



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

P. & A.29 OF 2017

(FORMERLY HCC.349/2013)

IN THE MATTER OF THE ESTATE OF JOSEPH KIMANI KARANJA (DECEASED)

KARANJA KIMANI.....APPLICANT

- V E R S U S -

JACINTA WANGARI GATITU.....1ST PETITIONER

ANN WAITHIRA GATITU.....2ND PETITIONER

J U D G M E N T

By the summons dated 9/12/2014, Karanja Kimani (the applicant) seeks the annulment of the grant of letters of administration issued to Jacinta Wangari Gatitu and Ann Waithira Gatitu and confirmed on 3/10/2014. The grounds for the application are that the proceedings leading to the grant were defective; that the grant was obtained by concealment from the court of material facts and total exclusion of other beneficiaries of the deceased. The application was supported by the affidavit sworn by the applicant dated 9/12/2014 and a further affidavit dated 18/6/2015.

The application was opposed by the 1st petitioner Jacinta Wangari Gatitu who filed a replying affidavit dated 7/5/2015.

On 20/7/2015, directions were taken, that the application be determined by way of *viva voce* evidence. The parties were directed to file their respective witness statements which they did and the court started by hearing the objector's case.

The objector was represented by Nancy Njoroge Advocate while the petitioner was represented by Mr. Waichungo Advocate. The objector, **Karanja Kimani (PW1)** is the father of the deceased and has 7 other children whom he named. He identified the 1st petitioner/respondent as the wife of the deceased son; that the deceased was buried at Igwamiti, on Laikipia/Nyahururu 6585/426 and that he lived in his plot in Nyahururu. PW1 stated that the respondent did not involve him in the Succession Cause but filed it with her sister; that the grant was confirmed on 3/10/2014 and all the property devolved to the respondent including Laikipia/Nyahururu/7099 which is the land on which the objector resides. PW1 said the 5 acre piece of land was bought for him by the deceased, the deceased built a house for him and he moved onto the land 15 years ago; that he has buried two of his children on the said land and the deceased never told him that he would move again because the deceased had moved him from his one acre land; he denied having any interest in NRB Block 82/35 31; Nyahururu Municipality Block 6/2019; that his son Njoroge lives in Plot 126 Nyahururu where the deceased had placed him and it is not included in the schedule filed in court; that his daughter lives on Kabazi/Munanda Block 2/2063 and that that land was given to her together Wangari by the deceased over 20 years ago; that they were given the land even before the respondent got married to the deceased. PW1 said he claims the land where his daughter Muthoni lives and where his son Njoroge lives and where he lives – Laikipia/Nyahururu/7099.

PW1 further testified that the deceased left a will with his grand-mother in the presence of Muinami (PW2); that the respondent failed to list all the deceased's properties, i.e.

- 1. Laikipia/Nyahururu 1706, where deceased was buried;**
- 2. Plot 6585/426, the plot in Nyahururu;**
- 3. Laikipia Nyahururu 9657; and**

4. L.R.69884 Nyahururu Town.

PW2 Susan Wangari, testified that the deceased was her brother and he asked her to go and live on the land Kabazi/Munanda Block 2/266, with her sister Muthoni; that the deceased built a house for them; that both live on the land with their children; that the deceased told them that the land is theirs but had not given them a title deed, she only claims where they were given to live.

PW3 Muinamia Wainaina a nephew to PW1 recalled that on 20/5/2011, the deceased asked him to go to talk to him and he came to Nyahururu. They met in a hotel where the deceased told him that the land on which the father (PW1) and sisters lived should remain with them and the plot where Njoroge lived should be used for the family's livelihood; that he was in company of one Kamau, now deceased and deceased's brother, Njoroge who wrote it down. He signed and left the will with the deceased. PW3 said that the deceased knew how to read and write in English.

The **petitioner, Jacinta Wangari Gatitu (DW1)** the widow of the deceased denied that the deceased left any will and she was not aware of the alleged will that Pw1 attempted to produce it in court. She adopted her statement that was filed in court and added that she has three children with the deceased who are all still in school:

1. Karen Wanjiku born - 7/12/1997

2. Eunice Wairimu born - 1/8/2005

3. Caleb Gatitu born - 5/3/2008

According to DW1, the deceased left four properties which she included in the application for confirmation; that other properties which were still in the sellers' names were not included. She prays that the said properties be transferred to her; that the deceased had 8 siblings, who are able to take care of themselves; that:

1. James Kuria and Francis Thuo are international athletes who reside in Nairobi;

2. Paul Njoroge works with KDF;

3. Susan Wangari, Miriam Njoki, Nancy Njeri and Esther Muthoni are all married and that Esther resides on deceased's Maombi Farm at Kabazi;

DW1 further stated that the applicant has a plot in Nairobi and has businesses from which he can take care of himself; that indeed the deceased used to help his parents and due to the 1997 clashes in Subukia, the parents moved to her home and it is then that the deceased built a house for them on plot 7099, measuring 5 acres where they reside to date; that it was the intention of the deceased to exchange the said land plot.7099 with the applicant's one acre land in Subukia but it was not done and the deceased transferred the land 7099 to himself in 2010.

DW1 said that after the deceased's demise, the deceased's family started harassing her demanding the titles to the properties. The matter was reported to the chief and it is then she decided to move the court without involving the deceased's family. Her prayer is that the court do dismiss the objection proceedings and let the confirmed grant remain.

After considering the affidavits, statements filed herein, the evidence of all witnesses and submissions of both counsel, I think that the issues that need determination are:

1. Whether the deceased died intestate

2. Whether the grounds for revocation/annulment have been proved;

3. Who are the deceased's beneficiaries?

According to the objector (PW1), the deceased left a will that distributed his estate upon his demise. The objector attempted to produce the purported will allegedly written on 20/5/2011 in the presence of PW3 and Kamau and the deceased's brother one Njoroge, who wrote it down. The same was only marked for identification and no explanation was given why the author Njoroge was not called as a witness nor why the original will could not be produced. The alleged will was not produced as an exhibit before this court and the discrepancies in the said document raised eyebrows e.g. the deceased did not know his children's names. In addition, it is questionable why the issue of the will was never raised during or soon after the deceased's burial. The only conclusion this court can arrive at is that what the objector tried to produce in court was prepared after the deceased's death and meant to hood wink this court into believing that the deceased left a will. PW3 was not a convincing witness and never impressed the court as a truthful witness and no wonder he could not tell that the deceased did not know how to read or write English. I find that the deceased died intestate.

Whether the grounds of revocation or annulment have been proved:

Section 76 of the Laws of Succession Act provides as follows:

“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.”

The Court of Appeal in *Matheka and Ann v Matheka (2005) KLR 255* expounded on the principles for revocation in Section 76 of the Laws of Succession Act when it said:

- i. A grant may be revoked either by application by an Interested Party or by the court on its own motion;
- ii. Even when revocation is by the court upon its own motion, there must be evidence that the proceedings to obtain the grant were defective in substances, or that the grant was obtained fraudulently by the making of a false statement by concealment of something material to the case or that the grant was obtained by means of untrue allegation of facts essential in point of law or that the person named in the grant has failed to apply for confirmation or to proceed diligently with the administration of the estate.”

It is not in dispute that PW1 is the wife of the deceased. The deceased died intestate. He was survived by his wife and three children and therefore the provisions of Part V of the Laws of succession Act apply and specifically Section 35(1) and (5) which is subject to the provisions of Section 40, where an intestate has left one surviving spouse and a child or children, the surviving spouse should be entitled to:

- a. “The personal and household effects of the deceased absolutely; and
- b. A life interest in the whole residue of the net intestate estate provided that, if one surviving spouse is a widow, that interest shall determine upon her remarriage to any person;
- 2.
- 3.
- 4.
- 5. Subject to the provisions of Section 41 and 42 and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death or in the case of a widow, remarriage, of the surviving spouse, devolve upon the surviving child, if there be only one or be equally divided among the surviving children.”

I agree with the interpretation given by J. Musyoka in *Re. Estate of Joshua Orwa Ojodeh Succ. Cause.2015/2012* at paragraph 6:

“Going by the above provision, where a deceased person is survived by a spouse or child or children, the other relatives are not entitled to a share in the intestate estate of such person. The spouse and child are entitled to the estate to the exclusion of all the other relatives include the parents of the deceased. Parents are only entitled where there is no surviving spouse or child....”

The parents are only entitled to inherit under Section 39 of the Act which provides:

- “Section 39 where an intestate 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. Brother and sisters and any child or children”

The objector claims to have been a dependant of the deceased. The objector could only be provided for as a dependant in accordance with Section 26 of the Act which provides relief for dependants.

The section provides as follows:

“Section 26 Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased’s estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the

will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate."

DW1 admitted that the deceased had settled the parents on parcel No.Laikipia/Nyahururu 7099 in 2002 after the 1997 Post Election violence clashes in Subukia. Though PW1 has an acre of land in Subukia, the deceased's parents have never gone back there since. PW1 said that the deceased had wanted PW1 to give him the one acre land in Subukia in place of the 5 acre he had settled but that had not materialized. There is no other evidence to support that assertion. According to PW1, he had been on Plot 7099 (the land) for about 14 years and that he had buried his daughter Miriam Wairimu and his daughter in law Margaret Wangui on the said land and the deceased never objected. Although DW1 said that the deceased transferred the land to himself when the objector failed to exchange with the land in Subukia, there is no evidence to support that contention. DW1 has contended that the objector has a plot and businesses in Nairobi but was unable to elaborate on the allegation. PW1 did admit that he had some temporary structures in Nairobi which have been pulled down.

Further to the above, DW1 stated that the objector has children who are well to do who can take care of him DW1. She named two of DW1's sons who are international runners as, James Kuria Karanja and Francis Thuo, while Paul Njoroge is a Kenya Defence Forces officer. It was not denied that the sons of the objector are not men of straw and can take care of their father, the objector.

The other issue is whether the objector should be relocated from Plot 7099 again upon the demise of the deceased. In fact, by a letter dated 20/1/2012, DW1 had agreed to transfer the Plot.7099 to the objector. DW1 admitted to that fact. She did not say why she changed her mind. Might it be because of what she alleged that her in laws started harassing her?

In my considered view, the deceased bought and settled his parents on the said land Plot 7099 and there is no scintilla of evidence that the intended to remove them from the said land. The deceased allowed PW1 to bury his children in the land. I doubt that the deceased intended to repossess the land.

It is not in dispute that the deceased had settled his sister Mary Muthoni, who is disabled and Susan Wangari (PW2) on Kabazi Munanda/Block 2/266 (Maombi). PW2 told the court that the deceased settled them on the land before he married DW1. DW1 was married to the deceased in 1996. It means that by the time of the deceased's demise, the sisters had been on the land for over 16 years.

DW1 admitted that the deceased used to assist his sister and he educated some of their siblings. DW1 also admitted that Mary Muthoni is physically challenged. Having been on the said land for so long and though Susan is a tailor they are people of low means. They live there with their children. There is no doubt in my mind that the deceased intended to settle his sisters on the said land and never intended to get it back.

Paul Njoroge, a brother of the deceased is said to be a Kenya Defence Forces officer and had been allowed to reside in one of the houses on plot 126 Nyahururu whereas other houses are rented out. It was admitted that it is the deceased who educated the said Paul Njoroge. Njoroge is employed and able to cater for himself. In my considered view, he cannot be deemed to be a dependant of the deceased. A dependant is defined under Section 29 of the Act to include parents of the deceased person who were maintained by the deceased immediately prior to his death. It is the duty of the said Paul Njoroge to demonstrate that he was a dependant of the deceased to be entitled to inherit from the estate. I do agree with J. Musyoka's observation in *Ojodeh's case* when he observed at paragraph 11 – 13:

"11. It is important to put this into perspective. When a man marries, he acquires new responsibilities – to his wife and children. These become his immediate family and his primary responsibility. The other relatives become secondary – including his parents. The law has given force to this arrangement, so that the responsibility over wife and children becomes a legal obligation. Such a married man does not have a comparable legal responsibility over his parents. His responsibility over his parents is not legal, but moral – it's not a responsibility that parents can legally enforce against their children.

12. The legal responsibility over wives and children is stated in statute. Husbands have a legal duty to maintain their wives, and parents have a legal obligation to care for provide for their children. Statute does not impose similar obligations on children towards their parents. The Matrimonial Causes Act and the Subordinate Courts (Separation and Maintenance) Act have very elaborate provisions on these duties towards wives and children. The Children Act is also strong on the maintenance of children. These statutes carry elaborate enforcement mechanisms for giving effect to the maintenance provisions. These provisions are geared to protecting wives and children from exposure to neglect by their husbands and fathers. Unfortunately, there are not comparable provisions to protect parents, the explanation for this being that children are under no legal obligation to maintain their parents.

13. This duty to maintain a wife and children extends to protection of widows and orphans following the death of the person who is legally bound to maintain them. The law ensures that widows and orphans are given first priority in terms of access to the property of a dead husband and father. The other relatives, including parents, are relegated to a secondary position, and only access the property in the event that there is no widow or child, or if they convince the court in a proper application that they were dependent on their dead child or sibling or other relative and that the court should then make provision for them out of the estate of the dead child. These provisions are designed to obviate the possibility of widows and orphaned children being rendered destitute, as they would be if they are forced to share their inheritance with the parents and siblings of the deceased. Quite clearly therefore under Succession Law, parents are not in the same footing with widows and children."

The first responsibility of a married man is to his wife and children and others are secondary. That is why the parents, brothers and sisters or any other persons have to prove dependency. Paul Njoroge was educated by the deceased and is standing on his own and is not entitled to share in the deceased's estate.

In regard to the deceased's parents and the two sisters, the deceased maintained and provided for them in terms of the land they are settled on. Now that the deceased is gone, they cannot expect to continue being dependant on DW1 who has 3 young children to look after and

bring up as well as both parents would have. The deceased's parents and sisters can now look upto their other three sons who are able for support.

In the end, I find that DW1 should have disclosed to the court that the deceased had dependants on plot Laikipia/Nyahururu/7099 and Kabazi Munda Block 2/266.

It is also apparent from the evidence that DW1 did not make a full disclosure of what comprised the deceased's estate. The deceased was buried on Laikipia/Nyahururu/1706. Although DW1 claimed that it was her piece of land, she did not produce any evidence in support thereof. PW1 also alleged that the deceased had put up their home on Plot 6585/426 which was not included in the schedule of deceased's properties. Other properties are Laikipia Nyahururu 9657, Plot.RR 41576 and Plot 69884 Nyahururu where rental houses are built. The explanation given by DW1 is that they were still registered in the seller's names but that is no good excuse not to include the said properties. I do agree that the petitioner was not forthright and withheld important facts from the court. Even if the applicant would not benefit from the other plots, yet the deceased left minor children and these properties must be managed properly for the benefit of the children so that the estate is not mismanaged.

I note from the certificate of confirmation that all properties devolved to DW1 wholly, which should not have been the case. They should have been held for her benefit and in trust for the three children of the deceased.

In conclusion, I find that the petitioner concealed some material facts from the court and failed to include all the deceased's property in the schedule. This court is satisfied that the grounds for revocation or annulment of grant under Section 76 of the Act have been met. Consequently, the grant issued to the petitioner on 3/10/2014 is hereby revoked.

Though I have ordered the revocation of the grant, it is my view that the DW1 remains the administrator of the deceased's estate being the wife. The 2nd petitioner was the petitioner's sister and has no claim to the estate. It is not my wish to interfere with the administrator but I direct that the 1st petitioner must get an inventory of all the deceased's property for purposes of confirmation of grant. The confirmation must be made within 90 days hereof and include my findings in this judgment. Each party to bear their own costs.

Dated, Signed and Delivered at NYAHURURU this 29th day of March, 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Kaburu holding brief for Mr. Kairu for Objector

Mr. Njogu holding brief for Mr. Waichungo for Petitioner

Soi – C/A