



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
SUCCESSION CAUSE NO. 2327 OF 1999
IN THE MATTER OF THE ESTATE OF KG (DECEASED)
MUIGAI KUNGU.....APPLICANT
VERSUS
PETER WAWERU KUNGU.....RESPONDENT
RULING

1. The deceased KG died intestate on 11th June 1975. He had two houses as follows:-

First house

- a) Rachel Njoki - wife (deceased);
- b) Joseph Gathirwa Kungu- son (deceased);
- c) Muigai Kungu - Son; (applicant); and
- d) Salome Wanjiru Maingi - daughter.

Second house

- a) Ruth Mukami Kungu - wife (deceased);
- b) Paul N. Kungu - son;
- c) Stephen Kinyanjui Kungu - son;
- d) Peter Waweru Kungu - son (petitioner/administrator);
- e) David Kirumba Kungu - son;
- f) Teresia Wanjiru Gakami - daughter;
- g) Agnes Waithira Thiongo - daughter; and
- h) Mary Waringa Mwariri - daughter.

2. According to the petition filed for the grant of letters of administration intestate, the only property of the estate was Ndarugu/Karatu/211 which according to the search measured 11.3 acres. The respondent stated it was 12.9 acres. A grant was issued to the respondent on 30th January 1995 and confirmed on 22nd January 1999. In the certificate of confirmation, the estate was shared as follows:-

- (a) Paul N. Kungu – 3 acres;
- (b) the respondent – 3 acres;
- (c) David Kirimba Kungu – 3 acres
- (d) Ruth Mukami Kungu (deceased) - 1.9 acres
- (e) the applicant – 1 acre;
- (f) Joseph Gathirwa Kungu – 1 acre.

3. In an application dated 16th November 2005 the applicant sought the revocation of the grant on the basis that it was obtained fraudulently by the making of false statement or by the concealment of something material to the case. He alleged that the deceased had another land Karatu/Ndarugu/216 which the respondent did not include in the petition and did not share. He further claimed that there was no agreement on the sharing of the estate, and that he had not been involved in the filing of the petition, the appointment of the administrator and the confirmation of the grant.

4. The respondent swore a replying affidavit to state that prior to the filing of the petition the applicant and his siblings were contacted variously but that they refused to participate. When the petition was filed, they were cited but took no action. They were then served with the application for confirmation and, once again, they did not attend. His case was that the deceased left a written Will which was the basis for the distribution of the estate. Lastly, he stated that parcel Karatu/Ndarugu/216 did not belong to the deceased.

5. The application was heard by oral evidence. The applicant testified and called one witness Peter Chege Kagombe (PW 1). The respondent testified and called Ng'ang'a Macharia (DW 1) and Stephen Kungu (DW 2).

6. The deceased died in 1975 which was before the **Law of Succession Act (Cap 160)** came into operation. Under **section 2** of the **Act** and **Article 159** of the Constitution, the estate of the deceased shall be governed by Kikuyu customary law, unless it contravenes the Bill of Rights or is repugnant of justice and morality or results in outcomes that are repugnant to justice and morality (**Wairia –v- Wairia [2012] 2 EA 452**). Only the administration of the estate will be done under the **Act** to the extent that it is possible.

7. In the replying affidavit the respondent annexed the certificate of official search (PWK 7) showing that land parcel Ndarugu/Karatu/216 was registered in the names of Margaret Wangari Gachuki and Waweru Gathirwa. It was not a parcel registered in the name of the deceased, and therefore could not be included in the estate of the deceased, or in this petition.

8. In the replying affidavit, and during oral testimony, the respondent produced evidence, by way of served citations (PKW 3) and hearing notices, to demonstrate that throughout he wanted the applicant to participate in this petition. At every stage the applicant was made aware by court process, but he elected not to participate. In his testimony, the applicant stated that many documents from court were brought to him and he was being forced to sign. He further said that he went to the chief severally over this matter but he was not told there were court documents. The petition was filed at Thika Court. He admitted that he was summoned to the chief severally before the case was filed. I find that the applicant was always aware of the case, was served at every stage and chose not to participate. PWK 5 are affidavits of service of the summons and hearing notices in respect of the confirmation of grant. They were served severally on him. He cannot at this late stage be heard to complain that he was not involved in the cause, or that his consent was not sought.

9. There is no dispute that the deceased died from drowning in the river. According to the applicant, he had been mentally ill for about 5 years and this is what made him jump into the river and drown. The respondent denied that the deceased had any mental illness. He stated that the deceased was well, but that he drunk liquor and that was what led him to fall in the river and drown. However, the death certificate that the respondent used to petition for the grant indicated that the deceased was a –

“mental case committed suicide.”

That evidence would materially support the applicant whose case was that the deceased had been mentally sick for 5 years prior to his death in 1975. If that is the case, and this is evident from the facts, then the deceased had no mental capacity to make the Will dated 14th July 1974 and produced by the respondent. I find that the alleged Will was not valid for lack of capacity.

10. The result is that the deceased died intestate. That being the case, and in order to be fair and equitable to the sons of the deceased, I direct that land parcel Ndarugu/Karatu/211 shall be shared equally among:-

- (a) Muigai Kungu (the applicant);
- (b) Peter Waweru Kungu (the respondent);
- (c) Joseph Gathirwa Kungu;
- (d) Paul N Kungu; and
- (e) David Kirumba Kungu.

11. I have considered that none of the daughters of the deceased showed interest in the estate. Further, the deceased's widows died. If they were alive, they would have had no more than a life interest in the estate.

12. In conclusion, the certificate of confirmation earlier issued shall be revoked and set aside. In its place there shall be a fresh certificate of confirmation in terms of paragraph 10 of the foregoing.

13. This was a family dispute. I make no order as to costs.

DATED and SIGNED at Nairobi this 25TH day of FEBRUARY 2019.

A.O. MUCHELULE

JUDGE

DATED and DELIVERED at Nairobi this 27TH FEBRUARY 2019.

ALI-ARONI

JUDGE