objector. They also stated that it was agreed that the estate of the deceased be shared equally amongst the deceased's beneficiaries and the wife who is on the estate that is Phyllis Nkatha be made the legal administrator.

[14] The deceased died on 17th October 1979 which is before the commencement of the **Law of Succession Act CAP 160**. As such **Section 2 (2) of CAP 160** cited below applies:-

“(2) 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.”

[15] But, applicable customary law applies to the extent that it is not inconsistent with the Constitution and justice. In any case, administration of such estate is governed by cap 160. In Meru custom daughters were not allowed to inherit (SEE: **Cotran Eugene, Restatement of African Law:2 Kenya II The Law of Succession 1969 Sweet & Maxwell at page 30**). The tradition was not in accord with **Section 82 of the retired Constitution and Article 27 of the Constitution of Kenya** which protected persons from all forms of discrimination on the basis of , say, gender and marital status. Therefore, such a custom is inconsistent with the Constitution, and justice which is to all, and not all of a particular or one kind, but all. Thus, the petitioner cannot disinherit daughters or widow of the deceased.

[16] From the record it is clear that the petitioner has not been honest with this court. He stated that Phyllis Nkatha, his mother, is deceased; that was a lie. He did not refute this. **Under Section 66 of CAP 160** the person who is at the top of the priority list of taking out letters of administration is the surviving spouse. If she does not wish to take them out then her consent or renunciation of right to apply are required, or apply for citation. None of these things was sought or obtained. The petitioner openly deceived the court. From the eulogy of Eunice Gauku it shows that she was a mother to Isaac Majau, Antony Mwitii, Jane Gakii, late Ngeera and Lucy Makena and step mother to Alice Karimi, David Mwitii and Nkatha. She was married to the deceased but some of her children namely Isaac Majau and Antony Mwitii are not mentioned anywhere.

[17] From the foregoing, I am satisfied that the petitioner deceived this court and disinherited the other beneficiaries. He left out other beneficiaries of the estate. Therefore, the grant was obtained through concealment of material fact or untrue statements to justify the grant.

[18] But before I close, I need to revisit the DNA issue. The petitioner avowed that the said dependants have no relation with the deceased and that a DNA test should be taken. He said he had only one brother who was born by her step-mother in 1981 and who died when he was a minor. How then can the deceased have fathered a person who was born two years after his death? On the other hand, the objector is willing to undergo the DNA test. Esther Nkatha and Jane Gakii averred that the objector was born in 1980 but her national identity card indicates 1986. These issues make it extremely important that the matter goes to full plenary.

Orders

[19] In the upshot, I make the following orders:

(a) The grant issued to David Mwitii Thurairia on 25th February 2014 and confirmed on 26th February 2014 is hereby revoked.

(b) A fresh grant shall be issued to Phyllis Nkatha and the Objector.

(c) Title for land parcel Kibirichia/Kibirichia/182 shall be reverted back to the name of the deceased.

(d) The administratrix shall apply for confirmation of grant within 14 days of today. As identity of rightful beneficiaries is obscure, parties shall ensure in their filings that they have listed and given details of all the beneficiaries of the deceased. It is so ordered.

Dated, signed and delivered in open court this 23rd day of January, 2019

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F. GIKONYO

JUDGE

In presence of

Kithinji for M/S Soy for petitioner

Wamache for Mutunga for Objector

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F. GIKONYO

JUDGE