



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D.S. MAJANJA J.

SUCCESSION CAUSE NO. 253 OF 2013

IN THE MATTER OF THE ESTATE OF MOMANYI MBAKA (DECEASED)

BETWEEN

CHARLES MBAKA NYANG'UTE.....1ST APPLICANT

DAVID OGEKA NYAKWAMA.....2ND APPLICANT

AND

GLADYS KEMUNTO MACHUKA.....1ST PETITIONER/RESPONDENT

SAMUEL MBAKA BOSIRE.....2ND PETITIONER/RESPONDENT

RULING

1. This cause concerns the estate of MOMANYI MBAKA (“the deceased”) who died on 28th November 1980. The petition for letters of administration intestate was filed by Gladys Kemunto Machuka (“Gladys”) and Samwel Mbaka Bosire (“Samwel”). The deceased’s only asset is a land parcel; WANJARE/BOGIAKUMU/1171 (“Plot 1171”). The petitioners were issued with the grant of letters of administration intestate on 12th October 2015 which were confirmed in favour of the petitioners on 13th October 2016.

2. The applicants filed the summons for revocation of grant dated 19th October 2017 seeking to revoke the grant on the ground that the petitioners misrepresented to court that they were daughter and son of the deceased while the deceased had only two sons, Maragia Maroro (“Maragia”) and Nyang’ute Maroro (“Nyang’ute”). The petitioners are the children of Maragia Maroro while Charles Mbaka Nyang’ute (“Charles”) is the son to Nyang’ute Maroro. The applicants explained that David Ogeka Nyakwama (“Ogeka”) is a purchaser and should be included in the proceedings leading to the acquisition grant of letters of administration.

3. The petitioners case was that Plot 1171 was for the children of Maragia. In her replying affidavit, Gladys deposed that Nyang’ute had been given land in Tanzania where his father was buried. She further contended that Ogeka was a stranger to the estate and that the sale agreement could not be valid because at the time the same was made, Charles had not obtained his identity card.

4. I directed that the matter be resolved by oral testimony. I heard the Charles (PW 1), Ogeka (PW 2), Manase Soap Nyatieno (PW 3) who testified on behalf of the applicants. Gladys (DW 1) testified for the petitioners.

5. The evidence emerging at the hearing was as follows. Charles testified that Nyang’ute went to Tanzania in 1960 and he was born to his Kenyan parents in 1962. He told court that the land was given to Ogeka by his father in 1985 who was charged with the responsibility of looking after it. Unfortunately, after Nyang’ute’s death in 2013, Ogeka was harassed and chased out of the land. He testified that the deceased had divided the land between his two sons and boundaries that were put up by the deceased have since been removed. Ogeka testified that the deceased was his uncle and that Gladys and her deceased parents lived on the land as well. While Nyang’ute and his family made their home in Tanzania, he was left behind to take care of the land. PW 3 testified that the petitioners and Charles are his cousins as he is the son of one of the deceased daughters. He told court that he used to see Ogeka working on the land. In cross-examination, he told the court that Nyang’ute died and was buried in Tanzania.

6. Gladys denied the claim by Charles. She told the court that she was seeing him for the first time in court and that she never knew that she had any uncle in Tanzania. She testified that Plot 1171 was left to her and her siblings when her father and mother died in 2010 and 2016

respectively. When cross-examined, she stated that her father did not inform her of his relatives in Tanzania and that when her parents died, Charles did not attend the funeral or lay claim to the land. She also told the court that while the deceased was still alive he sold portions of the land to some people who she found on the land when she was born in 1985 including Mary Ratemo, the Chief of the area who gave them the letter that enabled them to commence these proceedings.

7. It is not disputed that the deceased died on 28th November 1980 before the *Law of Succession Act (Chapter 160 of the Laws of Kenya)* (“the *LSA*”) came into force hence customary law is applicable to the distribution of the deceased’s estate by reason of **section 2(1)** thereof which provides as follows:

2(1) Except as otherwise expressly provided in the Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of this Act and to the administration of estates of those persons.

8. Since the deceased died in 1980 before the commencement of the *LSA*, the applicable law is Gusii customary law. Naturally Plot 1171 would devolve to his two sons Maragia and Nyang’ute and absent any reasons they are entitled to it in equal shares. While Gladys contended that the deceased gave land to his son Nyangute in Tanzania, there is no evidence that he owned another parcel of land in Tanzania. It appears that Nyang’ute worked in Tanzania. Further, the petitioners’ assertions that Nyang’ute was given land in Tanzania by the deceased does not explain why Ogega remained deceased’s portion of land for 28 years.

9. Although Ogega is party to these proceedings, he is not entitled to the deceased’s estate. When he testified he stated that he had no interest in the land but only had access to it as a licensee who had been permitted to utilize the portion belonging to Nyang’ute. His evidence supports the case that Nyang’ute had asked him to take care of the land while he was away.

10. Gladys, Samwel and Charles are the deceased grandchildren and their claim is based on the interests of their respective parents who are now deceased. Musyoka J., in *Estate of Veronica Njoki Wakagoto (deceased)* [2013] eKLR stated that:

[G]randchildren can only inherit their grandparents indirectly through their own parents, the children of the deceased. The children inherit first and thereafter the grand children inherit from the parents. The only time grandchildren inherit directly from their grand parents is when the grandchildren’s own parents are dead. The grand children step into the shoes of their parents and take directly the share that ought to have gone to the said parents.

11. Under **section 76** of the *LSA*, the court has power to revoke a grant of its own motion where the grant was obtained fraudulently by the making of a false statement or by the concealment from the court something material to the case. The evidence is clear that the petitioners failed to disclose that the deceased had other beneficiaries. As the applicant have proved that the deceased had another son; Nyang’ute Maroro who was not disclosed, the grant issued to the petitioners and duly confirmed must be revoked.

12. For the reasons I have set out, I now make the following orders:

(a) The grant of letters of administration issued to the petitioners dated 12th October 2015 and confirmed on 13th October 2016 is hereby revoked.

(b) A fresh grant shall now issue to **Gladys Kemunto Machuka** and **Charles Mbaka Nyang’ute**.

(c) The administrators or any of them shall file an application for confirmation within 30 days from the date hereof.

(d) Since it is alleged that there are people who purchased and are resident on land parcel **WANJARE/BOGIKUMU/1171**, the status quo regarding their possession, occupation and ownership shall remain pending hearing and determination of the summons for confirmation when they shall be at liberty to assert their claims for determination by this court.

13. This being a family matter there will be no orders as to cost.

DATED and DELIVERED at KISII this 28th day of MAY 2019.

D. S. MAJANJA

JUDGE

Mr Bosire instructed by Bosire Gichana and Company Advocates for the applicants

Mr Anyona instructed by Asati, Anyona and Company Advocates for the petitioners/respondents.