



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 3119 OF 2013

IN THE MATTER OF THE ESTATE OF KINYANJUI KAMAU (DECEASED)

AND

IN THE MATTER OF THE CHIEF MAGISTRATE'S COURT AT KIAMBU

SUCCESSION CAUSE NO. 305 OF 2012

IN THE MATTER OF THE ESTATE OF KINYANJUI KAMAU (DECEASED)

STANLEY NJOROGR KINYANJUI.....APPLICANT

VERSUS

BENSON KAMAU KINYANJUI.....1ST RESPONDENT

ALICE NJERI KINYANJUI.....2ND RESPONDENT

RULING

BACKGROUND

1. On the 23rd July 2003 Gathoni Kinyanjui (widow) and Benson Kamau Kinyanjui (son) petitioned for letters of administration intestate for the estate of Kinyanjui Kamau who died on the 30th May 1999 in Succession cause no **122 of 2003**. The petition was filed in the Principal Magistrate's Court at Kiambu. As per the said petition the deceased left the following surviving him; Gathoni Kinyanjui (widow), Benson Kamau Kinyanjui (son- Benson), Godfrey Njenga Kinyanjui (son-Godfrey), James Gitau Kinyanjui (son-James), Leonard Wainaina Kinyanjui (son-Leonard) and Stanley Njoroge Kianyajui (son-Stanley). Theonly asset listedis; **Maguga/Gitaru 901, 0.315 HA**. Gathoni Kinyanjui died on the 6.3.2008.

2. Benson Kamau Kinyanjui filed another succession causefor the estate of the same deceased, **SuccessionCause no 305 of 2012** at Kiambu on the **23.10.2012**. In this cause he swore an affidavit in support of the petition stating that the deceased died intestate and was survived by the following; **Benson Kamau Kinyajui, Alice Njeri Kinyanjui and Lucy Wanjiru Nganga**. He did not include his brothers who were named in **Succession Cause** no. **122 of 2003**. A grant was issued in the name of **Benson Kamau** on the **13th December 2012** in Succession Cause no. 305 of 2012. On the **23rd of May 2013****Benson Kamau Kinyanjui** sought to have the grant confirmed. He sought to have the **Muguga/ Gitaru/901, 0.315 HA**, registered in the name of Alice Njeri Kinyanjui. The grant in Succession Cause no. 305 of 2012 was confirmed on the 27.6.2013.

3. The Court record in **Succession Cause no 122 of 2003** indicates on the 4.3.2004 the Court noted that not all the beneficiaries had signed the consent form. On the 23.9.2004 the Court ordered that all the beneficiaries be present in court. On the **23.12.2004** the Court noted that amongst the six beneficiaries 3 had refused to give their consent but had filed affidavits of protest to the mode of distribution. The court record indicates that matter was to go for hearing. Benson (the petitioner) and Godfrey (the objector) were representing themselves, they later engaged advocates to represent them. The Objection proceedings were not conducted as the matter was adjourned severally between 7.7.2005 and 13.12.2006. On the 4.7.2013 the parties appeared before the Court for an application for substitution of the co-administrator Gathoni Kinyanjui. Benson, Godfrey, James and Alice objected and were instructed by the Court to file a formal objection and to take a date from the registry. This application was made by **Stanely Njoroge Kinyanjui** a son of the deceased. The application was not heard nor was the matter ever dealt with to its conclusion. The file is still pending.

APPLICATION

4. On the 4th December 2013 Stanley Njoroge Kinyanjui filed a summons brought under Section 76 of the Law of Succession Act Cap. 160 (the Act) seeking to revoke the grant issued in Succession Cause No. 305 of 2012. His grounds for seeking revocation of the grant are that; the grant was obtained fraudulently by leaving out his name and yet he is a beneficiary, he did not give his consent; that the respondent knew that Succession Cause No. 122 of 2003 (Kiambu) was pending yet he commenced and proceeded with Succession Cause No. 302 of 2012(Kiambu). That as a result of the illegal certificate of confirmation of grant he could have been disinherited of his rightful share of the deceased's estate as Muguga/ Gitaru/901 has since been registered in the name of Alice Njeri Kinyanjui.

5. In his affidavit in support of the summons, he depones that he is the biological son and beneficiary of Kinyanjui Kamau who died on 30th May 1999. That a confirmed grant of letters of administration of the deceased estate was irregularly made to Benson Kamau Kinyanjui on the 27th June 2013 in Succession Cause No. 305 of 2012. In the said Cause, he was not named as a beneficiary nor was his consent sought at the time of confirmation of the grant and distribution of the estate. That the Respondent commenced and proceeded with Succession Cause No. 305 of 2012 irregularly knowing that Succession Cause No. 122 of 2003 was pending before the same Lower Court. In Succession Cause No. 122 of 2003 directions had been given to Benson on 13th December 2012 with regard to the substitution of a deceased beneficiary. Instead of complying with said Court Order Benson filed Succession Cause No. 305 of 2012 excluding the Applicant. That the Respondent on the 27th June 2013 had the grant in Succession Cause No. 305 of 2012 confirmed and on the 4th June 2013 the Respondents transferred the land belonging to the deceased estate Muguga/Gitaru/901 in whole to Alice Njeri Kinyanjui. On discovering this, he registered a caution on the 21st August 2013 against the said title. That the Respondents failed to include another property, a commercial plot, Muguga/Gitaru Plot 12 in Succession Cause No. 305 of 2012 belonging to the deceased. He depones that the Respondents actions are criminal, fraudulent, illegal and that the grant should be revoked and a fresh one issued ordering equal distribution of Muguga/Gitaru/901 amongst all beneficiaries by way of sharing equal sale proceeds. That the 2nd Respondent to return the title issued to her to the Registrar of Land Kiambu for cancellation and her name substituted with that of the deceased.

6. In a Replying Affidavit dated 24th March 2014, Benson responds as follows; that it is within his knowledge that save from Alice Njeri Kinyanjui, the deceased gave land to all his other children during his lifetime. The only asset that remains in the deceased name was L.R. No. Muguga/Gitaru/901 and the same should go to Alice the deceased daughter who had not received anything during his lifetime. That the Applicant has benefited from the estate during the lifetime of the deceased. That during the distribution of the deceased estate whatever a beneficiary had received from the estate during the deceased lifetime is usually taken into account.

7. In a Supplementary Affidavit dated 27th February 2018, Alice Njeri Kinyanjui depones as follows; that the deceased distributed and gave land to all his children except her. The deceased had during his lifetime in the presence of witnesses expressed his wish which was reduced in writing that she should get the suit premises. That she had sued her brothers over the said suit premises in the Land Dispute Tribunal and their award was in her favour, which award was adopted as a Court Order in SRM Misc. Application No. 25 of 2008. She has been in possession of the suit premises for a long time and she has been cultivating it without any interference. She is aware that any asset given to a beneficiary by the deceased during his lifetime are taken into consideration when the remainder of his estate is been distributed after his death.

8. In a further affidavit, the Applicant Stanley avers that the deceased did not leave behind a written or oral will. That the writing exhibited by Alice is not a will, its validity and veracity is in doubt as he did not sign the same. It therefore has no legal basis nor any evidentiary value. That the deceased in 1984 gifted all his sons and one daughter Gladys Wanjiku who was not married portions of his land. The deceased died in 1999 and his wife in 2008. Alice has since 1980 lived in Kinoo where she is married and at no time did she cater for the deceased or his late wife. That had the deceased gifted the suit premises to Alice, he could have transferred the same to her in his lifetime. That it is their late mother who cultivated and was in possession of the suit premises, and not Alice. He took care of his late mother, lived with her as she cultivated the said suit land. That the award by the Land Dispute Tribunal relates to the property of the deceased which is the subject of adjudication in the Courts at Kiambu as the law of Succession Act were a nullity, ultra vires, void, unenforceable and the decree cannot be enforced. That the 2nd Respondent without consulting him leased the suit land to a certain lady in Kinoo in 2017 and has not been in possession as claimed.

9. Parties gave oral evidence in Court. Stanley adopted his affidavits and statement as his evidence. During cross examination he sought to be paid damages by Benson and Alice and to have the title cancelled. He admitted that the 2 plots are small that they cannot be divided. He sought to have them sold and to have the proceeds shared amongst the beneficiaries. He admitted that the shamba at Muguga was divided into equal shares and the sons of the deceased got their titles and that Alice was not given a portion.

10. Benson Kamau in his oral evidence asked the court to allow Alice to inherit parcel no Muguga/Gitaru/901 and that the Applicant is in Court because he wants them to sell 901. That plot no 901 is a quarter of an acre and if it is distributed to all of them it will not be any use to them. During cross examination he admitted that he knew of succession cause no. 122 of 2003 and 305 of 2012. That in 122 of 2003 he was the administrator with his mother. He admitted that he did not inform the court that they had filed 305 of 2012. That in succession cause no 305 of 2012 the Applicant's name is not listed. That they have agreed on the mode of collecting rent from the shop.

11. Alice Njeri Kinyanjui adopted her affidavit as her evidence. She testified that parcel no. 900 belongs to her sister and parcel no.901 belongs to her. That the land had not been transferred to her before her father died. That she was not given any land during her father's life time. She filed a case at the Land Tribunal against her brothers. That she assisted her parents when they were alive. During cross examination she stated that plot no. 12 at Gitaru market belongs to a company which belongs to her late father and uncle. She does not know who collects rent or who pays the rates. That before her father died he had written that her late sister Gladys be given .40 and she gets .40 of parcel no. 674. That parcel no. 901 was for her father and mother and herself and if both died she was to inherit it. That succession cause no. 122 of 2003 was terminated and she filed succession cause no. 305 of 2012 which gave her the title of the land.

12. Parties filed written submissions. The applicant in his submissions states that the only disputed fact is whether the deceased made the alleged wish dated 16th July 1989. That the proceedings to obtain the grant confirmed on the 27th June 2013 were defective in substance as per Section 76 (a) of the Law Succession Act. That the Respondent proceeded with Succession cause no. 305 of 2012 without involving him and without obtaining his consent. That the distribution of the estate as set out in the schedule was irregular. That the Respondents proceeded with Succession cause no. 305 of 2012 whilst succession cause no 122 of 2003 was still pending before the same lower court. That when the parties appeared in Succession Cause no. 122 of 2003 the Court advised them to file objection proceedings. That the Respondents chose to

get a letter from the chief of Kinoo instead of Muguga. That this shows that the grant was obtained fraudulently by making a false statement or concealment from the court of something material to the case. That the Respondents also failed to indicate another property Muguga/Gitaru Plot no. 12 in Succession cause no. 305 of 2012. That the Respondent failed to prove that there was a written note from the deceased which bequeathed her the parcel of land. The Applicant relied on Section 3 (4) of the Evidence Act which provides that a fact is not proved when it is neither proved nor disproved.

13. It was further submitted that if the Court finds in its discretion to accept the written note date 16th July 1989 by the deceased then the said note still favours the Applicant as it had a condition, that the 2nd Respondent could only be given the land if she was not married and poor, that if she was married and living a good life then the land should be given to the caretaker during their lifetime and that the caretaker is the Applicant because he took care of his parents during their life time.

14. The 1st and 2nd Respondents in their submissions stated as follows; that the family members agreed that Succession cause no.122 of 2003 be abandoned, this was clear in the Tribunal proceedings. That the award of the Tribunal was adopted as Court order and Alice is the lawful owner of Muguga/Gitaru/901, the parties did not appeal against the said order. That the filing of Succession cause no. 305 of 2012 was justified to transmit the suit premises to Alice. That the distribution of the deceased's estate is provided for in Section 38 and 42 of the Act. That the estate of the deceased should be divided equally amongst the children without discrimination, taking into account the previous benefits received by other children of the deceased with the exception of the 2nd Respondent. That the share of the deceased at Gitaru Plot No. 12 which was co-owned by the deceased and his brother should also go to the 2nd Respondent. It was further submitted that the law does not make any distinction amongst the categories of the children. To support this argument the Respondents relied on the following cases **Peter Karumbi Keingati & 4 Others vs Ann Nyokabi Nguthi & 4 Others [2015] eKLR**, **Charles Njau Nyaga vs. Agnes Wambui Ngugi [2015] eKLR** on the issue of a valid will.

DETERMINATION

15. I have considered the evidence, the rival submissions and the Law. There is no dispute there are two succession causes in Kiambu, cause no. 122 of 2003 and cause no. 305 of 2012, both relate to the same deceased Kinyanjui Kamau. Succession Cause no. 122 of 2003 was never finalised. It is still pending. Succession Cause no. 305 of 2012 relates to the same deceased and in the said cause the parcel of land the subject of the application was inherited by Alice. It is also not in dispute that the Applicant Stanley was not mentioned in Succession cause no. 305 of 2012 as a beneficiary nor were the other siblings. It was wrong and improper to file another succession cause no 305 of 2012, whilst the first one, cause no 122 of 2003 was still pending. It was also wrong not to name all the beneficiaries in Succession cause no. 305 of 2012, by not listing the Applicant and his other siblings the Petitioner concealed from the court material facts and obtained the grant unlawfully. Even if it had been agreed in the matter before the tribunal that they were to file another cause, a fact which is disputed, it was the duty of the petitioner to name and get the consents all beneficiaries and inform them that the cause had been filed and to withdraw succession cause no. 122 of 2003. In my view the grant obtained in succession cause no. 305 of 2012 were unlawfully obtained and I therefore revoke the grant issued in Succession cause no. 305 of 2012 together with all consequential orders. The parties shall proceed to determine the deceased's estate in Succession Cause no. 122 of 2003. I note that the said cause no. 122 of 2003 has been in court for the last 16 years. To speed up the distribution of the deceased's estate I make the following orders; **Succession cause no. 122 of 2003 shall be transferred to the High Court Family Division Nairobi for hearing and determination. I revoke the grant of letters of administration issued on the 30th September 2003 in Succession Cause no. 122 of 2003 and order that a fresh grant be issued in the names of Benson Kamau Kinyanjui, Stanely Njoroge and Alice Njeri Kinyanjui as administrators of the estate of Kinyanjui Kamau. The said administrators shall file a summons for confirmation of the grant within 60 days from the date of this ruling. Since this is a family matter each party to bear its own costs.**

Dated signed and delivered at Nairobi this 30th day of May 2019

R.E.OUGO

JUDGE

In the presence of;

Stanley Njoroge Kinyajui Applicant In Person

Mr. Njogu For the Respondents

Ms Charity Court clerk